

**WHY WE SHOULD STOP TALKING ABOUT VIOLENT OFFENDERS:
STORYTELLING AND DECARCERATION**

FORTHCOMING 2024

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ABSTRACT

The movement to decarcerate risks foundering because of its failure to grapple with so-called violent offenders, who make up nearly half of U.S. prisoners. The treatment of people serving sentences for offenses categorized as violent is a primary reason for the continued problem of mass incarceration, despite widespread awareness of the phenomenon and significant bipartisan interest in its reduction. People convicted of “violent offenses” are serving historically anomalous and excessively long sentences, are generally denied clemency and compassionate release, and are excluded from a wide array of legal reform and policy changes with decarceral aims. Keeping these people in prison for life or near-life sentences is extraordinarily expensive for state budgets, largely unnecessary from a public safety perspective, and cruel and unusual punishment from the viewpoint of international and historical standards. While the moral imperative to release those serving draconian sentences for nonviolent drug offenses is widely if not universally accepted, such efforts will ultimately be a drop in the bucket if we fail to address the 58% of state prisoners who are serving sentences for offenses categorized as violent.

Quantitative data about the low rates of recidivism for people released after serving long sentences for “violent offenses” will not alone shift the focus of our policies or politics. Rather, we need to develop a more nuanced understanding of “violent offenses” and “violent offenders” by hearing the voices of people who have been directly impacted by violence and by the system’s response to violence. These are, in many cases, the same people. Their stories are complex and human, defying simplistic narratives about innocent victims and bad offenders. Storytelling offers possibilities for reconceptualizing the stale terminology around violence and for shifting the discourse.

This Article draws on insights from the literature on epistemic injustice and criminal law democratization, together with the legal storytelling literature. It explores the power of storytelling as an advocacy tool in the slow work of person-by-person decarceration during back-end processes like clemency, parole, and compassionate release, as well as part of the broader movement for systemic decarceration. Storytelling is an important tool for advocates working within the system, as well as for abolitionists seeking to end the system. In some contexts, advocates and activists are best situated to tell these stories, but ultimately people should be given the opportunity and tools to tell their own stories.

INTRODUCTION

During more than a decade of increasingly broad support for decarceration, the conversation has been focused almost entirely on nonviolent drug offenders.¹ Michelle Alexander's book *The New Jim Crow*, first published in 2010, has had a significant impact on the public discourse around mass incarceration.² For the general public, Alexander brought to the fore not only the racially disparate impact of the War on Drugs, but also the extent to which such policies represented a continuation of past forms of white supremacy and racial oppression.³ Alexander's emphasis on the role that the War on Drugs played in creating mass incarceration has contributed to the mistaken impression that most people in prison are serving harsh drug sentences.⁴ While 46.7% of federal prisoners are serving sentences for drug offenses,⁵ federal prisoners make up less than 10% of the overall U.S. incarcerated population.⁶ Meanwhile, about 62% of state prisoners in the United States are serving sentences for crimes that have been designated as violent.⁷

The focus on unjust and draconian sentences for drug offenses has contributed to decarceral reforms over the past two decades being

1 *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (questioning whether there is in fact a consensus on criminal justice reform).

2 *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

3 *Id.*; *see, e.g.*, Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES (Mar. 6, 2012), <https://www.nytimes.com/2012/03/07/books/michelle-alexanders-new-jim-crow-raises-drug-law-debates.html>.

4 James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 23–24 (2012); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM*, 21–50 (2017).

5 E. ANN CARSON, U.S. DEP'T OF JUST., *PRISONERS IN 2021 – STATISTICAL TABLES 32 tbl.17* (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf>. Note that as recently as 2012, the percentage of federal prisoners serving drug offense sentences was 52%. SAM TAXY ET AL., *DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA* (2015). The percentage of federal prisoners serving time for drug offenses has decreased over the past eight years due in part to reforms focused on reducing drug sentence length, as discussed below; *see also* Ashley Nellis, *Mass Incarceration Trends* fig.6, THE SENT'G PROJECT (Jan. 25, 2023), <https://www.sentencingproject.org/reports/mass-incarceration-trends/> (illustrating rise and then decline of drug offenders as percentage of federal prison population 1980-2020).

6 E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUST., *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2021 – STATISTICAL TABLES 14 tbl.9* (2023), <https://bjs.ojp.gov/document/cpus21st.pdf>.

7 CARSON, *supra* note 5.

centered on offenses categorized as nonviolent. This approach is justified even among reformers as reaching for the low-hanging fruit before attempting deeper and politically riskier reforms.⁸ It has become increasingly apparent, however, that focusing reforms exclusively on nonviolent offenses will prevent widely shared decarceral goals from being realized.⁹ People serving offenses that have been categorized as violent are not, in fact, next in line. Rather, they, along with those who have committed sex offenses, remain pariahs excluded from most decarceral reform measures. They are the foils for nonviolent offenders, who are posited as deserving our empathy and concern, while those convicted of offenses categorized as violent or sexual are seen as the real bad guys.¹⁰

The violent-nonviolent dichotomy is based partly on public safety concerns and partly on moral judgment and retributivist impulses.¹¹ Safety concerns about releasing individuals who have already served decades of life or long sentences for serious “violent offenses” are largely without basis.¹² Empirical research has made clear that those serving life or long sentences for offenses categorized as violent are less likely to

8 PFAFF, *supra* note 4, at 186.

9 Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses From Criminal Justice Reforms*, PRISON POL’Y INITIATIVE (April 2020), <https://www.prisonpolicy.org/reports/violence.html>. A number of scholars have highlighted the false dichotomy between “violent offenses” and “nonviolent drug offenses.” See generally JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA*, 228–29 (2018) (discussing inherent violence of drug trade during 1980s); PFAFF, *supra* note 4, at 35–36 (discussing the “myth of the low-level, nonviolent drug offender”); BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON*, 179–80 (2018) (there is no drug trade without violence). *But see* Alice Ristoph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 614–15 (citing empirical research demonstrating weak association between drug trade and violence).

10 DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* 68 (2021).

11 Often concerns about public safety are based more on perceived risk than real risk. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING*, 59–89, 123–59 (2001) (debunking the broken windows theory, which posited that reducing public disorder leads to reduced crime victimization, and interrogating theoretical conceptions of order and disorder).

12 This Article uses the terms “violent offenses” and “violent offenders” to refer to categories utilized in criminal law and criminal policy debates. However, the terms are socially constructed and lack consistent, objective meaning, as discussed at greater length below. Therefore, in this Article the terms are offset with scare quotes or with prefatory language to indicate that the use of the terms is not an endorsement of the concepts.

recidivate upon release than those convicted of other offenses.¹³ This is at least in part because most people “age out of crime,” and so by the time a person reaches middle age, they are unlikely to commit further violence.¹⁴ Yet for the decision-makers—judges, parole boards, clemency commissions and offices, governors, and presidents—there is generally a stronger incentive to continue the incarceration of a person seen as potentially dangerous than there is to take a chance on release.¹⁵ Even if the decision-maker recognizes that the actual risk of violent recidivism is low, they may accurately assess the substantial risk that political enemies could take advantage of the specter of hypothetical violent recidivism

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- 13 J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1645, 1688–89 (2020) (reporting results of regression analysis indicating that “[w]ithin any given age bracket, individuals released after imprisonment for violent crimes recidivate at a lower rate than releasees who served time for any other category of crime,” “only 0.4% of individuals who were initially imprisoned for murder or nonnegligent manslaughter released after the age of fifty-five are reimprisoned,” “99% of those who previously served time for murder or nonnegligent manslaughter do not commit another murder or nonnegligent manslaughter upon release,” and “only 0.2% [of releasees] are reimprisoned within three years of their release for another murder or nonnegligent manslaughter if their release occurs after age fifty-five.”); *see also id.* at 1661 (noting caveat that “with almost any study of postrelease recidivism, the people studied are not a random sample of the prison population but a sample of those who were released: people who did not receive life sentences, who may have behaved well in prison, who have likely served substantial portions of their terms, and who are probably more likely to have ‘aged out’ of violent offenses than those more recently admitted.”).
- 14 John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, CRIME & JUST. 1, 5 (2001) (proposing a life-course framework for explaining desistance from crime); Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 301, 315 (2003) (finding that for men in population of delinquents who survived to age 50, 24% had no violent or property crime arrests after age 17, 48% had none after age 25, 60% had none after age 31, and 79% had none after age 40); PFAFF, *supra* note 4, at 191 (describing the bell curve of violent and criminal behavior over the life course, rising “in the late teen years through the twenties or thirties” before subsiding); Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 122 (2018) (describing decline in crime involvement as individuals age past their early to mid-twenties).
- 15 Michael O’Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 MARQ. L. REV. 1035, 1037 n.9 (2020); PFAFF, *supra* note 4, at 199 (noting “the risk for a parole board member, as for any politician, is that dreaded false negative: the parolee who recidivates in a salient way while on parole”); LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION* 147 (2023) (noting that parole boards are generally risk-averse and are susceptible to political pressure).

based on the person's criminal history alone.¹⁶

The problem is, therefore, partly a political one. It is also, as Jonathan Simon has argued, a political solution, insofar as “governing through crime” became the dominant paradigm in late-twentieth-century America.¹⁷ In his seminal 2006 book, Simon describes how

Americans have built a new civil and political order structured around the problem of violent crime . . . [in which] values like freedom and equality have been revised in ways that would have been shocking, if at all imaginable, in the late 1960s, and new forms of power institutionalized and embraced – all in the name of repressing seemingly endless waves of violent crime.¹⁸

“Governing through crime” works because of narratives that rely on simplistic dichotomies between offender and victim, violent and nonviolent, redeemable and irredeemable. These dichotomies are empirically flawed, morally problematic, and ultimately self-defeating if our goal is to reduce violence.

In addition to rehabilitation-related concerns, there is also the question of whether a “convicted murderer” deserves release or whether, for those serving life sentences, dying in prison is appropriate punishment for the harm they have caused. Generally, we reserve the greatest moral opprobrium for those who have killed or committed other acts of serious violence. And yet, as a society, we have an odd relationship with violence. We accept and even celebrate it in certain professional sports like boxing and UFC fighting, in which the brutality is the point, as well as football and hockey, in which the brutality is so intertwined with

16 This political fear is justified, as demonstrated by the backlash to sentence commutations and pardons issued by Republican Kentucky Governor Matt Bevin in 2019. The media played into this dynamic with headlines like the one that appeared in *The Guardian*. Ed Pilkington, *Why Did This US Governor Pardon Child Rapists and Brutal Killers?*, *THE GUARDIAN* (Dec. 21, 2019), <https://www.theguardian.com/us-news/2019/dec/21/kentucky-governor-pardons-matt-bevin>. It bears mentioning that Bevin's acts of clemency were marred by several factors: the grants were issued in a large batch on the eve of Bevin stepping down as governor; there were allegations that some grants were tied to political contributions and favors; and white people disproportionately benefited from the grants. *See id.* The media coverage, however, fixated on the nature of the underlying offenses.

17 JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3 (2006) (describing the “fear of crime and violence [as] irrational in its scope and priority,” and laying out the task of dislodging the centrality of crime from the exercise of authority in the United States); *see also* Ristroph, *supra* note 9, 618–20.

18 SIMON, *supra* note 17, at 3.

the rules of the game that it may as well be the point.¹⁹ We send thoughts and prayers to the victims of mass shootings, but gun sales continues to rise.²⁰ We toss “violent offenders” in prison, where they fall victim to violence perpetrated by prison guards and by other prisoners, which we tolerate or endorse.²¹ We accept as inevitable violence perpetrated by police officers, but punish violence committed against police officers far more severely than against the average mortal.²²

We also have a muddled sense of what violence even is, and although we currently treat it as categorically worse than all other types of harm, the reasons we do so are undertheorized.²³ A few scholars have

19 Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847, at 861–62 (2020) (quoting Erin E. Buckels et al., *Behavioral Confirmation of Everyday Sadism*, 24 PSYCH. SCI. 2201, 2201 (2013), which describes “everyday sadism” as manifested in “the popularity of violent films, brutal sports, and video games with cruel content – not to mention incidents of police and military brutality.”); see also Ristroph, *supra* note 9, at 592–93 (discussing jurisprudence of sports violence and distinctions regarding permissibility based on consent or social utility); SKLANSKY, *supra* note 10, at 23, 33–36 (discussing permissible violence of contact sports).

20 Matthew Miller et al., *Firearm Purchasing During the COVID-19 Pandemic: Results from the 2021 National Firearms Survey*, 175 ANNALS INTERNAL MED. 219 (2022); see Harmeet Kaur, *What Studies Reveal About Gun Owners in the US*, CNN (June 2, 2022), <https://www.cnn.com/2022/06/02/us/gun-ownership-numbers-us-ccc/index.html>.

21 Klingele, *supra* note 19, at 870–75 (discussing the prevalence of violence inflicted by state actors on prisoners due to chronic state of hypervigilance, solidarity-building among prison officials, and culture of control); Shaka Senghor, *WRITING MY WRONGS: LIFE, DEATH, AND REDEMPTION IN AN AMERICAN PRISON* 95–96, 148–51, 177–81 (2013) (describing incidents of violence committed by prison guards and by prisoners while incarcerated in Michigan); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2010, 2046 (2022) (discussing Department of Justice report documenting frequency of sexual assault in prisons, most committed by staff rather than by other prisoners); DANIELLE SERED, *UNTIL WE RECKON*, 74–77 (2019) (discussing “extraordinary” rates of violence experienced by incarcerated people). *But see* Brenda V. Smith, *Promise Amid Peril: PREA’s Efforts to Regulate an End to Prison Rape*, 57 AM. CRIM. L. REV. 1599 (2020).

22 See, e.g., SKLANSKY, *supra* note 10, at 88–122; *Assaults on Law Enforcement – How Mandatory Minimums and Felony Punishments Empower Police Abuse*, JUST. FORWARD VA. (July 7, 2020), <https://justiceforwardva.com/blog/2020/7/6/assaults-on-law-enforcement-how-mandatory-minimums-and-felony-punishments-empower-police-abuse>. Since George Floyd’s murder in May 2020 and the subsequent widespread protests during the summer of 2020, extreme acts of police brutality have been more publicized and there have been more legal consequences for the perpetrators. Nonetheless, those cases that engender public outrage remain the outliers amidst the day-to-day brutality of policing in the United States.

23 SKLANSKY, *supra* note 10, at 69–75 (describing the category of “violent crime” as a social construct).

drawn our attention to this phenomenon in recent years. Professor Alice Ristroph has highlighted the contingent meaning of violence and how it “extends beyond actual bodily injury; it becomes an abstraction, and eventually that abstraction may become a repository for all we find repulsive, transgressive, or simply sufficiently annoying.”²⁴ Professor David Sklansky has analyzed the historical shift toward penalizing violent offenses as categorically different from all other offenses, highlighting that the violent-nonviolent distinction was not always considered the most salient.²⁵ Professor Cecilia Klingele has argued that we are all capable of violence, and there is no categorical difference between the violent and the nonviolent.²⁶ Nor, as Danielle Sered has argued, is there a categorical difference between offenders and victims, despite the way the law essentializes each. Sered, who has spent a decade running a restorative justice project in New York City, underscores that offenders are often victims and/or observers of violence prior to the commission of their offenses and argues that approaches focused on punishment of the offender fail to take this complex reality into account.²⁷

This Article focuses on the hundreds of thousands of individuals who are serving sentences for offenses that have been categorized as violent. Some of these individuals are serving sentences for offenses that are violent only in the sense that they have been categorized as such under the law, including burglary and robbery convictions where the use of force is minimal or non-existent but meets the legal standard.²⁸ Some unknowable number of individuals are legally guilty of committing violent offenses despite not having committed any actual acts of violence

24 Ristroph, *supra* note 9, at 575.

25 SKLANSKY, *supra* note 10, at 46–51.

26 Klingele, *supra* note 19, at 851 (positing that “people who commit crimes of violence are not different in kind from other people” and “because the tendency to violence is universal, aggression and violence exist wherever people are given opportunity to exercise power of others – and particularly in contexts where the use of force is openly sanctioned, such as during arrest and within jails and prisons”).

27 SERED, *supra* note 21, at 73–74. Sered describes restorative justice as “a decision-making process that involves those most directly impacted by a given harm in identifying the pathway toward repair – and then carrying out the actions to get there.” *Id.* at 135; *see also* WESTERN, *supra* note 9, at 81 (describing the pervasive nature of violence in the lives of reentry study subjects and noting “[t]he division between the violent and the nonviolent is a moral distortion of a complex social environment in which victims, witnesses, participants, and offenders are often one and the same individuals who suffer harm from each part they play in episodes of violence”).

28 SKLANSKY, *supra* note 10, at 71, 75–85 (describing the recategorization of burglary as violent during the passage of the Armed Career Criminals Act).

because they were convicted as aiders and abettors, or convicted of felony murder based on the violent acts of another person or even a death by happenstance.²⁹ Many others have committed acts that are violent in the most literal sense of “overwhelming . . . the human body,” as in Ristroph’s formulation, but are unlikely to reoffend when released after lengthy prison terms.³⁰ When risk assessment tools are used in back-end processes like parole, people serving life or long sentences for serious violent offenses frequently score low risk for release—despite the inclusion of static factors like the seriousness of the offense.³¹ And yet many of these individuals have little chance for release and as a result, this population accounts for the bulk of state prisoners, the vast majority

29 See Anna Roberts, *Convictions as Guilt*, 88 *FORDHAM L. REV.* 2501, 2503–05 (2020) (discussing the problem with assuming legal guilt equates to factual guilt, for example where the required mens rea is absent); Kimberly Thomas, Civil-Criminal Litigation Clinic, 50-State Survey on Felony Murder Laws (on file with author); LINDSAY TURNER, WILDER RESEARCH, TASK FORCE ON AIDING AND ABETTING FELONY MURDER: REPORT TO THE MINNESOTA LEGISLATURE (2022), <https://mn.gov/doc/about/legislative-info/aiding-abetting/>; NAZHOL GHANDNOOSH ET AL., THE SENT’G PROJ., FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING (2022), <https://www.sentencingproject.org/reports/felony-murder-an-on-ramp-for-extreme-sentencing/>; Abbie VanSickle & Cary Aspinwall, *Fetterman and Oz Battle Over Pennsylvania’s Felony Murder Law*, THE MARSHALL PROJ. (Oct. 25, 2022), <https://www.themarshallproject.org/2022/10/25/fetterman-and-oz-battle-over-pennsylvania-s-felony-murder-law>; Sarah Stillman, *Sentenced to Life for an Accident Miles Away*, THE NEW YORKER (Dec. 11, 2023), <https://www.newyorker.com/magazine/2023/12/18/felony-murder-laws>.

30 See Ristroph, *supra* note 9, at 574; see also Prescott et al., *supra* note 13, at 1688–89.

31 See, e.g., ROBERT WEISBERG ET AL., *LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA* 16 (2011), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259833/doc/slspublic/SCJC%20Lifer%20Parole%20Release%20Sept%202011.pdf> (in a statistical study of people serving life sentences with the possibility of parole in California prisons, finding that “75% of lifers score as low risk and 90% as low or moderate risk by the California Static Risk Assessment instrument,” in contrast to the general inmate population which scored “28% low, 28% moderate, 11% high property, [7]% high drug, 22% high violent, and 4% none.”); see also BARBARA LEVINE & ELSIE KETTUNEN, *CITIZENS ALL. ON PRISONS & PUB. SPENDING, PAROLING PEOPLE WHO COMMITTED SERIOUS CRIMES: WHAT IS THE ACTUAL RISK?*, 9–11 (2014), https://www.prisonpolicy.org/scans/cappsmi/CAPPS_Paroling_people_who_committed_serious_crimes_11_23_14.pdf (discussing frequency of parole denials for people convicted of violent offenses despite parole guidelines scores of “high probability of release”). For general discussion of how risk assessment tools give disproportionate weight to “static” factors including events and circumstances that may be decades in the past, see Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 *NOTRE DAME L. REV.* 537, 577 (2016).

of those serving long term of years and life sentences, and nearly all of the elderly people who are dying in prison at an increasing rate.³²

Before we can change how we treat people convicted of so-called violent offenses, we need to work toward a broad reconceptualization of what a “violent offense” is, who a “violent offender” is, and, indeed, who an “offender” is.³³ People commit acts of violence and the ramifications of those acts for the victims, or victims’ surviving family members, can be severe and traumatic. However, for most, the resort to violence is circumstantial and transitory.³⁴ Most people desist from criminal behavior, including violent criminal behavior, as they age—for biological and social reasons, not because there is anything particularly effective about incarceration as a deterrent.³⁵ Thinking of perpetrators of these acts as intrinsically violent ignores the fact that most perpetrators of violence, and participants in violence, have themselves been victims of violence and have been surrounded by violence from an early age.³⁶ That is to say, while not all victims are perpetrators, nearly all perpetrators have also been victims. They have experienced violence prior to their offenses and are frequently revictimized in the criminal legal system. Regardless of their offenses, these individuals are caught up in cycles of violence and trauma prevalent in contemporary U.S. society.

32 See ACLU, *At America’s Expense: The Mass Incarceration of the Elderly* (June 2012), https://www.aclu.org/sites/default/files/field_document/elderlyprison_report_20120613_1.pdf; Rachel Lopez, *The Unusual Cruelty of Nursing Homes Behind Bars*, 32 FED. SENT’G REP. 264 (2020); Mira Edmonds, *The Reincorporation of Prisoners into the Body Politic: Eliminating the Medicaid Inmate Exclusion Policy*, 28 GEO. J. POVERTY L. & POL’Y 279, 292–96 (2021); Lauren C. Porter et al., *How the U.S. Prison Boom Has Changed the Age Distribution of the Prison Population*, 54 CRIMINOLOGY 30 (Feb. 2016); see PEAFF, *supra* note 4, at 188–89 (“the majority of those in prison, and a large majority of those serving long terms, have been convicted of violence.”).

33 The other most stigmatized group of people with convictions are those convicted of sex offenses. While there are many similarities in the treatment of and narratives about sex offenders, who in many ways face even greater barriers to reintegration, there are enough distinctions between the two groups that it would do a disservice to lump them together. Therefore, my focus in this article remains on those convicted of violent offenses.

34 PEAFF, *supra* note 4, at 190–91 (describing bell curve of youthful offending and desistance over the life course), 194 (noting impulsivity as highly significant risk factor for criminal offending).

35 See *id.* at 191–92; Sampson & Laub, *supra* note 14.

36 See SERED, *supra* note 21, at 196–202; WESTERN, *supra* note 9, at 68–69; Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 130 (2016); see also Rebeccah L. Sokol et al., *The Association Between Witnessing Firearm Violence and Firearm Carriage: Results from a National Study of Teens*, 171 PREVENTIVE MED. 107516 (2023) (finding that teenagers who had witnessed firearm violence were more likely to carry firearms).

In the perennial debate between characterological and circumstantial explanations for violence, the pendulum is swinging back toward circumstantial explanations in the academic literature. Yet criminal legal policies and practices continue to reflect characterological views, rooted in racially charged associations between Black men and violent crime.³⁷ Even many reform-minded elected officials—whether for pragmatic or ideological reasons—continue to distinguish between nonviolent offenders as deserving of mercy and violent offenders as dangerous and irredeemable.³⁸ That narrative is overly simplistic and dangerous. It ignores data demonstrating that violent offenses arise out of conditions of socioeconomic marginalization and material deprivation.³⁹ It ignores data demonstrating that those convicted of serious violent offenses have statistically low recidivism rates.⁴⁰ And it ignores data-based research suggesting that even those individuals who have been identified as having psychopathic traits may be amenable to treatment.⁴¹ It ignores the data because, when it comes to the topic of violent crime, emotions and stories always trump data. Fear of violent crime, and stories of particularly horrific violent crimes, continue to cast the narrative around criminal legal system policies to a significant

37 SKLANSKY, *supra* note 10, at 62, 87; SERED, *supra* note 21, at 10–11 (positing that mass incarceration arose out of a narrative about violence, with a racialized “imagined monstrous other” at its heart, which persists); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1600 (2017) (“The criminal justice system’s reinforcement of a presumed association between black people and criminality in the very determination of law breaking undergirds the system’s anti-democratic function and points to the need for an abolitionist approach.”).

38 FORMAN, *supra* note 9, at 220–22, 228–31 (describing calls for reducing punishment for “nonviolent drug offenses” by elected officials including then-President Obama; then-prosecutors Kamala Harris, Marilyn Mosby, and Seth Williams; U.S. Representative Marcia Fudge (D-OH), and presidential advisor Valerie Jarrett.); SKLANSKY, *supra* note 10, at 42–45. This call for reconceptualizing “violent offenders” is consistent with current calls to rethink public safety in the context of police killings and mass shootings. These topics are all intertwined and part of the violence endemic to the U.S. (rooted in our original sins of stolen land and stolen labor). Patrick Sharkey, *We Can’t Reimagine Safety Without Being Clear-eyed About America’s Gun Problem*, WASH. POST (April 22, 2021), <https://www.washingtonpost.com/opinions/2021/04/22/americas-gun-problem-cities-policing/>.

39 See, e.g., WESTERN, *supra* note 9, at 63–82, 180–86.

40 See generally Prescott et al., *supra* note 13.

41 See Jennifer L. Skeem & Devon L. L. Polaschek, *High Risk, Not Hopeless: Correctional Intervention for People at Risk for Violence*, 103 MARQ. L. REV. 1129, 1133 (2020) (arguing that intensive treatment should be directed precisely at the highest risk individuals even though they may present greater challenges than the easy cases and listing characteristics that present particular challenges).

extent.

This Article posits that stories can also help us out of the decarceral stasis around offenses categorized as violent. Hearing the stories of the people incarcerated for “violent offenses” can help the public develop a more robust understanding of violence and of so-called violent offenders. Telling their stories can also help individuals incarcerated for “violent offenses” recover their humanity and begin the process of reintegrating into society.⁴²

There is work to be done to create the space for those stories and to facilitate the telling of effective stories. Our current carceral responses to violence offer few, if any, opportunities for offenders to process the harm they have caused or the harm that has been perpetrated on them while incarcerated.⁴³ After years or decades of being warehoused in prison, incarcerated people are scheduled for parole or commutation hearings, during which they are asked to express remorse and insight in order to win release. On the whole, they are expected to provide particular, narrowly circumscribed narratives about the offense and themselves as offenders. Despite those intrinsic limitations, this step in the process presents an opportunity for people to speak for themselves, often for the first time since they were arrested, and to tell a more complete story of their lives. Advocates can play an important role in helping individuals to tell these stories effectively.

In addition to presenting an opportunity for individual liberation, robust storytelling by people most affected by the functioning of the criminal legal system can contribute to systemic change.⁴⁴ First-person accounts by incarcerated individuals of the circumstances leading up to their offenses, their experiences of incarceration, and their experiences of reintegration following release can provide the public with a more nuanced understanding of the people who have been labeled “violent offenders.” Back-end processes, such as parole and sentence commutation, can present strategic dilemmas regarding what stories will enhance or hamper a person’s chance for release. However, once in the community, there are opportunities for formerly incarcerated people to present fuller and more nuanced accounts of

42 See generally LOIS PRESSER, *BEEN A HEAVY LIFE: STORIES OF VIOLENT MEN* (2008).

43 See Terrell Carter et al., *Redeeming Justice*, 116 NW. U. L. REV. 315, 333–34 (2021).

44 As Professor Seema Saifee has argued, incarcerated people have much more to contribute to the movement for decarceration than their stories. They are knowledge producers and can be thought leaders with analytical critiques leading the way to a more just society. See generally Seema Tahir Saifee, *Decarceration’s Inside Partners*, 91 FORDHAM L. REV. 53 (2022).

their lives, thereby reclaiming their own humanity and helping to pave the road toward more humane release policies for those who remain incarcerated.

This Article proceeds as follows. Part I explores the limits of criminal legal system reform that fails to engage with people who have been convicted of offenses categorized as violent, and the limitations of quantitative data on influencing policy change. Part II argues first that storytelling is an important tool for individual liberation through back-end processes, particularly parole, clemency, and compassionate release. The Article next turns to the role of storytelling in system-change work, whether that work is done with abolitionist or reformist goals in mind. This Part also sounds a cautious note that while the public needs to hear people's stories to understand that "violent offenders" are just like the rest of us, until they understand that fundamental truth, they may not be adequately primed to hear those stories. The Article concludes with a call to use storytelling on these multiple fronts to further decarceration individually and systematically.

I. DECARCERATION AND ITS DISCONTENTS

By now the phenomenon of mass incarceration that developed over the course of the 1980s and 1990s is well-covered territory.⁴⁵ Although there remains some debate as to the most significant factors leading to mass incarceration, it is incontrovertible that by 2008, the overall U.S. incarceration rate had peaked at 536 per 100,000—as compared to 93 per 100,000 in 1972—and has been slowly and unevenly declining since then.⁴⁶ The unevenness of the decline is due to the significant differences in carceral practices across states and localities.⁴⁷ The slowness of the

45 In addition to the dramatic growth in prison populations, the "tough on crime" era gave rise to broad overcriminalization, including dramatic increases in the number of people on probation and other forms of community supervision at any given time, which have only recently begun to decline, and millions of people saddled with criminal records that limit housing, employment, and other aspects of their lives. See, e.g., U.S. DEPT OF JUST., BUREAU OF JUST. STAT., PROBATION AND PAROLE IN THE UNITED STATES (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf>; Gabriel J. Chin, *Collateral Consequences of Criminal Conviction*, CRIMINOLOGY, CRIM. JUST., L. & SOC'Y, 2017, at 1.

46 PFAFF, *supra* note 4, at 2, 242 n.23 (noting that national and state incarceration rates were highest in 2008, but the national and state prison populations peaked in 2009 because the U.S. population grew faster than the prison population between 2008 and 2009).

47 FORMAN, *supra* note 9, at 14 (describing "an almost absurdly disaggregated and uncoordinated criminal justice system – or 'non-system'" as contributing the

decline is due largely to the exclusion of offenses categorized as violent and the people convicted of those offenses from reform measures.

A. *The Role of Violent Crime Sentencing in Mass Incarceration*

Professor John Pfaff has done a deep dive into the data, concluding that people convicted of violent offenses accounted for 52% of state population growth since the beginning of mass incarceration in the 1980s.⁴⁸ Of the population incarcerated for a violent crime, nearly a quarter have been convicted of murder or manslaughter, and another quarter of robbery.⁴⁹ This adds up to close to 300,000 people, or one-quarter of all state prisoners.⁵⁰ Pfaff takes a macro approach focused on the category of conviction without drilling deeper into the facts or circumstances of the cases. Thus, when he says someone is “serving time for killing someone,” that undoubtedly includes domestic violence victims who killed their abusers; people convicted on an aiding and abetting theory who may have committed no actual acts of violence themselves; those convicted of felony murder, which requires only that they were engaged in committing an enumerated felony when a person died; or cases with other mitigating circumstances.

Rather than being strictly a matter of increased admissions, the reason people serving time for violent offenses constitute such a significant portion of the state prison population is because they are serving exceedingly long sentences.⁵¹ There are several mechanisms

growth of the carceral system); see Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, 104 MINN. L. REV. 2625 (2019); see also PFAFF, *supra* note 4, at 13, 70–71 (noting that 87% of all U.S. prisoners are in state correctional facilities and emphasizing that rather than a single criminal justice system, there is a “vast patchwork of systems that vary in almost every conceivable way”).

48 See PFAFF, *supra* note 4, at 187 (breaking out the data further to indicate that “[t]hirty-six percent of prison growth in the 1980s came from incarcerating more people for violent crimes” and “[f]rom 1990 to 2009 . . . about 60 percent of all additional inmates had been convicted of a violent offense.”).

49 *Id.*

50 Pfaff adds, “[a]nother 10 percent of all prisoners are in prison for aggravated assault, which usually requires serious bodily injury, the risk of death, or a dangerous weapon.” *Id.* at 187.

51 PFAFF, *supra* note 4, at 188–89 (“[A]most all inmates serving long sentences are in for violent crimes . . . Of those admitted to prison in 2003, only 3 percent had not yet been released or paroled by the end of 2013 . . . and almost all of the people in that 3 percent were serving time for serious violent crimes. Fully 65 percent of this 3 percent had been convicted of an index violent crime, with 25 percent of the 3 percent in for murder or manslaughter. In total, 83 percent of these inmates had been convicted of an index or non-index violent crime.”).

through which sentence lengths increased for these offenses in the 1980s and 1990s. The amount of time served increased for felony offenses due to legislative and policy changes at both the front and back end, including mandatory minimum provisions and mandatory sentencing guidelines, accompanied by a ratcheting up of sentence ranges.⁵² There was also a dramatic increase in the rate at which life sentences were imposed for so-called violent offenses.⁵³ At the same time, early release mechanisms became less available and less often utilized. A major factor in this back-end constriction was truth-in-sentencing (“TIS”) laws, passed in over 80% of jurisdictions, which increased the actual portion of a term-of-years sentence that was required to be served.⁵⁴ In the past, people serving life sentences were frequently released onto parole after fifteen or twenty years, but today, whether as a result of TIS laws or other mandatory or discretionary mechanisms, it is frequently the case that “life means life.”⁵⁵ Parole practices have become much more restrictive across the board, and more jurisdictions utilize determinate sentencing with no possibility for early release.⁵⁶ Finally, sentence commutation was regularly used in the past as a release valve on prison populations and as an expression of mercy, but commutations have been few and far between in recent decades, with some notable exceptions.⁵⁷

52 Prescott et al., *supra* note 13, at 1655.

53 SKLANSKY, *supra* note 10, at 67–68; Jones, *supra* note 9. See generally CHRISTOPHER SEEDS, DEATH BY PRISON: THE EMERGENCE OF LIFE WITHOUT PAROLE AND PERPETUAL CONFINEMENT (2022).

54 WILLIAM J. SABOL ET AL., URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS 6–14 (2002), <https://www.urban.org/sites/default/files/publication/60401/410470-The-Influences-of-Truth-in-Sentencing-Reforms-on-Changes-in-States-Sentencing-Practices-and-Prison-Populations.PDF>.

55 Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, THE SENT’G PROJ. (Sept. 2013), <https://www.sentencingproject.org/reports/life-goes-on-the-historic-rise-in-life-sentences-in-america/>; CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING, WHEN “LIFE” DID NOT MEAN LIFE: A HISTORICAL ANALYSIS OF LIFE SENTENCES IMPOSED IN MICHIGAN SINCE 1900 3 (Sept. 2006), <https://static.prisonpolicy.org/scans/cappsmi/When%20life%20did%20not%20mean%20life%20for%20web.pdf>; see generally ASHLEY NELLIS & NIKI MONAZZAM, LEFT TO DIE IN PRISON: EMERGING ADULTS 25 AND YOUNGER SENTENCED TO LIFE WITHOUT PAROLE, THE SENT’G PROJECT (June 2023), <https://www.sentencingproject.org/reports/left-to-die-in-prison-emerging-adults-25-and-younger-sentenced-to-life-without-parole/>.

56 See *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States*, ROBINA INST. OF CRIM. L. & CRIM. JUST., <https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-examining-legal-framework-united-states> (last visited Dec. 11, 2023).

57 Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. &

B. State-by-State Decarceration Limited by Violent Crime Exclusions

While we frequently talk about the criminal legal system as if it is unitary, the reality is that we have many criminal legal systems.⁵⁸ Thus, decarceration is necessarily a piecemeal process, with tremendous variation among the states.⁵⁹ Between 2009 and 2019, there was a net 11% decline in the overall U.S. prison population, but nine states decarcerated by 30% or more, while twenty-five states decarcerated by less than 10%.⁶⁰ During the same time period, four states actually added to their prison populations.⁶¹ Furthermore, California, as part of its “Realignment” process, represented 62% of the 56,000 net decline between 2009 and 2016, reducing its population by 35,000.⁶² If California is taken out of

CRIMINOLOGY 1169 (2010). The exceptions to this rule have taken different forms. President Obama issued 1715 sentence commutations in the last two years of his presidency, with a focus on nonviolent drug offenders. *Obama Administration Clemency Initiative*, OFF. OF THE PARDON ATT’Y, U.S. DEP’T OF JUST., <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> (last visited Dec. 11, 2023). Oregon Governor Kate Brown issued 104 sentence commutations and 130 pardons during her 2015-2023 tenure, including a range of grantee profiles and offenses. Noelle Crombie, *Gov. Kate Brown Ends Term with Flurry of Commutations, Pardons; Calls Clemency a Chance ‘to Save Lives’*, THE OREGONIAN (Jan. 14, 2023), <https://www.oregonlive.com/politics/2023/01/gov-kate-brown-ends-term-with-flurry-of-commutations-pardons-calls-clemency-a-chance-to-save-lives.html>. Kentucky Governor Matt Bevin generated controversy when he issued 428 pardons and commutations in the last few months of his term after losing his bid for re-election. *See supra* note 14. In Connecticut, the independent Board of Pardons and Parole granted nearly 100 sentence commutations in 2022-2023 before political backlash caused them to grind to a halt. Jamiles Lartey, *Connecticut Normalized Clemency. Not Anymore.*, THE MARSHALL PROJ. (May 6, 2023), <https://www.themarshallproject.org/2023/05/06/connecticut-incarceration-clemency-commutation-pardon-justice-reform>.

58 Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 910-912 (2023) (discussing current scholarship contesting the existence of a single “criminal justice system”); Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55 (2018); PFAFF, *supra* note 4, at 13; FORMAN, *supra* note 9, at 14.

59 *See* PFAFF, *supra* note 4, at 108–13.

60 NAZGOL GHANDNOOSH, THE SENT’G PROJ., CAN WE WAIT 60 YEARS TO CUT THE PRISON POPULATION IN HALF? I (2021).

61 *Id.* at 2. Between 2014 and 2019, the prison population in Kansas grew by 4.12%, Nebraska by 4.7%, Idaho by 6.6%, and Montana by 27.7%. *Id.* at 4 (citing Bureau of Justice Statistics Prisoners Series (1999-2019) and noting that the Montana stats may not be accurate due to “incomparability across years.”).

62 PFAFF, *supra* note 4, at 14, 242 n.24. Realignment was the state response to the Supreme Court’s 2011 decision in *Brown v. Plata* which upheld the 9th Circuit’s mandate to reduce the California state prison population to 137.5% of its designed capacity, meaning that 38,000 to 46,000 individuals had to be released, to relieve

the equation, the national decarceration figures are significantly less impressive.

Reform measures have addressed drug and property crimes, and have sought to reduce excessive sentences by restoring credits for good behavior (known as “good time credits”), scaling back truth-in-sentencing laws, and reforming parole policies and procedures.⁶³ However, no state has addressed the population of violent or sex offenders specifically, and most states explicitly have excluded violent and sex offenders from otherwise applicable reforms.⁶⁴ Even California’s Realignment process, which was responsible for the single largest prison population drop, was restricted to “triple-nons” (“non-violent, non-serious, non-sex felony offenses”).⁶⁵

The types of reforms that have been enacted are due, in part, to significant advocacy and scholarship focused on the particularly

overcrowding in violation of the 8th Amendment. *See* Brown v. Plata, 563 U.S. 493, 509–10 (2011); *see also* John F. Pfaff, *Why the Policy Failures of Mass Incarceration are Really Political Failures*, 104 MINN. L. REV. 2673, 2678, 2688–89 (2020) (“Only twenty-six states were holding fewer people in prison in 2016 than in 2009, and over 35% of the decline in those twenty-six states was just California; nearly 60% of the nation’s decline occurred in just the five biggest-declining states (California, New York, Texas, New Jersey, and Connecticut).”). *But see* MAGNUS LOFSTROM & STEVEN RAPHAEL, IMPACT OF REALIGNMENT ON COUNTY JAIL POPULATIONS 2 (2013), <https://gspp.berkeley.edu/assets/uploads/research/pdf/p73.pdf> (finding approximately 12% increase in county jail populations during the first nine months of realignment suggesting a portion of the prison population reduction was simply displacement to county jails but not on a one-to-one basis); MAGNUS LOFSTROM & BRANDON MARTIN, PUBLIC SAFETY REALIGNMENT: IMPACTS SO FAR (2015), <https://www.ppic.org/publication/public-safety-realignment-impacts-so-far/> (describing additional decrease in prison population below court-mandated target due to passage of Proposition 47 in November 2014, reducing penalties for many drug and property offenses).

63 *See* DENNIS SCHRANTZ ET AL., THE SENT’G PROJ., DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS (2018).

64 *See* Jones, *supra* note 9 (including Appendix that lists reform legislation over the past 15 years with carve-outs for those convicted of violent offenses); *see* PFAFF, *supra* note 4, at 186 (describing not only reform legislation focused on nonviolent crimes but reform measures like drug diversion excluding those convicted of violent offenses).

65 Pfaff, *Policy Failures of Mass Incarceration*, *supra* note 62, at 2677; *see* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS, 165–66 (2014) (discussing “non, non, nons”). Liberal reformers played a role in removing rehabilitation as a focus of penal policy in the 1970s by articulating the position that prisons should primarily house “especially dangerous repeat offenders.” Frampton, *Dangerous Few*, *supra* note 21, at 2022–23 (quoting from Nat’l Council on Crime & Delinquency, *The Nondangerous Offender Should Not Be Imprisoned*, 4 CRIME & DELINQUENCY 449 (1973)).

egregious racial disparities in the prosecution and punishment of drug offenses, as discussed above.⁶⁶ In addition, most decision-makers are risk averse when it comes to the specter of violent crime. The long shadow of Michael Dukakis' "Willie Horton Problem" and the perpetual availability of this racist dog whistle as a tool for political advantage continues to affect the willingness of public officials to break with the status quo in favor of more liberal release policies.⁶⁷ Finally, there is a different moral judgment made about those who are considered to have committed acts of violence and a lack of clarity about what a violent offense conviction actually means about a person's past acts, future proclivities, and essential character.⁶⁸

The categorical exclusion of these offenses becomes apparent upon considering the specific decarceral measures that states have taken. Connecticut was one of the states with the greatest reduction in its prison population—an astounding 39.2% reduction from its peak year of 2007 to 2019.⁶⁹ Policy changes that contributed to the decrease in Connecticut included a focus on reducing youth arrests through a reduction in school suspensions and expulsions and changed criteria for detention, as well as legislation that raised the age of criminal responsibility from sixteen to eighteen; increasing prison releases by enlisting reentry professionals in release decision-making and creating an Enacted Risk Reduction Earned Credit Program; reducing returns to prison by 55% through strengthening reentry programs; and statutorily

66 See generally ALEXANDER, *supra* note 2.

67 In 1987, Massachusetts prisoner William Horton committed a home invasion and rape after absconding from a weekend furlough. During the 1988 presidential election, George Bush's campaign manager Lee Atwater successfully weaponized the episode, which ended up torpedoing then Massachusetts Governor Michael Dukakis' electoral chances, with lasting impact on the political calculus around prison release policies. See DAVID C. ANDERSON, *CRIME & THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* 245–56 (1995); Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html>; Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJ. (May 13, 2015), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>; Daniel Medwed, *The Innocent Prisoners' Dilemma*, 93 IOWA L. REV. 491, 510 (2008) (citing Beth M. Huebner & Timothy S. Bynum, *An Analysis of Parole Board Decision-making as a Function of Eligibility*, 22 J. CRIME & JUST. 193, 198 (1999) ("Despite the centrality of the decision point, parole staff generally get feedback on their judgments only when there is bad news to report[.]").

68 SKLANSKY, *supra* note 10, at 23–25, 36–40.

69 GHANDNOOSH, *supra* note 60, at 4; see also MARC MAUER & NAZGOL GHANDNOOSH, *THE SENT'G PROJ., FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES* (2014).

eliminating mandatory sentences and reclassifying some drug possession crimes as misdemeanors.⁷⁰ Rhode Island similarly reduced its prison population by 34.3% between its peak in 2008 and 2019 through reforms such as new earned-time and risk-reduction program credits, elimination of mandatory minimum sentences for drug crimes and marijuana decriminalization, and reduced prison returns and probation revocations due to improved reentry strategies.⁷¹

South Carolina reduced its prison population by 22.1% between its peak in 2009 and 2019.⁷² South Carolina reduced prison admissions through diversion for parole revocations, sentence-based probation incentives, and the use of risk/needs assessments to improve supervision and services provision.⁷³ Like other states, South Carolina reformed its drug laws, eliminating mandatory sentencing for drug possession, creating more prison alternatives for drug offenses, and equalizing crack and powder cocaine sentences.⁷⁴ With respect to property crimes, the state reclassified many felonies as misdemeanors, reducing the possibility of a prison sentence.⁷⁵

Mississippi reduced its prison population by 18% from 2008 to 2016.⁷⁶ The most significant reform enacted in Mississippi, resulting in two-thirds of its prison population reduction, was a legislative scaling back of the state's truth-in-sentencing law to the longer of either one year or 25% of time served for nonviolent convictions, applied retroactively.⁷⁷ The state also enacted early release and parole reforms, as well as policies to reduce prison admissions through graduated sanctions for felony property and drug offenses.⁷⁸

The differential decline in the U.S. prison population, when broken down by conviction offense, is stark. Between 2007 and 2018, there was a 31% reduction in the prison population serving time for drug offenses and a 24% reduction in the prison population serving

70 SCHRANTZ ET AL., *supra* note 63, at 9, II. Other states that have seen dramatic decreases in prison populations include New York, New Jersey, and Michigan.

71 GHANDNOOSH, *supra* note 60, at 3; SCHRANTZ ET AL., *supra* note 63, at 35.

72 GHANDNOOSH, *supra* note 60, at 4.

73 SCHRANTZ ET AL., *supra* note 63, at 43.

74 *Id.*

75 *Id.*

76 *Id.* at 25. More recent statistics suggest that decarceration has slowed in Mississippi as the rate of decrease between 2008 and 2019 is only 12.8%. GHANDNOOSH, *supra* note 60, at 4.

77 See SCHRANTZ ET AL., *supra* note 63, at 27–28.

78 See *id.* at 27, 29.

time for property offenses.⁷⁹ Yet between 2009 and 2018, there was a mere 5% reduction in the prison population serving time for violent offenses.⁸⁰ Drug sentencing reform has been the single biggest factor in prison population decline, but even if all people serving drug sentences were released, the population would only be reduced by 16%.⁸¹ Between 2009 and 2019, the average annual rate of decline was 1.2%.⁸² Even if the rate of decline doubled, it would still take 23 years to achieve a 50% reduction—and 50% would still be double the last stable rate in the U.S. prison population during the period from the 1920s to the early 1970s.⁸³ If we remain at the current rates of decline, it will take until 2078 to cut the U.S. prison population by 50%, a pleasingly round numeric goal that has had some currency.⁸⁴

The reductions are significant, and we ought not underestimate the impact that these decarcerative strategies have had on thousands of people's lives. Nonetheless, when comparing the numbers to where they were prior to the growth of mass incarceration, it becomes clear how far we have floated from the shore. There were approximately 200,000 individuals in state or federal prisons in 1972, but 1.4 million in 2019—some ten years after the national decline began.⁸⁵ Indeed, prison population statistics consistently understate the actual number of people incarcerated because they are snapshots of the prison population at year end, and do not capture individuals who spent time in prison earlier in the year or the approximately 12 million people who cycle in and out of county jails during the course of the year.⁸⁶ The global comparison is equally shocking. The United States has the most people incarcerated – comprising approximately 25% of the total global prison population—and the highest per capita rate of incarceration in the world.⁸⁷ Against this backdrop, even seemingly remarkable declines in some state prison

79 GHANDNOOSH, *supra* note 60, at 3.

80 *Id.* at 3.

81 PFAFF, *supra* note 4, at 35.

82 GHANDNOOSH, *supra* note 60, at 3.

83 Alfred Blumstein, *Dealing with Mass Incarceration*, 104 MINN. L. REV. 2651, 2654, 2661 (2020).

84 GHANDNOOSH, *supra* note 60, at 3; PFAFF, *supra* note 4, at 8 (citing the goal of organization Cut50, which has since become Dream Corps Justice, to “cut it in half.”).

85 GHANDNOOSH, *supra* note 60, at 1; *see also* PFAFF, *supra* note 4, at 2 (reporting 1.56 million in 2014).

86 PFAFF, *supra* note 4, at 2, 240 n.4.

87 Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

populations are little more than a drop in the bucket.

These declines are also likely to hit a plateau if reforms continue to exclude the large populations of state prisoners serving sentences for violent offenses.⁸⁸ In addition to categorical exclusion from reform measures, people who have been convicted of serious violent offenses also face substantial barriers to release, even by means from which they are not formally excluded, such as sentence commutation and parole for those with parole-eligible sentences. As a result, the population least likely to reoffend—those who have grown old in prison while serving life or long sentences—are the ones who are least likely to be released, stagnating prison population declines.⁸⁹

Excessive sentences for those convicted of “violent crimes” and the curtailing of back-end release mechanisms remain key factors in the bloated prison population. By 2013, approximately two-thirds of state prisoners over the age of fifty-five were serving sentences for violent offenses, half for rape or homicide.⁹⁰ Stated another way, nearly 16.3% of prisoners convicted of homicide were over fifty-five years old.⁹¹ Due to the accelerated aging process that occurs in prison, a substantial portion of this population is chronically ill and dying while incarcerated.⁹² If we focus decarceration strategies solely on those serving sentences for nonviolent property and drug offenses and ignore those serving sentences for violent offenses, the prison population will continue to age and will remain excessively large for decades to come.⁹³ Keeping

88 It is difficult to assess the current trend based on the figures from 2020 through the present, because the prison and jail numbers dropped early in the pandemic due to pandemic-related releases and reduced intake, but began to rebound as criminal legal system mechanisms largely returned to business as usual. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023) <https://www.prisonpolicy.org/reports/pie2023.html>.

89 See Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL’Y INITIATIVE (Aug. 2, 2023), <https://www.prisonpolicy.org/blog/2023/08/02/aging/>.

90 Prescott et al., *supra* note 13, at 1656.

91 *Id.*

92 See generally ACLU, *supra* note 32; Lopez, *supra* note 32; Edmonds, *supra* note 32; see also Farah Acher Kaikow et al., *Caring for the Rapidly Aging Incarcerated Population: The Role of Policy*, J. GERONTOLOGICAL NURSING, Mar. 2023.

93 Prescott et al., *supra* note 13, at 1656, 1658 (also noting that “As of 2016, black people were about seven times more likely to be incarcerated than white people for violent crimes (and about nine times more likely for murder). . . Thus, even if all racial disparities in prison admission rates, sentence lengths, and early release rates were eliminated within each category of crime, substantial racial disparities in incarceration would remain simply because of how much longer we imprison people for violent crimes.”).

these people in prison is extraordinarily expensive for state budgets, largely unnecessary from a public safety perspective, and cruel and unusual punishment from the viewpoint of international and historical standards.⁹⁴

That the decarceration ship remains stuck on the iceberg of violence was demonstrated clearly by President Obama, who at various points during his presidency advocated for reducing the prison population—but consistently and explicitly limited any focused efforts on the population of nonviolent offenders. Indeed, his administration’s Clemency Project 2014, which was announced with great fanfare, was aimed exclusively at “non-violent, low-level drug offenders who were not leaders of – nor had any significant ties to – large-scale organizations, gangs, or cartels” and “who ha[d] a clean record in prison, d[id] not present a threat to public safety, and who [were] facing a life or near-life sentence that [was] excessive under current law.”⁹⁵ The administration also indicated an interest in receiving petitions from “first-time offenders or offenders without an extensive criminal history.”⁹⁶ Although 1,696 federal prisoners were released, in the end, only 5.1% of grantees actually met all of the stated criteria, which highlights the fantastical nature of the administration’s line-drawing.⁹⁷

C. *The Real Risk of Being Perceived as “Soft on Crime” and the Illusory Risk of Serious Violent Crime Recidivism*

It was apparent from the stated eligibility criteria that the

94 Kim Steven Hunt & Billy Easley II, *The Effects of Aging on Recidivism Among Federal Offenders*, U.S. SENT’G COMM’N 3 (2017). See generally ACLU, *supra* note 32; Lopez, *supra* note 32; Edmonds, *supra* note 32.

95 James Cole, Deputy Att’y Gen., Remarks as Prepared for Delivery at the New York State Bar Association Annual Meeting 4, 6 (Jan. 30, 2014); Barkow, *supra* note 47, at 2638 (“We let outlier cases drive what we do.”).

96 Cole, *supra* note 95, at 6.

97 U.S. SENT’G COMM’N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 18 (Sept. 2017), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf (noting also that 78% of grantees met 3 or more of the stated criteria and two grantees did not meet any of the stated criteria); see also Sean Nuttall, *Inside the Clemency Lottery*, THE MARSHALL PROJ., 2–4 (Jan. 26, 2017), <https://www.themarshallproject.org/2017/01/26/inside-the-clemency-lottery>; CTR. ON THE ADMIN. OF CRIM. L. AT NYU L. SCH., THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE (2018), https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf.

Obama Administration was determined to avoid releasing an individual who might go on to commit an act of violence that could undermine the entire project.⁹⁸ While the concern about political blowback was reasonable in light of the public discourse around crime and violence, the probabilities of actual new violence by grantees were low. Although difficult to quantify, there were almost certainly thousands of additional people who could have been released without any increase in risk to public safety who were instead denied due to some history of violence, whether as part of their offense of conviction, a prior conviction, or their record while incarcerated.⁹⁹ A fifty-year-old who had served twenty years in prison for a drug trafficking conviction, but who had committed a felony assault when he was eighteen years old, would have been considered ineligible under the Obama criteria, despite all signs pointing to a lack of current dangerousness.¹⁰⁰

Despite Biden's campaign promise to "use the president's clemency power to secure the release of individuals facing unduly long sentences for certain non-violent and drug crimes,"¹⁰¹ as of this writing more than three years into his presidency, President Biden has granted a mere 24 pardons to those who had already completed their sentences and 129 sentence commutations.¹⁰² This includes thirty-one commutations

98 See Cole, *supra* note 95.

99 U.S. SENT'G COMM'N, *supra* note 97, at 14–15 (reporting that all grantees under the Clemency Initiative had been sentenced for a drug trafficking offense, 31.8% had a weapon involved in their offense, and 14.1% "were also convicted of an offense involving the use or carrying of a firearm during and in relation to a crime of violence or a drug trafficking crime, or the possession of a firearm in furtherance of those crimes."); *id.* at 25 (noting that three grantees had used violence in connection with the drug trafficking offense for which they were convicted and three others were convicted of both a drug trafficking offense and a violent offense).

100 Despite not meeting eligibility criteria, this hypothetical person might still be granted clemency due to the arbitrariness with which the criteria were implemented. See generally CTR. ON THE ADMIN. OF CRIM. L. AT NYU L. SCH., *supra* note 97.

101 See Austin Sarat, *It's Time for President Biden to Use His Vast Clemency Power*, THE HILL (Jan. 4, 2022), <https://thehill.com/opinion/criminal-justice/588159-its-time-for-president-biden-to-use-his-vast-clemency-power/>.

102 *Commutations Granted by President Joseph Biden (2021-Present)*, U.S. DEP'T OF JUST., OFFICE OF THE PARDON ATT'Y, <https://www.justice.gov/pardon/commutations-granted-president-joseph-biden-2021-present> (last visited Apr. 25, 2024), <https://www.justice.gov/pardon/pardons-granted-president-joseph-biden-2021-present> (last visited Apr. 25, 2024); THE WHITE HOUSE, CLEMENCY RECIPIENT LIST (April 28, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/28/clemency-recipient-list-3/>.

to individuals who had been released to home confinement during the pandemic, the vast majority of whom had been convicted of drug or financial crimes.¹⁰³ Even if Biden were fulfilling his campaign promise, those sentenced for violent or sex crimes would be categorically excluded.

D. Decarceration of Violent Offenders Will Come Later . . . or Never?

Among criminal legal system advocates and policymakers, the large percentage of prisoners serving sentences for violent offenses is not a secret. Many reformers acknowledge that efforts addressing those serving sentences for nonviolent offenses while ignoring or purposely excluding those who are serving sentences for violent offenses will not end mass incarceration.¹⁰⁴ But they argue that it is necessary to begin with the “low-hanging fruit.” Many of these reformers believe that it will first be necessary to persuade the public that nonviolent sentences should be reduced before it will be possible to convince the public that sentences for violent offenders should also be made shorter.¹⁰⁵

Increasingly, scholars have critiqued the feasibility of this strategy of chipping away at mass incarceration by focusing on nonviolent offenders, arguing that this sort of reform can end up

103 U.S. DEP’T OF JUST., OFF. OF THE PARDON ATT’Y, *supra* note 102. Biden did also issue blanket pardons to those convicted of federal marijuana simple possession offenses, in recognition of how far out of step federal and state marijuana policies have gotten and as a signal to Congress to legislate accordingly. U.S. DEP’T OF JUST., JUSTICE DEPARTMENT STATEMENT ON PRESIDENT’S ANNOUNCEMENTS REGARDING SIMPLE POSSESSION OF MARIJUANA (Oct. 6, 2022), <https://www.justice.gov/opa/pr/justice-department-statement-president-s-announcements-regarding-simple-possession-marijuana>.

104 This is just one of many areas of criminal justice reform where what the experts know diverges dramatically from the policies that are made. *See* Barkow, *supra* note 47, at 2627 (positing that criminal justice policies result from “bad facts that are on the news” and are “emotionally satisfying” but “make us less safe in the long term”); SIMON, *supra* note 17, at 4 (noting “[c]riminologists and sociologists have long sought to document that this fear of crime and violence is irrational in its scope and priority. But even if the public were to seriously consider the empirical evidence for this position, there would be little reason to expect the civil order built around crime in America to disappear anytime soon.”).

105 *See, e.g.*, FORMAN, *supra* note 9, at 229 (quoting Valerie Jarrett on NPR, “If we can begin with the nonviolent drug offenders, it’s an important first step. It doesn’t mean that we wouldn’t come back if research indicated that we should tailor other parts of our judicial system. But let’s start with where we have consensus and move forward and not let the perfect be the enemy of the good.”).

making broader reform more difficult.¹⁰⁶ Ultimately, this strategy results in political trade-offs, easing sanctions for nonviolent offenses while simultaneously lengthening sentences for violent offenses.¹⁰⁷ This is a result of the commonly made argument for releasing nonviolent offenders to free up beds for the *real* bad guys: violent offenders. This approach directly dampens the decarcerative effect of sentencing reform because it emphasizes the release of the relatively smaller number of nonviolent offenders while further justifying the retention of the much greater number of so-called violent offenders.¹⁰⁸ Furthermore, enhancing already harsh sentences has very little impact on deterrence and diminishing returns on incapacitation.¹⁰⁹

The second problem with this approach is that the rhetoric is damaging to broad-based reform. The more those who have committed violent crimes are villainized, the less possibility there is for humanizing these individuals down the road. The more times President Obama talked about “violent criminals” by saying “[m]urderers, predators, rapists,

106 PFAFF, *supra* note 4, at 186; FORMAN, *supra* note 9, at 230 (suggesting that “criminal justice reform’s first step – relief for nonviolent drug offenders – could easily become its last”); GOTTSCHALK, *supra* note 65, at 165–95 (2014).

107 FORMAN, *supra* note 9, at 221; *see also* GOTTSCHALK, *supra* note 65, at 167 (“Some opponents of the war on drugs have supported easing up on drug offenders and other nonviolent offenders in order to get tough with the ‘really bad guys.’”); SCHRANTZ ET AL., *supra* note 63, at 8 (describing the phenomenon of reform “packages” that include harsher penalties for violent offenses together with reduced penalties for non-violent offenses). There are some reformers who believe that beginning with more modest measures is a way to get a foot in the door to other forms of early release.

108 Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. SOC. SCI. 238, 243, 248–49 (2016) (discussing problem of bifurcating violent versus nonviolent offenders in reform efforts, partly as a result of Republicans leading the way on reform focused on the fiscal costs rather than the human costs of mass incarceration).

109 SCHRANTZ ET AL., *supra* note 63, at 8; Prescott et al., *supra* note 13, at 1660 n.74 (citing various sources including Nagin on Deterrence). This fixation on the dangerousness of people serving offenses for violent crimes has even carried over into the COVID era. States have considered release or home confinement transfers of older and medically vulnerable prisoners to limit the spread of infection within prisons and jails, but such efforts were curtailed because of a fear that it would cause a spike in crime. Where releases were effect, most often those convicted of violent offenses were excluded for that reason—even though the majority of older prisoners who were most vulnerable to COVID-19 complications are those serving sentences for serious violent crimes; *see* John Pfaff, *The Forever Bars*, WASH. POST (Apr. 10, 2020), <https://www.washingtonpost.com/outlook/2020/04/10/prison-violent-offender-jail-coronavirus/> (arguing that release of those convicted of violent offenses must also be taken seriously, as laid bare in the context of the COVID-19 crisis); Prescott et al., *supra* note 13, at 1647–48.

gang leaders, drug kingpins—we need some of those folks behind bars,” the narrower the path toward true decarceration became.¹¹⁰ Fears about violent crime recidivism bleed into all areas of criminal legal system reform. For instance, the Fair Sentencing Act of 2010 was an important step forward in reducing excessive sentences for drug offenses, but it did not have retroactive effect prior to the First Step Act of 2018.¹¹¹ When President Obama launched his major clemency push in 2014, he could have decided to use his clemency power to commute the sentences of the class of individuals who would have received shorter sentences had they been sentenced after the Fair Sentencing Act took effect.¹¹² Instead, the administration instituted a labor-intensive bureaucratic process to assess merit and to weed out candidates with any risk factors like a “history of violence.”¹¹³ Furthermore, Obama could have used the clemency grants as an opportunity to humanize who “an offender” is to the public by telling the story of each grantee. Instead, when the clemency grants were issued in batches, it was done quietly, in contrast to the fanfare that came with the announcement of the project.¹¹⁴

It is possible that these two imperatives could have come into conflict. If the administration did not focus as much on a clemency candidate’s history of nonviolence, it might have been even more

110 FORMAN, *supra* note 9, at 221; *see also* O’Hear & Wheelock, *supra* note 15, at 1038–40 (articulating public support for punitive policies as an impediment to decarcerative criminal justice reform), 1040 n.16 (highlighting uncertainty regarding extent to which public figures shape or follow public opinion on punitiveness).

111 *See* MICHAEL A. FOSTER & JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10611, CRACK COCAINE OFFENSES AND THE FIRST STEP ACT OF 2018: OVERVIEW AND IMPLICATIONS OF TERRY V. UNITED STATES 2 (2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10611>.

112 Paul J. Larkin, Jr., “*A Day Late and a Dollar Short*” —President Obama’s Clemency Initiative 2014, 16 GEO. J. L. & PUB. POL’Y 147, 147–48, 156–58 (2018).

113 *See* U.S. SENT’G COMM’N, *supra* note 97, at 7–11; *see generally* Margaret Colgate Love, *Obama’s Clemency Legacy: An Assessment*, 29 FED. SENT’G REP. 271 (2017).

114 *Compare, e.g.*, WHITE HOUSE, PRESIDENT OBAMA GRANTS COMMUTATIONS (June 3, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/03/president-obama-grants-commutations> (noting that President Obama had granted 42 sentence commutations followed by a list of the names, offenses, sentences, and terms of commutations granted to each individual), *with* Cole, *supra* note 96, *and* ATT’Y GEN. HOLDER, U.S. DEP’T OF JUST., JUSTICE DEPARTMENT SET TO EXPAND CLEMENCY CRITERIA, WILL PREPARE FOR WAVE OF APPLICATIONS FROM DRUG OFFENDERS IN FEDERAL PRISON (Apr. 21, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-justice-department-set-expand-clemency-criteria-will-prepare-wave> (announcing in video message the possibility of thousands of commutation grants under the initiative).

difficult to justify the individual's release to the public and could have risked greater backlash. At the same time, President Obama, one of the greatest rhetoricians of our time, might have used his bully pulpit at a moment of unusual bipartisanship around the singular issue of criminal legal system reform, to tell the American public that "we are all worth more than the worst thing we've ever done."¹¹⁵ As the first Black president, Obama faced greater expectations that he would take action to reform unjust criminal legal system policies and he also faced particular landmines in doing so. Even taking that political reality into account, it is confounding that he chose to use rhetoric that directly undermined true decarceration, despite expressing an interest in rightsizing the system of incarceration.

Most people have a difficult time saying what the "right" number of prisoners is—with the notable exception of prison abolitionists, for whom the right number is somewhere between zero and very few ("the dangerous few," per Paul Butler, Thomas Frampton, and others).¹¹⁶ There is a broad consensus, however, that the U.S. prison population should be significantly smaller than it is currently.¹¹⁷ To achieve anything close to even a 50% reduction in our prison population, we must look at ways to reduce the population of people serving sentences for violent offenses.¹¹⁸

115 This quote which has recently been attributed to Bryan Stevenson was earlier articulated in this form by Sister Helen Prejean, whose work with death row inmates was portrayed in the film *Dead Man Walking*.

116 See PFAFF, *supra* note 4, at 8 (describing general consensus on reducing incarceration rates but lack of clarity about what the target number should be); MARIAME KABA, *WE DO THIS 'TIL WE FREE US* (2021); Frampton, *Dangerous Few*, *supra* note 21, at 2018; *Berkeley Talks: Paul Butler on How Prison Abolition Would Make Us All Safer* (transcript), UNIV. OF CAL. AT BERKELEY (Jan. 17, 2020), <https://news.berkeley.edu/2020/01/17/berkeley-talks-transcript-paul-butler/>.

117 *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>. *But see* Levin, *After the Criminal Justice System*, *supra* note 58 (critiquing the legitimacy of criminal law and discussing the exacerbation of power imbalances within the system).

118 Although they constitute a smaller percentage of the overall prison population (and an overlapping one, insofar as people convicted of rape are considered both violent offenders and sex offenders), a truly effective decarcerative agenda would also require us to rethink how we talk about and treat sex offenders. *See, e.g.*, Eric S. Janus, *Preventing Sexual Violence: Alternatives to Worrying About Recidivism*, 103 MARQ. L. REV. 819 (2020).

E. The Limitations of Quantitative Data

There is a sense among advocates and scholars that a more evidence-based approach will help shift criminal legal system policy.¹¹⁹ In response to the anecdotal and impressionistic basis for criminal justice policies over the last half century, a new generation of scholars and policymakers have promoted evidence-based reform and sought to leverage data to move the needle in the reform debate.¹²⁰ As Professor Erin Collins has written:

[T]he evidence-based paradigm has played a prominent role in shaping popular reforms across the criminal procedure spectrum. Its core tenets—the belief that data should drive reforms, a faith in the statistical empirical methods to produce such data, a commitment to efficiency, as measured by recidivism—come together to support a seemingly uncontroversial proposition: the evidence-based paradigm provides an apolitical approach that helps identify effective reforms.¹²¹

As Collins argues, the evidence-based paradigm is itself ideologically inflected and so the collection of more quantitative data alone will not fundamentally change the nature of our policymaking.¹²² In addition to the important theoretical objections Collins raises, we know this to be true because we already have significant amounts of data, and it has not moved the needle appreciably in regard to violent offense policies. For example, ample empirical evidence demonstrates that people who have served long sentences for offenses categorized as violent have extremely low recidivism rates.¹²³ Additionally, research consistently reveals that most individuals “age out of crime.”¹²⁴ Furthermore, recidivism rates are extremely low among older released prisoners, prisoners released after fifteen years or more, and prisoners

119 Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 *BYU L. REV.* 403, 405–07 (2022); Klingele, *supra* note 31, at 538–39.

120 Collins, *supra* note 119, at 406–07, 406 n.10–n.11 (citing numerous articles and policy papers advocating for “evidence-based” decision-making).

121 *Id.* at 424–25.

122 *Id.* at 408–11.

123 Prescott et al., *supra* note 13, at 1645–48.

124 Laura S. Abrams et al., *Growing Up Behind Bars: Pathways to Desistance for Juvenile Lifers*, 103 *MARQ. L. REV.* 746, 751–52 (2020) (providing additional nuance as to what makes people age-out of crime). See generally Laub & Sampson, *Understanding Desistance from Crime*, *supra* note 14; Sampson & Laub, *Life-Course Desisters?*, *supra* note 14.

who have served sentences for murder or negligent manslaughter.¹²⁵

In a significant empirical study, J.J. Prescott, Benjamin Pyle, and Sonja Starr found that individuals who were incarcerated for homicide offenses have lower overall recidivism rates than the general population of released offenders and conclude that “[t]his finding suggests that there are diminishing returns to very long sentences, even for homicide and that the vast majority of individuals released after serving a sentence for homicide are not dangerous.”¹²⁶ Other studies have yielded similar results. A Michigan study found that parolees who had served sentences for homicide were re-imprisoned at a significantly lower rate than the average parolee: 5.7% as compared to 16.7%.¹²⁷ Over 99% of people released after serving a sentence for homicide or a sex-offense did not return to prison within three years with new convictions for similar offenses.¹²⁸ A similar California study found that the recidivism rate for individuals sentenced to life in prison was 13.3%, as compared to 65.1% for non-lifer parolees.¹²⁹ A 2020 study of juvenile lifers resentenced under *Miller* and released in Pennsylvania indicated a re-arrest rate of 3.45% and a reconviction rate of 1.14%.¹³⁰

Yet another study has demonstrated that there are “no statistically significant effects of imprisonment on violent reoffending”; in other words, recidivism rates remained the same whether a person convicted of a violent offense was sentenced to prison or probation.¹³¹

125 See generally Prescott et al., *supra* note 13.

126 Prescott et al., *supra* note 13, at 1645, 1647; see also Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y, 483 (2006) (finding that after six or seven years since last offense the risk of a new offense approximates that of a person with no criminal record).

127 Prescott et al., *supra* note 13, at 1678; LEVINE & KETTUNEN, *supra* note 31.

128 LEVINE & KETTUNEN, *supra* note 31, at 2; see also Jones, *supra* note 9 (noting that of the 200 people convicted in Maryland of violent crimes in 1981 or earlier who were released following the 2012 case *Unger v. Maryland*, by 2018 only 5 had returned to prison for a parole violation or new crime).

129 LIFER PAROLEE RECIDIVISM REPORT, CAL. DEP’T OF CORR. & REHAB. REPRESENTATIVES 2, 8, 9 (2013). The lifers in this study were all serving sentences for first degree murder, second degree murder, kidnapping, attempted first degree murder, or assault with a dangerous weapon. *Id.* at 2.

130 TARIKA DAFTARY-KAPUR & TINA ZOTTOLI, RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 10 (Montclair State University Digital Commons, 2020), <https://digitalcommons.montclair.edu/cgi/viewcontent.cgi?article=1084&context=justice-studies-facpubs> [https://perma.cc/CBN9-CZPE].

131 Jennifer E. Copp, *The Impact of Incarceration on the Risk of Violent Recidivism*, 103 MARQ. L. REV. 775, 787 (2020) (citing Harding et al. study); *id.* at 789 (citing

Such evidence does not suggest that incarceration is never appropriate, however, there is evidence that sentences significantly shorter than those currently being served would serve the same purpose.¹³² Furthermore, longer sentences lead to greater challenges when reintegrating into society, creating additional burdens on the public interest.¹³³ In short, the data is clear that we do not have to wait until individuals are elderly to release them, and we certainly do not have to imprison them for their natural lives in order to achieve public safety objectives. And yet reforms reflecting the substantial weight of the evidence remain off the table.

If anything, certain dubious assumptions undergirding much of the data suggest that even favorable recidivism statistics likely overstate the actual risk to public safety posed by this population. Troublingly, most studies use new arrests as the main metric of recidivism, and by doing so, they assume an arrest means that the person has committed a new crime.¹³⁴ This is a faulty assumption. The statistics are also skewed because for a person on parole, the chance of re-arrest is substantially increased by virtue of being under surveillance. Most released individuals are also returning to communities where more intensive police surveillance is the rule.¹³⁵ Considering that the majority

research finding versatility in reoffending to be predominant pattern (as compared to specialization, further undermining utility of violent v nonviolent categorization)); *id.* at 790 (calling for researchers to avoid false dichotomy between violent and nonviolent in light of findings about versatility of offending, so as to influence policymaking that does not prioritize nonviolent offenders exclusively).

132 JaneAnne Murray et al., *Second Look = Second Chance: Turning the Tide Through NACDL's Model Second Look Legislation*, 33 FED. SENT'G REP. 341, 341–42 (2021), <https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-the-nacdl-model-second-look-legislation.pdf>.

133 *See, e.g.*, Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOCIO. REV. 526, 526–46 (2002); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 31 (2009) (describing negative impacts of extended incarceration on employability due to gaps in work history, physical or psychological trauma, and frayed social networks); *see also* Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOCIO. REV. 529–46 (2000); Bruce Western and Becky Pettit, *Incarceration and Racial Inequality in Men's Employment*, 54 INDUS. & LAB. REL. REV. 3, 3–16 (2000).

134 *See* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1009–10 (2019); Collins, *supra* note 119, at 432; *see also* Cecelia Klingele, *Measuring Change, From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY 769, 786–87 (2019).

135 Christy A. Vishner & Jeremy Travis, *Life on the Outside: Returning Home after Incarceration* (SUPP. TO 91(3)) PRISON J., at 103S–104S (2011) (noting that “a majority of [incarcerated people] come from a small number of urban communities” and

of crimes go unsolved,¹³⁶ increased surveillance is likely to correlate with increased likelihood of apprehension—not increased likelihood of offending. Recidivism statistics also rarely get as granular as the severity or type of re-offense, and so serious offenses are lumped together with misdemeanors, which may be quite trivial.¹³⁷ Finally, the “scarlet F” of a felony conviction, combined with the onerous terms of parole, makes it extraordinarily difficult for people to obtain and keep jobs in the formal economy and more likely that they will resort to informal or illicit market activity.¹³⁸ This behavior is more reflective of economic reality than a propensity toward criminality, and points toward the need for more robust non-carceral responses.

In many policy areas, data matters. It has the veneer of objective truth. It can help persuade and it can bolster reform. But in the realm of violent crime policy, at least for the past four decades, data has not mattered nearly as much as emotions and stories. The stories of the statistically insignificant cases in which people on parole or furlough committed egregious new crimes bolstered the “tough on crime” shift in the system, particularly when the victims were white and middle class.¹³⁹ Among the most notorious of these was the story of Willie Horton, which derailed Massachusetts Governor Michael Dukakis’ run

136 “[t]hese communities, already struggling with poor schools, poor health care, and weak labor markets, are now shouldering the burden of reintegrating record numbers of former prisoners.”); Collins, *supra* note 119, at 432; KABA, *supra* note 116, at 88–92 (describing the oversurveillance of young Black and brown people). See Prescott et al., *supra* note 13, at 1665; *Crime in the U.S. 2019*, FBI: UNIFORM CRIME REPORTING PROGRAM, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/clearances> (last visited Dec. 28, 2023); John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RSCH. CTR. (Mar. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/>.

137 See Collins, *supra* note 119, at 432. But see generally Prescott, *supra* note 13.

138 Access to formal employment can be hampered by a lack of skills-training in prison, limited job history, and physical ailments caused or exacerbated by time in prison. As Collins notes, “seemingly race neutral factors are themselves ‘structured by racial domination – from job market discrimination to ghettoization.’” Collins, *supra* note 119, at 446 (quoting RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CROW*, 11 (2019)); see also DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2009); Hinton, *supra* note 272, at 25 (describing the exclusion of former prisoners from the formal economy thereby contributing to recidivism); WESTERN, *supra* note 9, at 7 (noting that for the half of study subjects who reported having employment one year after returning home from prison, “the work they did was typically informal, often cash jobs offered by friends or family”).

139 DAVID C. ANDERSON, *THE CRIME AND POLITICS OF HYSTERIA* 5–25 (1995).

for president.¹⁴⁰ The stories of victims were deployed to justify significant carceral moves with the support of some feminists, despite the warnings of other scholars and advocates that this would lead to greater harm.¹⁴¹ But if stories can inspire carceral policy - and decision -making, they can also inspire decarceral policy- and decision-making. Storytelling is thus a powerful tool in the movement for decarceration, as explored in the balance of this Article.

II. STORYTELLING FOR DECARCERATION

Telling and amplifying the stories of incarcerated individuals, many of whom are also victims, can help to combat the simplistic narratives that have dominated criminal legal system debates in recent decades. These stories can and should be told in the context of individual cases, and as part of broader policy debates. There is a role for effective storytelling through existing mechanisms for release: parole, sentence commutations, and compassionate release or medical parole. All these mechanisms are too slow and limited for those who wish to tear the system down. They nonetheless present avenues to freedom for individual people and at no cost to abolitionist goals.¹⁴²

Yet too many people who seek release through these mechanisms are being denied, despite not posing a public safety risk.¹⁴³ The primacy of their original offense will continue to impose a major impediment to release, as addressed in greater detail in Section II.B. Nonetheless, more individuals could win release by telling more effective stories about themselves. Some of us are natural storytellers, while others struggle to tell compelling stories, particularly about ourselves. Peer-to-peer workshops can be an effective way to prepare to tell one's own story.¹⁴⁴ Attorneys and other advocates can also play a role in helping incarcerated people to tell their own stories sincerely and compellingly.

Effective storytelling can also play an important role in the

140 *See generally id.*

141 Collins, *supra* note 119, at 413–14; *see generally* AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* (2020).

142 *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, *YALE L. J.*, 2497, 2516–17 (2023).

143 *See generally* LEVINE & KETTUNEN, *supra* note 31; Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses From Criminal Justice Reforms*, PRISON POL'Y INITIATIVE (April 2020), <https://www.prisonpolicy.org/reports/violence.html>.

144 *See Infra* Section II.C.

broader movement for decarceration, whether with abolitionist or reformist ends in mind, as discussed in Section II.C. In the realm of violent criminal legal system policy, stories will continue to trump data and so the deployment of stories can be an effective strategy for policy change. In addition to the ends that stories can help achieve, the raising up of stories can also impact the process of policymaking. The reification of quantitative data and professional expertise fundamentally devalues other forms of knowing and other knowledge producers. Thus, revalorizing the voices and stories of those most affected by criminal legal system policies should be a significant component of reimagining the system as a whole, as proposed by the growing literature on criminal legal system democratization and epistemic injustice. It is to the epistemic injustice literature that this Article turns next.

A. *Epistemic Injustice*

As alluded to above, scholars increasingly have underscored the problematic nature of basing criminal legal system policy on data with the appearance of neutrality.¹⁴⁵ Collins posits that the evidence-based paradigm is not ideology-free.¹⁴⁶ Rather, it “seeks the most public safety at the lowest financial cost” but “narrowly defines the cost of a reform in fiscal terms while holding fast to a reductive notion of public safety that excludes the safety of those most directly impacted by the system itself.”¹⁴⁷

Scholars writing in this area draw on the concept of “epistemic injustice” pioneered by Miranda Fricker in her 2007 book, *Epistemic Injustice: Power and the Ethics of Knowing*.¹⁴⁸ As Fricker writes, epistemic injustice involves “subordination of social groups [which] leads to excluding those groups from producing and sharing knowledge.”¹⁴⁹ Fricker defines “testimonial injustice” as “prejudice in the economy of credibility.”¹⁵⁰ Drawing on Fricker’s conceptual framework, Collins argues that the evidence-based methodology “creates a hierarchy of

145 See, e.g., Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007 (2022) (deploying Black Feminist Epistemology); Ngozi Okidegbe, *When They Hear Us: Race, Algorithms and The Practice of Criminal Law*, KAN. J. L. & PUB. POL’Y 329 (2020); Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739 (2022).

146 Collins, *supra* note 119, at 409.

147 *Id.*

148 MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007).

149 Collins, *supra* note 119, at 438.

150 *Id.* at 438–39.

knowledge that values narrowly defined, quantitative-focused empirical expertise over other forms of expertise, such as that emanating from lived experience and qualitative, community-focused methodologies.”¹⁵¹ The insights of those with the most intimate knowledge of subordination by and through the criminal legal system are thereby rejected unless they can be “proven” through ostensibly objective scientific methods.¹⁵² In this mode of analysis, as illuminated by Critical Race Theory, “privileging numbers necessarily refutes the power of narrative.”¹⁵³ In other words, in the evidence-based framework, stories do not matter.

Eve Hanan brings epistemic injustice theory to bear in the context of individual sentencing decisions and broader sentencing reform discussions.¹⁵⁴ She highlights how incarcerated people are marginalized when their experiences and knowledge are considered irrelevant or unreliable, “contributing to the dearth of knowledge about prison-as-experienced applied in sentencing decisions.”¹⁵⁵ At the same time, the wall between prison and the free world is so impermeable that apart from corrections officials, few of the people making criminal legal system policy or making decisions about the fate of particular incarcerated people know what it is actually like in prison.¹⁵⁶

In response to these forms of epistemic injustice, both Hanan and Collins advocate for amplifying the voices of those impacted by the criminal legal system. Hanan argues that “incarcerated people must be active participants in shaping public, collective understanding of prison’s cruelties,” and suggests that those cruelties must be taken into account in sentencing decisions.¹⁵⁷ Likewise, Collins writes, “The suggestion here, particularly for those already empowered to influence the reform agenda, is quite simple: listen more – particularly to the

151 *Id.* at 410, 438.

152 *Id.* at 410.

153 *Id.* at 438 (quoting Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE. REV. 1485, 1488 (2004)); see also Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WISC. L. REV. 443 (2016).

154 See generally M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185 (2020).

155 *Id.* at 1191.

156 See, e.g., Scott Horsley, *Obama Visits Federal Prison, a First for a Sitting President*, NPR (July 16, 2015), <https://www.npr.org/sections/itsallpolitics/2015/07/16/423612441/obama-visits-federal-prison-a-first-for-a-sitting-president> (describing President Obama’s tour of a federal prison in Oklahoma City while promoting his criminal justice reform agenda). During that unique visit, Obama went out of his way to note “[t]here are people who need to be in prison” and that “I don’t have tolerance for violent criminals.” *Id.*

157 Hanan, *Invisible Prisons*, *supra* note 154, at 1192.

people who have been historically targeted by the criminal legal system and suffer its effects – and assume less.”¹⁵⁸ These calls to incorporate and elevate the voices of those most affected by systems of oppression are echoed in the literature on criminal legal system democratization,¹⁵⁹ as well as the literature on epistemic injustice in other contexts.¹⁶⁰ This Article joins those voices, urging revalorization of the perspectives and stories of those most affected by the carceral apparatus. Those stories are important in individual advocacy settings and policy debates, which are each addressed in turn in the remainder of this Article.

B. *Storytelling for Individual Liberation*

Storytelling plays an important role in many different advocacy contexts, and has been explored extensively in the lawyering literature. While most people are represented by attorneys at the trial and direct appeal stages of a criminal case due to the constitutional right to counsel recognized by *Gideon v. Wainwright* and its progeny, very few are represented during back-end processes like parole, commutation, and compassionate release.¹⁶¹ Most individuals are therefore left to prepare and tell their own stories in the quest for release. The effective telling of one’s story can be the difference between being released or not. Assisting incarcerated people to tell their own stories can be a

158 Collins, *supra* note 119, at 454; *see also* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1488 (2005) (“defendants are experts in the system, with unique experiences that could cast light on the central efficiencies and inefficiencies of the criminal process, as well as its various claims to fairness.”).

159 *See, e.g.*, Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021); *see also* Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777 (2022); Amna Akbar et al., *Movement Law*, 73 STAN. L. REV. 821 (2021).

160 *See, e.g.*, S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097 (2022); Yvette Butler, *Silencing the Sex Worker*, 71 UCLA L. REV. (forthcoming 2024).

161 *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (recognizing a constitutional right to counsel at trial); *Douglas v. California*, 372 U.S. 353, 358 (1963) (recognizing a constitutional right to counsel on direct appeal); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding no right to counsel for those charged with misdemeanors unless they face jail sentence); *Ross v. Moffitt*, 417 U.S. 600, 614–19 (1974) (holding no constitutional right to counsel on direct appeal after the first appeal as of right); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (noting that there is no constitutional right to counsel to raise collateral attacks on a conviction). Importantly, even where there is a constitutionally guaranteed right to counsel, the performance of counsel may be and frequently is deficient. *See generally* Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N. U. L. REV. 597 (2011).

meaningful contribution to effecting decarceration through individual liberation.

1. Constraints on Storytelling

Although storytelling is a valuable tool, it is important to recognize the constraints that exist in the scope and impact of storytelling in individual advocacy settings. The most fundamental limitation is the anecdotal and unverifiable nature of storytelling, which leaves open the door to exactly the sorts of biased and inequitable decision-making that determinate sentencing and evidence-based practices have aimed to end. But to the extent that parole and commutation decisions are inherently discretionary, effective storytelling simply endeavors to help the decision-maker see the person before them as an individual who could be safely released.

There are, however, four other limitations that underscore the difficulties inherent in current systems of release. First, many discretionary release mechanisms are entirely paper-based, or have paper-based processes to screen out the majority of applicants, providing constrained opportunities for individuals to tell their own stories effectively.¹⁶² Second, the Pre-Sentence Investigation/Report (PSI/

162 See, e.g., ARIZ. BD. OF EXEC. CLEMENCY, COMMUTATION OF SENTENCE APPLICATION (2023), https://boec.az.gov/sites/default/files/2023-01/Commutation%20Application%20Rev%2001_23_2023.pdf (paper application that initiates process); *Frequently Asked Questions*, ARIZ. BD. OF EXEC. CLEMENCY, <https://boec.az.gov/helpful-information/faq> (last visited Dec. 28, 2023) (describing two-hearing process, including an initial in-absentia hearing at which “[m]embers of the public, victims, inmate’s family and supporters” may attend but not speak and inmate does not appear); STATE OF ALASKA BD. OF PAROLE, EXECUTIVE CLEMENCY PACKET (2018), <https://doc.alaska.gov/Parole/documents/Final%20Clemency%20Application.pdf> (including description of entirely paper-based clemency process); 158 ARK. CODE R. § 001 (LEXISNEXIS 2023) (describing process for requesting an executive clemency application form, after which the Board votes to deny clemency or to schedule a hearing at which inmate may appear with supporters); CAL. PENAL CODE § 4812 (2022) (describing process for evaluating applications for reprieves, pardons, and commutations of sentence, which may include “tak[ing] testimony and [] examin[ing] witnesses under oath”); *Clemency*, COLO. DEP’T OF CORR., <https://cdoc.colorado.gov/resources/clemency> (last visited Dec. 28, 2023) (describing entirely paper-based clemency process); *Application for Pardons and Commutations*, Ky.Gov, <https://governor.ky.gov/services/application-for-pardons-and-commutations> (noting that “[a]pplicants whose request is granted will be notified; applicants whose request is not granted will not be notified unless their application is granted at a later time,” and not providing for any hearing process).

PSR) is the dominant narrative and plays too important a role in the release process, considering that it often contains inaccuracies and was written years or decades earlier.¹⁶³ Third, most parole or commutation hearings are highly structured with limited opportunities for the petitioner to speak off-script, despite the guise of being a free-ranging conversation.¹⁶⁴ Finally, expressions of remorse are given primacy in the release assessment, but decision-makers may ascribe insincerity to these required displays of emotion, and any quibbling with the PSR version of events can be interpreted as a failure to take responsibility.¹⁶⁵ Each of these constraints is addressed below.

a. Paper-Based Processes

In most jurisdictions that maintain systems of discretionary parole, parole procedures involve a hearing or interview where the person must speak on their own behalf.¹⁶⁶ There is more variation in

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- 163 See generally Gregory W. Carman & Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 ST. JOHN'S L. REV. 1 (Winter 2004); Rory Monaghan & Kaitlyn Konefal, *Presentence Investigation Reports and Racial/Ethnic Disparities in Sentencing*, 69 CRIME & DELINQUENCY 2460, 2460–83 (2023) (reporting results of study in Pennsylvania suggesting completion of PSI was associated with more severe sentencing outcomes and noting limited opportunities to access or challenge PSI inaccuracies post-sentencing despite continuing significance of the document in decisions regarding the individual's life and liberty).
- 164 M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 320 (2018); Danielle Lavin-Loucks & Kristine M. Levan, *Identity, Discourse, and Rehabilitation in Parole Hearings in the United States*, J. PRISON EDUC. & REENTRY, June 2018, at 18, 21; GOODMARK, IMPERFECT VICTIMS, *supra* note 15, at 148 (noting that most parole boards have lists of factors to consider, with nature and severity of crime being the most important according to a national survey), 152–53 (a parole hearing “is a performative space in which inmates are expected to conform to a meticulously choreographed set of expectations”) (quoting HADAR AVIRAM, *YESTERDAY'S MONSTERS: THE MANSON FAMILY CASES AND THE ILLUSION OF PAROLE* (2020)).
- 165 GOODMARK, IMPERFECT VICTIMS, *supra* note 15, at 318; Medwed, *supra* note 67, at 513–16.
- 166 See, e.g., WYO. BD. OF PAROLE, POLICY AND PROCEDURE MANUAL 38 (2018), <https://boardofparole.wyo.gov/board-staff-information/policy-procedure>; W. VA. CODE § 62-12-13(m) (2023) (“Before releasing any inmate on parole, the Parole Board shall arrange for the inmate to appear in person before a Parole Board panel and the panel may examine and interrogate him or her on any matters pertaining to his or her parole[.]”); VT.. STAT. ANN. tit. 28, § 502 (“The Board shall interview each inmate eligible for parole consideration under section 501 of this title before ordering the inmate released on parole. The Board shall consider all pertinent information regarding an inmate in order to determine the inmate's eligibility for parole. The Board may grant parole only after an inmate is interviewed in

commutation and compassionate release processes. Some states have commutation or compassionate release processes that begin with a paper application or a request by the department of corrections itself and lead to an in-person hearing.¹⁶⁷ In others, the process is entirely paper-based.¹⁶⁸ Federal compassionate release is made by motion and is most frequently decided without a hearing.¹⁶⁹ Whether the paper

accordance with this section.”); UTAH CODE ANN. § 77-27-7 (2023) (“(2) Before reaching a final decision to release any offender under this chapter, the chair shall cause the offender to appear before the board, its panel, or any appointed hearing officer, who shall personally interview the offender to consider the offender’s fitness for release and verify as far as possible information furnished from other sources. Any offender may waive a personal appearance before the board.”); 61 PA. CONST. STAT. ANN. § 6139(6) (2023) (“In no case shall parole be granted unless a board member, hearing examiner or other person so designated by the board shall have seen and heard the offender in person in regard thereto within six months prior to the granting or dismissal thereof.”); OR. ADMIN. R. 255-030-0023(1)(2023) (“The inmate shall be present in person, by telephone or videoconference, or by any other electronic medium that ensures the inmate, the Board, and other participants the opportunity to hear and be heard.”); N.D. CORR. & REHAB., POL’Y & PROCS. § 5(e)(8) (2021), https://www.docr.nd.gov/sites/www/files/documents/parole_pardon/Parole/Parole%20Board%20Policy%20-%202021.pdf (“During the Parole Board meeting, the Parole Board may interview adults in custody or conduct a review of the appropriate documents without interviewing the adults in custody.”).

167 See, e.g., N.M. CORR. DEP’T, PAROLE OF GERIATRIC PERMANENTLY INCAPACITATED OR TERMINALLY ILL INMATES (2022), <https://www.cd.nm.gov/wp-content/uploads/2024/02/CD-050400.pdf> (describing process for seeking early parole due to permanent incapacitation or terminal illness); N.H. REV. STAT. ANN. § 651-A:10-I(II); N.H. CODE ADMIN. R. PAR. 303.03 (describing medical parole hearings in New Hampshire); MICH. COMP. LAWS § 791.244(1-2) (2017) (describing public hearing process after Parole Board interview and vote to proceed on application for sentence commutation).

168 See, e.g., MO. PAROLE BD., PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES § 29(B) (“The Board will then review the case without a personal hearing, make a decision, and forward the decision in writing to the offender.”), https://doc.mo.gov/sites/doc/files/media/pdf/pdf/2019/08/20190725_Blue_Book_V2_0.pdf; MISS. CODE ANN. § 47-7-31 (2019) (“Upon request of the governor the department of corrections shall investigate and report to him with respect to any case of pardon, commutation of sentence, reprieve, furlough or remission of fine or forfeiture” with no hearing provision); MINN. DEP’T OF CORR., 203.200(G) CONDITIONAL MEDICAL RELEASE (2022), <https://policy.doc.mn.gov/DocPolicy/PolicyDoc.aspx?name=203.200.pdf> (providing that Commissioner approves or denies Conditional Medical Release based on paper packet).

169 Email from Elizabeth A. Blackwood, Counsel & Director, First Step Act Resource Center, Nat’l Ass’n of Crim. Defense Lawyers (“NACDL”) to Mira Edmonds, Clinical Assistant Professor of L., Univ. of Mich. School of L. (Aug. 1, 2023) (on file with author); see also *United States v. Taylor*, No. 21-6707, 2022 WL 17581955,

application is all that is considered or whether it is used as an initial screening step, a paper-based process constrains the ability to tell one's own story.¹⁷⁰

Many incarcerated people are highly skilled writers who can tell their story in writing just as effectively, if not more effectively, than an advocate could. However, a significant percentage of incarcerated people have more limited formal schooling.¹⁷¹ Where the process is entirely paper-based, or where a paper-based process is used to screen out most applicants, some incarcerated people may struggle to tell their story in a way that persuades, or even stands out for consideration.

In this context, professional storytelling by attorneys can make a significant difference. Often just having the name of an attorney or law school clinic can bring a person's application to the fore. In a sea of paper, the imprimatur of an attorney can perform the function of an initial screening mechanism. This is an unfortunate reality, as it inserts the value of an attorney unnecessarily when there are not enough attorneys available to do this work, and because it devalues the words and experience of the incarcerated themselves.

b. The Primacy of the PSI Story

The storytelling in the presentence report, commonly known as the PSI or PSR, carries the most weight in back-end processes such as

at *1 (4th Cir. Dec. 12, 2022) (citing *Richardson v. Kornegay*, 3 F.4th 687, 695 (4th Cir. 2021) (stating standard of review for denial of evidentiary hearing in federal habeas corpus proceeding)) (holding the district court did not abuse its discretion in denying the defendant's motion for an evidentiary hearing in resolving a motion for compassionate release).

170 Advocates have found creative ways to address this limitation. The Criminal Justice Clinic at American University Washington College of Law embedded a video from their client's family in the compassionate release motion they filed under Washington, D.C.'s then newly enacted Compassionate Release Act. The motion was granted without hearing. Email from Jenny Roberts, Professor of L., American University Washington College of Law, to Mira Edmonds, Clinical Assistant Professor of L., Univ. of Mich. School of L. (June 28, 2023) (on file with author).

171 See U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATS., HIGHLIGHTS FROM THE U.S. PIAAC SURVEY OF INCARCERATED ADULTS: THEIR SKILLS, WORK EXPERIENCE, EDUCATION, AND TRAINING, PROGRAM FOR THE INTERNATIONAL ASSESSMENT OF ADULT COMPETENCIES: 2014 Tbl. 1.1., (2016), <https://nces.ed.gov/pubs2016/2016040.pdf> (reporting 30% of the U.S. prison population did not complete high school, as compared to 14% of the general population); see also tbl. 1.2 (reporting 29% of U.S. prison population surveyed tested at below Level 2 literacy, compared to 19% in the general population).

parole, commutation, and compassionate release. This report is prepared by the probation department and is submitted to the judge prior to sentencing.¹⁷² When done well, the person preparing the report will talk to the person who has been convicted, their family, and the victim or victim's family; gather school and health records, as well as records from any prior cases; and provide a comprehensive account of the person, the offense, and its impact.¹⁷³ In reality, these reports are frequently incomplete and contain inaccuracies.¹⁷⁴ Most significantly, the account of the offense is generally drawn from police reports, and therefore often includes a version of events that the person hotly contests, and that may even be inconsistent with the evidence as adduced at trial.¹⁷⁵ Furthermore, the PSI is written at the time of sentencing, so it presents a picture of the person that is static and generally at the lowest moment of their lives. Yet the story in the PSI follows the person through their incarceration and into parole, commutation, or resentencing, often decades later.¹⁷⁶

This presents a dilemma for the client who feels particularly strongly about presenting a version of events that contradicts the story told in the PSI. A common approach is to skate over any areas of potential discrepancy, or else to find a nuanced way to square the two accounts whenever possible. The dilemma presented by the dominance of the PSI story demonstrates why storytelling in individual cases is only a partial solution when biases remain in the system. Even at this last stage of the criminal legal process, a person's liberty is at stake and so the storytelling remains circumscribed, careful, incomplete, and with

172 Carman & Harutunian, *supra* note 163, at 2–3 (2004); Timothy Bakken, *The Continued Failure of Modern Law to Create Fairness and Efficiency: The Presentence Investigation Report and Its Effect on Justice*, 40 N.Y. L. SCH. L. REV. 363, 364–66 (1996).

173 Carman & Harutunian, *supra* note 163.

174 There has been surprisingly little written about the PSI/PSR considering the central role it plays in sentencing and back-end processes. My assertions here are based primarily on my experiences as a practicing attorney, as well as conversations with other attorneys and with clients and other incarcerated people.

175 Kimberly Thomas, *Sentencing: Where Case Theory and Client Meet*, 15 CLINICAL L. REV. 187, 199 (2008) (articulating that “the stories that defendants tell about themselves at sentencing are not always the stories of contrition, or even mitigation, that judges want to hear,” and may include contestation of certain elements of the offense, or facts in police or probation reports, as well as claims of complete innocence).

176 It is precisely in recognition of this fact that prior to the resentencing of people serving juvenile life without possibility of parole (“JWLOP”) sentences an amended PSI may be written.

ellipses.

c. Structured Hearings

Most parole or commutation hearings are framed as informal conversations but are in fact structured interviews.¹⁷⁷ The hearing officer may describe the hearing as an opportunity for the incarcerated person to talk about themselves, but in actuality there are certain unspoken requirements that must be satisfied in order to obtain release. Most important is that the person talk about the offense in a way that mirrors the official version of events, demonstrates remorse and acceptance of responsibility, and demonstrates insight into their actions and behaviors.¹⁷⁸ They must also be able to talk in a similar manner about any misconducts that may have occurred while incarcerated.

People seeking parole are generally given an opportunity to talk about anything positive they have done while incarcerated.¹⁷⁹ The scaling back of prison programming over the past several decades means there is often little depth or variety for the person to discuss in this regard.¹⁸⁰ This is particularly the case for individuals serving life sentences who are frequently unable to access programming available to others toward the end of their sentences.¹⁸¹ And finally, they must be able to talk about their release plans—where they will live, with whom they will live, and what they plan to do with their time, including work, study, or substance abuse treatment.¹⁸²

The structured nature of this conversation leaves little room for an individual to stand out or tell the story they may wish to tell about themselves. The task, then, is to provide as much positive individuation as possible within these constraints. Nonetheless, to the extent that the

177 Hanan, *Remorse Bias*, *supra* note 164, at 320.

178 *Id.* at 304, 320–26; Victor L. Shammass, *The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight*, 42 POL. & LEGAL ANTHROPOLOGY REV. 1, 10–12 (2019).

179 My description of these proceedings draws primarily on my experience representing incarcerated people at parole hearings in Washington, DC, and attending and participating in parole and commutation hearings in Michigan.

180 Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 309–10 (2017) (noting shortages in available programming, with variability across prisons, and particular limitations in prisons with higher security levels).

181 *See, e.g.*, ASHLEY NELLIS & BREANNA BISHOP, THE SENT’G PROJ., A NEW LEASE ON LIFE 13, 21 (2021), <https://www.sentencingproject.org/reports/a-new-lease-on-life/> (describing restrictions on programming offered to people serving life sentences).

182 *See, e.g.*, FRANK RODRIGUEZ, CRIM. DEF. RES. CTR. OF THE MICH. STATE APP. DEF. OFF., DEFENDER GUIDE TO MICHIGAN’S COMMUTATION PROCESS 14–16 (2015).

original offense remains of primary importance in decision-making, the most skillful storytelling about the incarcerated person's life before the offense, at the time of the offense, and after the offense may not matter.¹⁸³

d. The Trouble with Remorse and Insight Stories

Invariably a significant portion of a parole or commutation hearing is dedicated to discussion of the offense, along with appropriate expressions of remorse and acceptance of responsibility for one's actions.¹⁸⁴ Incarcerated people must be adept at telling that story in ways that do not minimize their role or the wrongfulness of their actions. The focus on the offense and assessment of how the offender talks about the offense is justified as having some bearing on the likelihood of recidivism.¹⁸⁵

There are deep-rooted assumptions that a credible expression of remorse indicates the aberrational nature of the offense, while a lack of expressed remorse suggests the offense is indicative of bad character.¹⁸⁶ Yet there is little evidence that remorse correlates with recidivism, and little evidence that sincerity can be reliably detected.¹⁸⁷ Furthermore, it

183 See, e.g., Jon Miller & Zach Russo, *The Dehumanizing Theatre of the Parole Process: The Interview*, THE NEW YORKER (Nov. 17, 2021), <https://www.newyorker.com/video/watch/the-dehumanizing-theater-of-the-parole-process>.

184 Hanan, *Remorse Bias*, *supra* note 164, at 316; Medwed, *supra* note 67, at 516.

185 Medwed, *supra* note 67, at 493–95; Lilliana Paratore, Note, “*Insight*” Into Life Crimes: *The Rhetoric of Remorse and Rehabilitation in California Parole Precedent and Practice*, 21 BERKELEY J. CRIM. L., 2016, no. 1, at 95, 111–12.

186 Hanan, *Remorse Bias*, *supra* note 164, at 313; Cf. June P. Tagney et al., *Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism*, 25 PSYCH. SCI. 799, 801–02 (2014) (finding feelings of guilt negatively correlated with recidivism, while feelings of shame can generate both defensive and prosocial attitudes); Richard Weisman, *Detecting Remorse and Its Absence in the Criminal Justice System*, in 19 STUD. L. POL. & SOC'Y 121, 121–22, 126 (Austin Sarat & Patricia Ewick eds., 1999).

187 Hanan, *Remorse Bias*, *supra* note 164, at 317 (describing general overconfidence in the ability to read the mental states of others, with little correlation between confidence of assessment and accuracy of assessment); see also Medwed, *supra* note 67, at 536; Paratore, *supra* note 185, at 125; Shammas, *supra* note 178, at 10–12; Colleen M. Bertysessa, *Modeling “Remorse Bias” in Probation Narratives: Examining Social Cognition and Judgments of Implicit Violence During Sentencing*, 78 J. SOC. ISSUES 452, 452, 462 (2022); RALPH C. SERIN ET AL., U.S. DEP'T OF JUST., NAT'L INST. OF CORR., RISK ASSESSMENT IN PAROLE DECISION-MAKING 14–15, <https://s3.amazonaws.com/nicic.jdrive.localdocs/033624.pdf> (aggregating studies showing little to no correlation with post-release behavior and factors such as parole interviewee's demeanor, testimony, or remorse, and input by victims, family, institutional staff, court reports, and police information).

can often feel like a no-win situation for people who find in parole and commutation hearings that “expressions of remorse are both expected and likely to be discounted as self-serving.”¹⁸⁸ Even where remorse is entirely sincere, the person being interviewed may struggle to convey that sincerity because a parole hearing, while informal in some respects, is “actually a high-stakes interview for freedom in which the defendant is still under incredible pressure to perform.”¹⁸⁹

The difficulty in detecting sincerity can be exacerbated by cultural difference between the incarcerated individual and the decision-maker.¹⁹⁰ And even apart from cultural differences, “[b]ecause people experience mixed emotions and express them in divergent ways, we cannot accurately identify the internal state of other people based on observing their nonverbal behavior, particularly people we do not know well.”¹⁹¹ In fact, research suggests that genuine remorse may be impossible for any of us to ascertain.¹⁹²

Contesting the facts of the case, or failing to provide adequate details about the underlying offense, is frequently seen as failing to take responsibility for the offense.¹⁹³ “Any time a defendant deviates from the expected content of a remorse display, he creates ambiguity about the sincerity of his remorse.”¹⁹⁴ This opens the door to implicit bias that impacts both sentencing decisions and release decisions in a racially biased fashion.¹⁹⁵ In many respects, back-end processes like parole and commutation can feel like a re-litigation of the initial sentencing decision, with consideration of the same factors, rather than a fresh assessment of who the person has become.

Finally, although rarely conceded, the focus on the underlying

188 Hanan, *Remorse Bias*, *supra* note 164, at 318; *see also* Kathryn M. Young & Hannah Chimowitz, *How Parole Boards Judge Remorse: Relational Legal Consciousness and the Reproduction of Carceral Logic*, 56 L. & SOC’Y REV. 237, 254 (2022).

189 Hanan, *Remorse Bias*, *supra* note 164, at 320.

190 *Id.* at 321; Young & Chimowitz, *supra* note 188, at 255.

191 Hanan, *Remorse Bias*, *supra* note 164, at 321.

192 Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 140–41 (2015) (citing several studies suggesting general inability to ascertain remorse); *see also* Susan A. Bandes, *Remorse and Demeanour in the Courtroom: Cognitive Science and the Evaluation of Contrition*, in THE INTEGRITY OF THE CRIM. PROCESS 309, 326 (2016).

193 Hanan, *Remorse Bias*, *supra* note 164, at 326 (citing empirical study by Catherine Gruber). *But see* ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER’S STORY (2009) (telling the story of Smith’s client Patsy Kelly Jarrett, who was granted parole after more than 28 years in prison despite maintaining her innocence).

194 Hanan, *Remorse Bias*, *supra* note 164, at 326.

195 *Id.*

offense in these hearings can seem like another form of punishment, an effort to force the person to again confront the awfulness of what they have done. This retributivist impulse is generally misplaced in a parole hearing, as the primary inquiry in the parole context is the public safety risk that release might pose. To the extent that commutation is considered an act of mercy, a moralizing dialogue of this nature could be appropriate, depending on the nature of the commutation process in a given jurisdiction.

Many people also have internal barriers to effective self-presentation. Some individuals who are guilty remain in denial about their guilt, as they are deeply enmeshed in a process in which maintaining one's innocence is crucial to any prospect for freedom.¹⁹⁶ Professor Rachel Lopez and her formerly incarcerated co-authors Terrell Carter and Kempis Songster have written about the damage that is caused by a system set up for people to deny guilt.¹⁹⁷ As they describe, after all appeals and collateral attacks are finished, many individuals have spent years denying their guilt.¹⁹⁸ Furthermore, these individuals have been given little opportunity and few tools for coming to terms with what they have done.¹⁹⁹ This can cause suffering by the victim and their family, as well as by the incarcerated person and their family insofar as the incarcerated individual's failure to acknowledge their wrongdoing diminishes the likelihood that they will be released.²⁰⁰

For individuals who have spent years or decades minimizing their guilt in their own minds, and who have been given little or no opportunity to come to terms with what they have done, figuring out how to tell their own story is challenging. It may take years for people who have committed serious acts of violence to come to terms with their actions and to be able to speak about them openly, striking the tone that the parole board wants to hear—with insight, remorse, and the appropriate degree of emotion, neither emotionless nor overly emotional, which could seem to evoke self-pity. Unprocessed trauma may pose a further impediment to people's ability to tell their stories in a way and with the affect that is expected.²⁰¹ Lawyers may or may not

196 *Id.*

197 Carter et al., *supra* note 43, at 328–29.

198 *Id.*

199 *Id.* at 333–34.

200 *Id.*

201 See GOODMARK, IMPERFECT VICTIMS, *supra* note 15, at 148 (noting that it can be difficult to provide the required detailed accounts of the offense at a parole hearing because traumatic memories may have been blocked); see also Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.C.L. L. REV. 257

be the best equipped to help their clients reach this self-realization. Lawyers are storytellers by trade, so most skilled lawyers will know how to craft an effective story. But even the best lawyer, without therapeutic training, may struggle to help a client in denial about their role in the offense to achieve the insight necessary to self-present effectively.²⁰²

2. The Silencing of Criminal Defendants

Despite the various constraints on the scope and form of stories that incarcerated people are able to tell about themselves, having even a limited opportunity to tell their story is significant to many incarcerated people, as most have been silenced throughout the rest of the criminal legal process. The criminal legal system is designed to silence people charged with crimes.²⁰³ The right to remain silent—that initial incantation of the *Miranda* warnings that brought the right into public consciousness in a thousand police procedurals—is fundamental.²⁰⁴ And advocates have good reasons to encourage their clients to remain silent during the pretrial and trial phases of a case.²⁰⁵ Rarely, if ever, has a defense attorney read their client’s statement to the police and rejoiced at the client having seized the opportunity to tell their story. From the moment the attorney enters the case, their advice is nearly always for the client to stay silent and let the lawyer do the talking.²⁰⁶ It is the exception to the rule for a lawyer to want their client to testify during evidentiary hearings or grand jury proceedings in the hopes of an early-stage dismissal.²⁰⁷ It is also uncommon for an attorney to want their

(2013); Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127 (Almerindo E. Ojeda ed., 2008).

202 Faced with a client “in denial,” we also face the uncomfortable situation of not wanting to strong arm a client with a legitimate innocence claim into admitting guilt, while lacking the time or resources to do a thorough investigation into such claims. I have experienced this dilemma in my work preparing commutation applicants for their public hearings. It also bears noting that therapy outside of the correctional context may include among its goals helping the patient to achieve “insight” into their own psycho-emotional development and interpersonal relationships, but rarely is the focus “insight” in the sense of taking responsibility for the harm one has caused.

203 Natapoff, *supra* note 158, at 1452–53.

204 *Id.* at 1450.

205 *Id.* at 1459–60.

206 *Id.* at 1458–59; Kimberly Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 *FORDHAM L. REV.* 2641, 2642–43 (2007).

207 While this varies by jurisdiction, this has been my experience as a criminal defense attorney and the experience of many colleagues I have spoken with.

client to testify during trial.²⁰⁸ A past history of criminal convictions or other prior bad acts frequently renders client testimony a prospect with more risk than reward.²⁰⁹

If a case is instead resolved with a plea, the client must generally speak during the plea colloquy.²¹⁰ This is, however, among the most scripted forms of speech, with the client's contribution primarily in the form of "yes" and "no," with any divergence from the script threatening to derail the plea itself.²¹¹ In addition, there can be an unacknowledged—but widely understood—gap between what is said during a plea colloquy and what is actually true.²¹² The reality is that the "trial tax"—the near universal practice of imposing a harsher sentence on the defendant who rejects a plea and is convicted after trial—often makes pleas the most logical resolution of a case, regardless of the client's actual guilt or innocence. Furthermore, pleas are frequently taken after brief conversations with counsel, and with little or no investigation.²¹³ In the end, the recitation of what the client is pleading guilty to is often a reduced charge that may bear little resemblance to what actually happened.²¹⁴

At sentencing, the client has an opportunity to speak with the least ostensible risk. At this stage of proceedings, the client's guilt has already been determined, whether by verdict or by plea, and so the fear of ill-considered words from the client impacting the outcome of the case is lessened. Allocution can thus be an opportunity for an individual to speak for themselves and draw the court's attention to their humanity.²¹⁵ While mitigation is the traditional purpose of allocution, mitigation stories may not be consistent with the defendant's experiences and can contribute to their further alienation from the process.²¹⁶ Counsel's job is to paint a picture of their client beyond the charged offense, in the hope of getting a more lenient sentence. This often means, however,

208 Thomas, *Beyond Mitigation*, *supra* note 206.

209 Natapoff, *supra* note 158, at 1461.

210 *Id.* at 1463–64. Some jurisdictions allow or require written plea colloquies.

211 *Id.*; see also M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 514 (2021) (describing the scripted nature of plea colloquies in which any diversion from the script can cause the plea to fail).

212 Thea Johnson, *Fictional Pleas*, 94 IND. L. J. 855, 857 (2019).

213 Natapoff, *supra* note 158, at 1462–63. See Hanan, *Talking Back in Court*, *supra* note 211, at 513 (discussing minimal discussion appointed counsel may have with clients prior to plea).

214 Johnson, *supra* note 212, at 857.

215 Thomas, *Beyond Mitigation*, *supra* note 206, at 2644–45.

216 *Id.*

“painting the defendant in a victimized rather than [an] empowered light.”²¹⁷ Kimberly Thomas has developed what she calls a “humanization theory of allocution,” which she argues “allows for a broader range of defendant speech – potentially combating the loss of offender’s voice in the criminal justice system,” which “could benefit the criminal justice system and the public by improving the legitimacy and accuracy of the sentencing process.”²¹⁸

If the defendant does choose to speak at sentencing, the path forward is narrow. Hanan describes the dilemma clearly: “The defendant who does not explain the circumstances of his crime offers the court no mitigation evidence to support a reduced sentence, but the defendant who explains his circumstances earns the ire of the court for making excuses for his bad behavior.”²¹⁹ Indeed, if a defendant presents traditional mitigating evidence themselves, there is a risk that such testimony would be harmful to the case.²²⁰ It is generally more effective to have such information introduced by counsel, or, depending on the circumstances, by family members.²²¹

Furthermore, strategic considerations about client speech extend into the post-sentencing phase of a case, which is often a lengthy process of appeals and collateral attacks.²²² As a result, counsel may be concerned about their client’s unfiltered speech at sentencing, as a verbal misstep by the client could affect not only sentencing but also appeals, collateral attacks, or back-end release processes.²²³ The client’s words are memorialized in the sentencing transcript, which can resurface at parole or commutation hearings years or decades later.²²⁴

Despite the many reasons counsel might advise a client to speak as little as possible, there are costs to silencing the people most directly affected by the criminal legal system. Wrongful convictions can result from defendant silence.²²⁵ In far more cases, the defendant may

217 Natapoff, *supra* note 158, at 1465.

218 Thomas, *Beyond Mitigation*, *supra* note 206, at 2645.

219 Hanan, *Remorse Bias*, *supra* note 164, at 326 (citing *United States v. Beserra*, 967 F.2d 254, 255–56 (7th Cir. 1992)).

220 *Id.* at 325 (“At a sentencing hearing . . . there is a risk that the judge will view the defendant’s effort to describe his ‘rotten social background’ as a failure to take responsibility for his actions, a Gee Officer Krupke! effort to avoid punishment.”).

221 *Id.*

222 See Carter et al., *supra* note 43, at 328–29.

223 See Natapoff, *supra* note 158, at 1466; Thomas, *Beyond Mitigation*, *supra* note 206, at 2674.

224 Thomas, *Beyond Mitigation*, *supra* note 206, at 2674.

225 Natapoff, *supra* note 158, 1488.

be left feeling that they have not been heard, and as a result, may feel disempowered and disengaged from the very process that will forever alter their lives.²²⁶ In a system in which most criminal defendants are already “other” to most judges due to differences of race, class, and life circumstance, a defendant’s silence can further dehumanize them before the court. This silencing continues throughout a person’s incarceration and even after release, because of felony disenfranchisement laws and other formal or informal collateral consequences of conviction.²²⁷

3. From Incorporating Client Voice to Telling One’s Own Story

Scholars focused on client-centered lawyering have written about how lawyers can more effectively incorporate their client’s voice into their advocacy.²²⁸ But if there are good reasons to incorporate client voice in carefully circumscribed and edited fashion at the pretrial and trial stages of proceedings, back-end processes like parole, commutation, and compassionate release present an opportunity for individuals to tell their own stories after having their stories told by others for so many years. This storytelling moment can provide healing for both incarcerated individuals and victims.

Being able to tell one’s own story, however, is not easy to do—particularly when that story may involve trauma as well as deep guilt and shame. After decades in prison, where the safest approach is not to discuss one’s offenses, many clients can benefit from the assistance of others to tell their story in an appropriate manner.²²⁹ Lawyers are often

226 Thomas, *Beyond Mitigation*, *supra* note 206, at 2643.

227 Natapoff, *supra* note 158, at 1489 (citing Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. POVERTY L. & POL’Y 249, 252 (2004)).

228 See, e.g., Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Binny Miller, *George Floyd and Empathy Stories*, 28 CLINICAL L. REV. 281 (2021); Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 401–02 (1997).

229 GOODMARK, IMPERFECT VICTIMS, *supra* note 15, at 153 (“To perform well, a person seeking parole must be able to verbalize their thoughts and emotions, appear reflective, and do so in a ‘socially legitimate form’ – all things that incarcerated people might otherwise avoid doing in prison out of self-protection.”); Shammas, *supra* note 178, at 14–15 (“In their everyday lives, inmates must adopt a tough stance and build social alliances to avoid violence, abuse, and exploitation. In the parole hearing, however, and for the briefest of intervals during an otherwise lengthy, uninterrupted, decades-long existence behind bars, an inmate must temporarily shed his prison persona – the ‘yard face’ of the carceral habitus – and substitute for it a pose of contemplative reflection and irenic respectability.”) (internal citation omitted).

skilled storytellers and can help clients shape their lives into coherent narratives that make sense to an outside audience.

This process takes time. There is no right to appointed counsel in the context of release proceedings, and in some jurisdictions pro bono or retained counsel is excluded from participating in parole or commutation hearings.²³⁰ As a result, most people petitioning for clemency or seeking parole release will not have anyone to help them prepare. Even if they are able to find representation, time to prepare is often limited and made more challenging by restrictive prison legal visit and legal call protocols. Many incarcerated people would benefit from the assistance of attorneys and non-attorneys to prepare for parole and commutation interviews or hearings. In New York, the Parole Preparation Project recruits and trains volunteers to help incarcerated people to prepare for their parole hearings.²³¹ In Maryland, an organization called PREPARE conducts workshops and distributes written materials to help incarcerated people and their families prepare for parole hearings and for re-entry if they are granted parole.²³² In Michigan, the Michigan Women's Justice & Clemency Project works with incarcerated women to submit clemency petitions and prepare for public hearings.²³³ There are other grassroots efforts engaging in similar work, and room for many more.

A particular challenge for lawyers and their clients is presented when the client maintains their innocence. It is important to acknowledge that there are innocent people in prison, far more than will ever be exonerated, and that there is a real risk of railroading an innocent person into a narrative of taking responsibility for an offense they have not committed.²³⁴ For some incarcerated individuals, there is no dilemma: they will take responsibility for an offense if it will get

230 See GOODMARK, *IMPERFECT VICTIMS*, *supra* note 15, at 152 (noting that there is not a constitutional right to counsel at parole hearings and that at least two states do not allow parole-seekers to be represented by attorneys at all).

231 *About Us*, PAROLE PREPARATION PROJECT, <https://www.paroleprepny.org/about-us> (last visited Dec. 28, 2023).

232 PREPARE, <https://prepare-parole.org/> (last visited Dec. 28, 2023).

233 MICH. WOMEN'S JUST. & CLEMENCY PROJECT, <http://websites.umich.edu/~clemency/index.html> (last visited Dec. 28, 2023).

234 NAT'L REGISTRY OF EXONERATIONS & NEWKIRK CTR. FOR SCI. & SOC'Y, U. OF CAL. IRVINE, *MILESTONE: EXONERATED DEFENDANTS SPENT 20,000 YEARS IN PRISON 4* (2018), <https://www.law.umich.edu/special/exoneration/Documents/NRE.20000.Years.Report.pdf> (calculating a collective 20,080 years in prison served by the 2,265 exonerees in the Registry as of August 2018, and noting the "many thousands of innocent defendants who spend years or decades in prison but are never exonerated"); Medwed, *supra* note 67, at 539–41.

them out of prison. For others, the cost of admitting responsibility for a terrible act that they did not commit is too high a price to pay for freedom.²³⁵ In either case, preparing for a parole or commutation hearing in that situation requires even more careful consideration and conversation. There are also plenty of guilty people who have not come to terms with their guilt.²³⁶ A careful and empathetic advocate can build a relationship of trust that may enable a person to eventually accept responsibility for their actions and learn how to express their remorse sincerely.

There will never be enough attorneys and other advocates to help every incarcerated person prepare their story. As a result, efforts by incarcerated people to help each other process the harm they have suffered and perpetrated, and prepare to tell their stories, are tremendously important. In Michigan, American Friends Service Committee (“AFSC”) advocates worked with a group of incarcerated people at Kinross Correctional Facility to develop a parole readiness curriculum designed to fill this lacuna.²³⁷ Efforts are underway to spread the curriculum to other facilities via incarcerated ambassadors. Carter, Lopez, and Songster describe similar efforts by incarcerated men in Pennsylvania, who formed the Right to Redemption Committee within the organization Lifers Incorporated, to work through these difficult issues together and prepare themselves to advocate for their own release.²³⁸ In another iteration, incarcerated men in California developed a curriculum dedicated to deconstructing toxic masculinity and examining their past attitudes and actions, as documented in CNN film *The Feminist on Cellblock Y*.²³⁹ Because of the communication barriers between incarcerated people and those on the outside, there are undoubtedly other efforts underway that continue to fly under the radar.

What are the stories that people are preparing themselves to tell? There are certain “stock stories” that are expected from incarcerated people, and, while fighting for their freedom, adopting these stories may be beneficial.²⁴⁰ These are stories about themselves as causers of harm,

235 *Id.*

236 *Id.* at 539 (discussing some individuals’ reluctance to admit guilt because it conflicts with their self-conception as “good actors”).

237 Am. Friends Serv. Comm. Iowa, *Parole Readiness Workshops*, YOUTUBE (Nov. 19, 2012), <https://www.youtube.com/watch?v=2pB4AzrZ0qY>.

238 Carter et al., *supra* note 43, at 325–27.

239 *The Feminist on Cellblock Y* (CNN 2017).

240 Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415–18 (1989).

who have since developed insight, taken responsibility for their wrongs, been adequately punished, and no longer pose a danger to society. Increasingly, there is also room for offenders to tell counterstories—stories that detail trauma suffered, stories about poor choices amid constrained opportunities, stories about having outgrown youthful foolishness and developed into mature adults despite, not because of, prison.²⁴¹ These stories are not appropriate for all audiences. With the assistance of an advocate or in community with other incarcerated people, the incarcerated person must decide which stories to tell which audiences.

a. Trauma Stories

Discussion of trauma has grown exponentially in recent years, in popular culture and in the legal context.²⁴² While trauma suffered by victims dominates the discourse, increasingly there is space for the stories of incarcerated individuals' trauma as well.²⁴³ In the quest for contextualization and humanization, this matters. Trauma discourse allows the general public to understand, in the way that family, friends, and advocates close to incarcerated people understand, that there is always context and that there are no monsters here. Some of the stories may be about early trauma, ongoing trauma, trauma immediately preceding the offense, and trauma by and through incarceration.²⁴⁴

At the same time, it is important to minimize the retraumatization that can occur when people talk about their traumatic experiences, particularly in a hostile environment like a parole interview.²⁴⁵ There are three ways in which retraumatization can be minimized. First,

241 *Id.*, at 2435–40.

242 Jessica Bennett, *If Everything Is 'Trauma,' Is Anything?*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/opinion/caleb-love-bombing-gaslighting-trauma.html>.

243 For example, a number of decisions issued by District of Columbia Superior Court judges granting compassionate release considered and gave weight to childhood trauma and adversity experienced by applicants, even where the offenses of conviction involved violence. *See, e.g.*, United States v. Evans, No. 2008 CF3 5414 (D.C. Super. Ct. Jan. 14, 2021) (Josey-Herring, C.J.); United States v. McGill, No. 1995 FEL 3297 (D.C. Super. Ct. Dec. 29, 2020) (Becker, J.); United States v. Paige, No. 2001 FEL 5821 (D.C. Super. Ct. Dec. 15, 2020) (Nooter, J.); United States v. Beckwith, No. 2015 CF1 8354 (D.C. Super. Ct. Oct. 23, 2020) (Becker, J.); United States v. Jackson, No. 2002 FEL 7449 (D.C. Super. Ct. Oct. 9, 2020) (Broderick, J.); United States v. Wilson, No. 1975 FEL 097258 (D.C. Super. Ct. May 13, 2020).

244 Hanan, *Invisible Prisons*, *supra* note 154, 1193–97.

245 I wish to acknowledge Natalie Holbrooke for raising my awareness about this important issue.

the telling of trauma stories should be encouraged only to the extent necessary. What is “necessary” is inherently a subjective assessment, and the decision to tell one’s story should ultimately be made by the person who suffered the trauma. Second, the discussion of traumatic events should be handled with sensitivity, to minimize the retraumatizing effect. An advocate can intervene to avoid retraumatizing an incarcerated individual but must recognize that the difficult decision to intervene or not may lead to unforeseen consequences because of the dramatic power differential in back-end processes like parole hearings. Third, the potential for retraumatization might direct the decision about who will convey the narrative. The story may be best told by the person who experienced the trauma or it may be best told by an advocate who will be less affected by the storytelling process.

It is also important to avoid reinforcing victimization narratives that may leave incarcerated people ill-equipped to tell necessary stories about taking responsibility. This dilemma arises most often in the context of advocacy for women who are serving sentences for violent offenses that arose out of the context of domestic abuse.²⁴⁶ Victimized by their abusers, these women have subsequently been victimized by the criminal legal system.²⁴⁷ Increasing recognition of the role that abuse played in the trajectory of these individuals’ lives and the commission of their offenses is a step forward.

Nonetheless, there are two notes of caution to sound about the new recognition of “criminalized survivors.”²⁴⁸ First, while it can be both healing and helpful for advocacy efforts to recognize when offenders have

246 See generally GOODMARK, *supra* note 15.

247 *Id.* One of the handful of pardons that President Biden has granted was to a woman described as a survivor of domestic violence, and several of the 18 sentence commutations that Michigan Governor Gretchen Whitmer granted in December 2022 were to women recognized as survivors. *Pardons Granted by President Joseph Biden (2021 to Present)*, OFF. OF THE PARDON ATT’Y, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/pardons-granted-president-joseph-biden-2021-present>; Andrea May Sahouri, *Whitmer Grants 22 Clemency Requests, Including 4 Pardons*, DETROIT FREE PRESS (Dec. 28, 2022), <https://www.freep.com/story/news/politics/2022/12/23/whitmer-pardons-sentence-commutations/69753431007/>. There have likewise been a number of high-profile cases involving women who were victims of sex trafficking before killing their traffickers or abusive customers. See, e.g., Bobby Allyn, *Cyntoia Brown Released After 15 Years in Prison For Murder*, NPR (Aug. 7, 2019), <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder>; Jessica Contrera, *The State of Ohio vs. a Sex-Trafficked Teen*, WASH. POST (June 1, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/child-sex-trafficking-alexis-martin-ohio/>.

248 GOODMARK, *supra* note 15, at 10.

also been victims, the system, as currently structured, requires offenders to take responsibility for their actions and talk about the alternatives they had to killing their partners—whether or not those alternatives felt viable in the moment.²⁴⁹ Too much victim talk and too few expressions of taking responsibility can torpedo a chance for release.²⁵⁰ It takes a great deal of nuance to convey both one's victimization and one's acceptance of responsibility for one's actions.²⁵¹ Advocates and allies can play an important role in helping people to walk this line in preparation for parole and commutation hearings. It may also be more strategic to delegate the victimization story to the advocate while the incarcerated person tells the insight story.

Second, focusing on the victimization of domestic violence survivors runs the risk of once again calving off a subsection of the incarcerated population as capable of rehabilitation and deserving of mercy, in contrast to the general population of “violent offenders” who are the “real bad guys.” We see this dynamic at play in the way that so-called nonviolent offenders are distinguished from violent offenders, juveniles are distinguished from adults—or more to the point, seventeen-year-olds are distinguished from eighteen-year-olds—and domestic violence survivors are distinguished from those who may not have experienced intimate partner violence, but may have experienced plenty of other forms of violence and trauma.²⁵² Yes, the nonviolent, the innocent, the victims justified in their actions deserve mercy. So do the factually guilty, the ones who pulled the trigger, the ones who made the plans, the ones who actually killed. They too can be rehabilitated and can experience redemption.²⁵³

249 See GOODMARK, *supra* note 15, at 153 (“Those seeking parole must tell a story of remorse and redemption, and they must tell that story the right way, to explain their past actions without trying to excuse them and assure the parole board that nothing will happen again.”).

250 *Id.*

251 *Id.* (“Presenting information about their previous victimization requires people seeking parole to seek a delicate balance.”).

252 See generally M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151 (2019) (discussing the problems inherent in considering juveniles uniquely capable of rehabilitation and ignoring the science showing adult capacity for change). Erin Collins discusses similar differentiation in her article on the unique space given in status courts, like veterans' courts and girls' courts, to a contextualized consideration of the defendant's offenses, as compared to problem-solving courts, like drug courts and mental health courts, which more frequently emphasize the need for the offender to take responsibility and not to make excuses. Erin Collins, *Status Courts*, 105 GEO. L.J. 1481, 1483–84, 1527 (2017).

253 Carter et al., *supra* note 43, at 330 (“We wanted to remind people that every man,

b. Different Stories for Different Audiences

Different stories are tailored for different audiences.²⁵⁴ The fact that there are different valences to stories does not make any of these stories untrue. A person could have suffered as a victim of domestic violence, intertwined with childhood trauma (or Adverse Childhood Events, or “ACEs”), which may have led to making worse and even lethal decisions at a crucial moment. A person could have been a victim *and* could also be guilty of causing significant harm when other solutions were possible.²⁵⁵ The nuance will be lost in some contexts, and before some audiences, so a more simplistic narrative of acceptance of responsibility for one’s acts may be the most viable story in those situations. Individuals and their allies and advocates must make strategic decisions about when, where, and how to present stories about themselves. While being able to tell one’s own complex life story is the ideal, this may not always be the most strategic choice. In the end, the goal is freedom, and there will be time to tell one’s full story after release. Unlike other compromises within criminal legal system work, this decision to play by the rules as they currently exist does not actively work against abolitionist goals.²⁵⁶

c. Stories in the Present Tense

The stories that do not get nearly enough attention, and that should be the focus of release decisions, are the stories of how incarcerated people have grown since their offense. Many incarcerated

woman, and child has an absolute right to redemption and that no other human being or system could take that away. . . .We decided to call ourselves Right to Redemption – a constant reminder of the pain for which we were responsible, but also a reminder that every one of us belonging to this sometimes-loving, sometimes-hateful, sometimes-estranged human family has an inherent capacity to try to make amends for that pain.”).

254 Thomas, *Sentencing, supra* note 175, at 190–91 (noting that client and counsel may have different goals for different stages of legal proceedings, and thus potentially different but consistent case theories to achieve each goal).

255 A DV survivor’s feeling that she has no other option besides killing her abuser is borne out by research showing that the most dangerous time for a victim is when she attempts to leave her abuser. As a result, the argument that there was always a choice besides violence will likely not resonate with many who have experienced intimate partner abuse themselves.

256 ANGELA Y. DAVIS ET AL., ABOLITION. FEMINISM. NOW. 5 (2022) (describing the “both/and” idea of working to dismantle carceral systems and simultaneously providing support to incarcerated people in parole and other settings); *see also* Akbar, *supra* note 142 (describing a framework of “non-reformist reform” in various sites of contestation); KABA, *supra* note 116, at 2–5.

people struggle to tell this story about themselves effectively.²⁵⁷ In part, many people are simply not used to talking about themselves—no one has ever cared to hear their story before. Additionally, the prison context creates incentives for people not to distinguish themselves, but rather to fit in and keep a low profile.²⁵⁸ To suddenly expect the opposite in the context of a parole or commutation hearing is quite unrealistic.

Most people facing the possibility of parole or commutation know that their records of achievement or program completion matter, although it frequently seems as if such records are significant primarily if they do not exist.²⁵⁹ A stack of such records is rarely acknowledged except in passing, and almost never cited as a primary basis for release.²⁶⁰ The quantity, recency, and severity of disciplinary infractions is also significant. It is nearly impossible to have zero disciplinary infractions after decades in prison, because the disciplinary system and administrative appeal system is punitive, arbitrary, and stacked against the prisoner. These records, or lack thereof, can be used to construct a narrative about the person they have become, and are given some consideration by the decision-makers.²⁶¹

Overall, however, the story of who the incarcerated person has become is undervalued in parole and commutation proceedings,

257 In this Section, I draw on my experience working with incarcerated individuals in Washington, D.C. and Michigan in their quest for release through parole, commutation, and/or compassionate release.

258 This is a sentiment that was frequently expressed during workshops that I participated in with incarcerated women at Women's Huron Valley Correctional Facility in Ypsilanti, Michigan in 2022. *See also Shammass, supra* note 178, at 14–15.

259 This sense is based on my experience watching and participating in parole and commutation hearings in Washington, D.C. and Michigan. *See also Shammass, supra* note 178, at 7–10 (discussing parole board members' emphasis on participation in programming during California parole hearings).

260 Records of achievement are hard to accrue with the reduction of programming available in prison over the past several decades. Lifers find themselves particularly vulnerable in this sense because much programming is available toward the end of one's sentence but if they are serving a life sentence there is no end. *See Nellis, supra* note 181; *see also Shammass, supra* note 178, at 8–9 (describing parole hearing during which inmate was chided for failing to participate in programming despite having spent two decades in a security housing unit ("SHU") in a maximum-security facility without access to programs), 12 (describing programming as insufficient on its own, but as a "necessary precondition for learning how to express the transformative effects these programs had on the inmate himself").

261 Former prison officials are sometimes available as expert witnesses to write declarations and/or to testify at a parole or commutation hearing, and can provide guidance on how to interpret a prison disciplinary record and the story it tells. *See, e.g., PRISONOLOGY*, <https://prisonology.com/> (last visited Dec. 28, 2023).

which are primarily backward-looking. This bias toward the past is part of why the forward-looking nature of second-look sentencing, which is just beginning to spread through the states, is likely to lead to more significant decarceration.²⁶² Second-look processes necessarily involve reconsideration of whether the person should still get the life or lengthy term-of-years sentence that they were given years or decades ago.²⁶³ In most jurisdictions, there is no reason that parole and commutation proceedings cannot give similar weight to consideration of who an individual is today, rather than who they were when they committed a terrible offense decades ago. Frequently, petitioners for release receive “high probability of release” scores when assessed under parole release guidelines—but are denied release nonetheless.²⁶⁴ This cultural bias against release needs to be addressed systematically. In the meantime, the more compellingly a person can convey their reformed nature to decision-makers, the more likely it is that they will be released, despite the long odds.

But the odds do indeed remain long. I experienced this firsthand when working with DeAngelo Jones.²⁶⁵ DeAngelo was born in 1975 and raised by his mother in Detroit. He has served nearly thirty years of a forty- to sixty-year sentence for assault with intent to commit armed robbery, after having been acquitted of felony murder. DeAngelo was eighteen years old when he was arrested in 1994 and nineteen years old when he was convicted in 1995. Just three years older than me, DeAngelo was in prison when I graduated from high school, when I graduated from college, when I graduated from law school, when I had my three children, and when I came to work at the University of Michigan Law School. DeAngelo did not commit any actual acts of violence but was instead convicted as an aider and abettor during an armed robbery

262 Nazol Ghandnoosh, *A Second Look at Injustice*, THE SENTENCING PROJECT 15–16 (May 12, 2021), <https://www.sentencingproject.org/reports/a-second-look-at-injustice/>; FAMILIES AGAINST MANDATORY MINIMUMS, *Second Look Sentencing*, <https://famm.org/secondlook/> (last visited Dec. 28, 2023) (summarizing pending Second Chance legislation across jurisdictions and providing various resources regarding Second Look legislation); Kellie R. Hannan et al., *Public Support for Second Look Sentencing: Is There a Shawshank Redemption Effect?*, 263 CRIMINOLOGY & PUB. POL’Y 284 (2023) (finding a majority of public supported second look sentencing in Washington, DC even for those serving murder convictions).

263 See NAT’L ASS’N CRIM. DEF. LAWS., NACDL MODEL “SECOND LOOK” LEGISLATION (2020).

264 See, e.g., LEVINE & KETTUNEN, *supra* note 31.

265 My sincere thanks to DeAngelo for giving me permission to share his story in this Article.

gone wrong. When he first got to prison, he struggled with undiagnosed depression and got in more trouble. After a stint in solitary confinement, he decided he had to get himself straight.

Since then, DeAngelo has used his time in prison to educate himself and to advocate for others. He is a highly successful jailhouse lawyer who, like many other jailhouse lawyers, manages to write and file pleadings that rival those of many trained and barred attorneys. DeAngelo participated in an offense with devastating consequences for the victim and the victim's family. DeAngelo is no longer that young, lost kid. He is a mature, insightful, and intelligent middle-aged man with so much potential. Yet he was recently denied a sentence commutation after a public hearing, seemingly based entirely on the nature of the original offense—despite telling his story effectively, showing insight, taking responsibility, not minimizing the harm he caused, and developing an effective reentry plan with community and family support.

I have learned so much from DeAngelo and I am lucky to know him. He is considered to be a violent offender and has been convicted of a serious violent offense, but he committed no actual act of violence, poses no public safety threat, and has been punished more than adequately for the harm he caused. Keeping him in prison serves no purpose, and he remains there only because of the dynamics described in this Article. The unjust outcomes of parole and commutation proceedings for individuals like DeAngelo demonstrate the necessity of shifting the narrative around violent offenses with the aim of broader decarceral reform.

C. Storytelling for System Change

No matter how sincere the remorse, how much insight into one's behavior and mistakes, and how long the record of good behavior while in prison, substantial numbers of incarcerated people like DeAngelo will continue to be denied discretionary release under the current criminal legal system and the current culture of punitiveness and fear. There was a time when this was not the case. And for the first time in decades there is hope that we could be on the cusp of a changed approach to sentencing and release. While the broad calls for police abolition that reached fever pitch in 2020 have faded, the ease with which they faded points to the need to deepen critiques of the carceral state. Re-entrenchment of carceral solutions in response to overblown media portrayals of increased crime over the past couple of years only underscores the importance of narrative shifts and deeper analysis of

the structural reasons for violence.

Storytelling by and about people who have been convicted of violent offenses can play an important role in broader system change.²⁶⁶ Appeals based in anecdotes and emotions played a role in the shift toward harsh sentencing policies. The movement toward evidence-based reform arose in response to that untethered policymaking.²⁶⁷ The appeal of decision-making based on quantitative data is its veneer of ideological neutrality. However, evidence-based reform is itself inscribed with certain values and assumptions, and so more and better data will not be enough to change our policies around so-called violent offenses. We need to acknowledge and appreciate the limits of data, and seek additional solutions.

Until we challenge the public perception of “offenders” as fundamentally different from victims, empirical research will not fundamentally shift the ways that violent offenses are addressed. Storytelling is an important tool to help shift the narrative. Storytelling is necessary to disrupt the binary between offender and victim, and to redefine the stale terminology around “violent offenses” and “violent offenders.” Storytelling in this vein is an important component in the movement to combat epistemic injustice, helping to reintegrate different ways of knowing and valorize different knowledge-producers. Counterstories by those who are or have been incarcerated for offenses categorized as violent are necessary to broaden the lens provided by the counterstories of victims over the past several decades. The goal is not to elevate certain voices over others, but rather to expand the conversation in a way that highlights how carceral responses to violence fail us all.

1. Disrupting the Offender/Victim Binary

The strength of the victims’ rights movement of the past four decades has entrenched a clear distinction between “victims” and “offenders” in the popular imagination and in the structures of the criminal legal system. That distinction is flawed. Most perpetrators of violence are also victims of violence, participants in violence, and witnesses to violence.²⁶⁸

266 There is an important role for storytelling whether the changes sought are reformist or abolitionist.

267 Collins, *supra* note 119, at 413–14.

268 See SERED, *supra* note 21, at 4, 73–75, 197–98; see WESTERN, *supra* note 9, at 67, 79–82; see also Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*,

“The criminal” is dehumanized in the United States to a significant extent because, in the popular imagination, “the criminal” is a Black man.²⁶⁹ Glenn Martin, founder of Just Leadership USA, addressed this issue, asking, “What’s the public really scared of? If it’s only crime, we could get out of this mess quickly. This is about race, this is about class, and we have to tackle those issues. The way you do that is by changing the way the public thinks about who is or was in prison.”²⁷⁰ This is work that must be done by the people most directly affected by the criminal legal system as well as their allies. For those who care about ending mass incarceration, the task is not just to seek to change policies but to counteract the culture of fear.²⁷¹

As Mona Lynch has written, “the ‘offender,’ and especially the ‘serious offender,’ now more than ever falls in a discrete category of being that is rigidly distinguished from the ‘law abiding’ . . . he is a criminal ‘other,’ and severe and incapacitative punishment is necessary to contain and control him.”²⁷² There is a dialectical effect between the manner in which media and government officials discuss crime and public opinion

87 BROOKLYN L. REV. 1319, 1319–21 (2023) (describing harm caused by reification of victim/offender binary).

269 See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (tracing the historical development and enduring idea of “black criminality”).

270 Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJ. (Mar. 4, 2015), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent>.

271 Martin highlights the importance of elevating the voices of those most affected by the system: “It’s a moral argument, that historically, leads to reform,” he said. “You think of HIV/AIDS. It’s not until the people impacted spoke directly to the public that you started seeing real change.” For consideration of another contribution to this mammoth task, see Sebastian Smee, *With His Camera, Gordon Parks Humanized the Black People Others Saw as Simply Criminals*, WASH. POST (Aug. 5, 2020), https://www.washingtonpost.com/entertainment/museums/with-his-camera-gordon-parks-humanized-the-black-people-others-saw-as-simply-criminals/2020/08/04/5a93b07a-d336-11ea-9038-af089b63ac21_story.html (reviewing the recent release of *GORDON PARKS: THE ATMOSPHERE OF CRIME, 1957*, with a lead essay by Bryan Stevenson).

272 Mona Lynch, *The Contemporary Penal Subject(s)*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 98 (Mary Louise Frampton et al. eds., 2008); see also Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L. J. 830 (2000); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA*, 13, 25 (2016); MUHAMMAD, *supra* note 269; Janus, *supra* note 118, at 828 (discussing the sex offender as “other” and the misconception that sex offenders are extremely likely to reoffend).

regarding crime.²⁷³ The popular media has a tendency to emphasize violent crime and unusual crimes—“if it bleeds, it leads,” as the adage goes.²⁷⁴ Even when crime rates are declining, coverage of crime remains constant or increases.²⁷⁵ Black perpetrators receive disproportionate media coverage, while Black victims receive significantly less coverage than other victims.²⁷⁶ In this context, narratives of offenders as “other” take over.²⁷⁷

Terrell Carter, Rachel Lopez, and Kempis Songster have written movingly about the work that Carter, Songster, and other lifers did together as the Right to Redemption Committee to disrupt these categories.²⁷⁸ They write:

We became acutely aware of how labels and their connotations can define the entirety of who we are by a tragic moment that only lasted for a flash out of a lifetime and, as a result, imprison us more effectively than iron bars or stone walls ever could. Our lives in prison were filled with stereotypes, classifications, labels, and oversimplifications of individual human beings

273 Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession, & Penal Reform*, 139 DAEDALUS 62, 69–70 (2010) (summarizing public opinion research that indicates high levels of public support for policing, crime prevention programs for youth, and nonviolent offender drug treatment, but intense opposition to additional prison funding); Simon Hallsworth, *Rethinking the Punitive Turn: Economies of Excess and the Criminology of the Other*, 2 PUNISHMENT & SOC’Y 145 (2000); see Richard Sparks, *The Media and Penal Politics*, 2 PUNISHMENT & SOC’Y 98 (2000); Katherine Beckett & Marco Brydolf-Horowitz, *A Kinder, Gentler Drug War? Race, Drugs, and Punishment in 21st Century America*, 22 PUNISHMENT & SOC’Y 509, 511 (2020).

274 Mary Louise Frampton, *Transformative Justice and the Dismantling of Slavery’s Legacy in Post-Modern America*, in AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 213–14 (Mary Louise Frampton et al. eds., 2008); see also Michael O’Hear, *Violent Crime and Media Coverage in One City: A Statistical Snapshot*, 103 MARQ. L. REV. 1007, 1009, 1015, 1017 (2020) (reporting results of empirical study of Milwaukee media outlets that coverage was disproportionately of violent crime without humanizing or contextualizing information, but link between media coverage and public opinion about crime was unclear); Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 453–58 (2006); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 860–871 (2010). See generally Alec Karakatsanis, ALEC’S COPAGANDA NEWSLETTER, <https://equalityalec.substack.com/>.

275 Frampton, *Transformative Justice*, *supra* note 274, at 214.

276 *Id.*; see also SERED, *supra* note 21, at 211.

277 Lynch, *supra* note 272, at 100 (describing “the dehumanization process of the penal subject,” after which “talk of penal subjects – prisoners and condemned convicts particularly – as bearing and deserving human rights is absolutely foreign.”).

278 See generally Carter et al., *supra* note 43.

created for convenience, expediency, and even political and economic advantage: “criminals,” “superpredators,” and “convicted felons.” These words denied who we were as human beings and left no space for alternative narratives.²⁷⁹

Carter and Songster’s powerful telling of their own stories, including the harm they caused and their journeys to reclaim their own humanity, demonstrates the power of storytelling.

Reasserting the humanity of people who have committed grave transgressions is essential, and part of that work is contextualizing their acts within their life story. Rarely does a person commit violence that they have not previously been exposed to in one fashion or another.²⁸⁰ Human conflict is dynamic and complex, and not infrequently, the person who ends up with the “offender” label is the one who hits hardest or hits last. The offender this time may have been the victim last time. Amplifying the stories of those who have caused harm and who have been harmed may lead to trauma-informed responses to violence and less reflexive carceral solutions.

2. The Task of Redefining “Violent Offense” and “Violent Offender”

Stories can help us see the complex humans who are, or have been, incarcerated for what have been classified as violent offenses. The language we use in telling those stories is also significant. Terms such as “con,” “ex-con,” “offender,” “violent offender,” “killer,” and “murderer” all essentialize a person based on a single thing they have done.²⁸¹ Bad offenders are defined in diametric opposition to good victims, essentializing both and leaving little room for what Leigh Goodmark and others call “criminalized survivors” or “imperfect victims.”²⁸² The

279 *Id.* at 328.

280 SERED, *supra* note 21, at 196–202; *cf.* Sokol et al., *supra* note 36 (reporting study findings that witnessing violence, whether involving firearms or not, was strongly associated with teenagers carrying firearms).

281 Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2548 (2020) (raising the additional objection to using the term “offender” because it “nestles factual guilt neatly within legal guilt” in a system in which there are ample reasons to doubt the convergence of the two in many cases). The disability rights community has done tremendous work promoting “people-first” language, which has been drawn on in this and related efforts to change the language used to describe marginalized populations. *See, e.g., The Language Project*, THE MARSHALL PROJ. (Apr. 12, 2021), <https://www.themarshallproject.org/2021/04/12/the-language-project>.

282 *See* Goodmark, *supra* note 15, at 10.

term violent offender has been used as an essential category used to distinguish individuals beyond hope of rehabilitation—the real bad guys—from others who can be rehabilitated. Those considered to be violent offenders are almost uniformly excluded from criminal legal system reforms, including most diversionary programs and the few remaining forms of early release.

“Violent offense” is a contested term, and its meaning varies across jurisdictions and areas of law.²⁸³ It is both overinclusive and underinclusive. Certain offenses, like robbery and burglary, are frequently categorized as violent, regardless of whether physical violence actually occurred.²⁸⁴ A charge for possession of a weapon alone can be classified as a violent offense, and a burglary committed at an empty residence without any weapons can be classified as a violent felony.²⁸⁵ In the immigration context, a noncitizen can be rendered deportable and ineligible for relief based on a conviction for a “crime of violence,” which is broadly defined to “require only the use of some physical force against the person or property of another or, in the case of a felony, a ‘substantial risk’ of such force.”²⁸⁶ And, as discussed above, a person can be convicted of a “violent offense” for playing only a tangential role in the commission of a violent act like murder.

There are many people who have committed violent acts against other people—who have killed, who have assaulted, who have raped. We cannot and should not diminish the reality or the consequences of violence.²⁸⁷ The work is to reduce cycles of violence, not to deny that they exist. Part of reducing violence is to acknowledge the humanity of

283 Ristroph, *supra* note 9, at 602–10 (discussing the slipperiness of the term “violent crime” in federal jurisprudence around the Armed Career Criminals Act); SKLANSKY, *supra* note 10, at 69–85; O’Hear, *supra* note 274, at 1018–21 (cataloguing inconsistencies in how “violent crimes” are defined across jurisdictions).

284 Nicole Smith Futrell, *Decarcerating New York City*, 48 *FORDHAM URBAN L.J.* 58, 91 (2020).

285 See O’Hear, *supra* note 274, at 1008; SKLANSKY, *supra* note 10, at 74.

286 Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 *WASH. & LEE L. REV.* 469, 484 (2007); see Allegra McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 *AM. CRIM. L. REV.* 105, 149 (2012) (describing case of a person deemed deportable and ineligible for relief based on battery conviction for pulling another person’s hair in a bar fight).

287 Alexandra Napatoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1724–27 (2006) (describing problem of underenforcement of serious crime in low-income communities of color); see Lisa L. Miller, *What’s Violence Got Do with It? Inequality, Punishment, and State Failure in US Politics*, 17 *PUNISHMENT & SOC’Y* 184, 193–94 (2015) (describing dramatic racial disparities in homicide risk in the United States).

people who have committed violence and to understand the complexity of their lives.²⁸⁸ Importantly, working to understand a person's childhood trauma does not mean excusing violence, but rather understanding that these individuals have suffered, too. Amplifying stories about this complexity underscores the futility of warehousing people as a means to end violence.²⁸⁹

As anyone who has worked with individuals charged with or convicted of murder or other homicide offenses will tell you, they are mostly just people. Most homicides are circumstantial. They are not committed by a person on a murderous rampage, or by a psychopath or a sadist, although such killings certainly happen. Far more commonly, homicides are committed in the context of the drug trade; they are committed when a simple robbery goes wrong; they are committed as an act of revenge, whether motivated by business or love interests; they are committed by people who are afraid, or who are afraid to appear afraid; they are committed, by and large, by young men at a very particular stage in their social and neurological development.²⁹⁰ Or they

288 See SERED, *supra* note 21, at 249 (“In cases of interpersonal wrongdoing, accountability is to those responsible for harm what grief is to those harmed. It is an unparalleled tool for responsible parties to transform their shame, and in so doing, to recuperate a sense of dignity, self-worth, connectedness, and hope – the things they lost when they caused harm.”); WESTERN, *supra* note 9, at 186 (“If we are going to reduce our prison populations, we must acknowledge that human frailty under conditions of poverty puts people at risk of simultaneously becoming both the perpetrator and the victim of violence. This moral complexity, where victims and offenders are often one and the same, is challenging for a justice system designed to assess guilt or innocence and mete out punishment.”); Theresa Vargas, *A Peace Corps Worker Was on a Date in D.C. With His Wife. Then Came a Stray Bullet*, WASH. POST (July 24, 2021), https://www.washingtonpost.com/local/jeremy-black-shooting-death-dc/2021/07/23/97085ce6-ec02-11eb-ba5d-55d3b5ffcafl_story.html (“When I ask her whether she believes that the young men behind the shootings don’t care about the city because they feel the city doesn’t care about them, she points to an African proverb: ‘A child that is not embraced by the village will burn it down to feel its warmth.’ ‘That’s what we’re seeing,’ she said. ‘We’re seeing kids that have experienced a lot of trauma, a lot of pain. Folks like to say we’re making excuses for them, but these aren’t excuses. These are the reasons things are happening.’” (quoting Ryane Nickens, founder of TraRon Center, which aims to help D.C. children affected by gun violence)).

289 See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 63 (2018); *id.* at 29 (emphasizing the cycles of destructive masculinity and “empathetic inurement” that are needed to survive prison, and so not only do current approaches fail to give people the tools to avoid violence in the future, but in fact create the conditions for further inability to empathize).

290 See James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the United States*,

are committed by people, primarily women, who have been subjected to domestic violence and killed their abusers, or killed at the demand of their abusers.²⁹¹ These people are not “killers,” but rather people who have killed. They are not “violent offenders,” but rather people who have committed offenses that have been categorized as violent.²⁹²

Indeed, our focus on the individual actions of so-called violent offenders obscures the state’s failure to provide security for certain segments of the U.S. population.²⁹³ Failure to address the despair and rage of marginalized youth, and to provide non-carceral solutions to violence, perpetuates mass incarceration. This point is both glaringly obvious and too often ignored. As Lisa Miller has written, both high rates of incarceration and high rates of violent crime reflect the same state failure.²⁹⁴ She argues that it may be difficult to decarcerate before providing sufficient security from violence.²⁹⁵

Despite all the ways in which the criminal legal system categorizes and sorts based on violence, there is little evidence that the system is effective at averting or reducing actual violence, particularly when the victims are poor and Brown or Black.²⁹⁶ After four decades of increasingly punitive, after-the-fact responses to complex social and economic problems, it is time to utilize a different approach that involves solving those problems, including poverty and racism, and corresponding inadequate access to quality education, nutrition,

BUREAU OF JUST. STATS., <https://www.bjs.gov/content/pub/pdf/htius.pdf> (noting based on data for 1975–2005 that 77% of homicide victims and nearly 90% of offenders were male, that one third of murder victims and almost half of offenders are under the age of 25, peaking in the 18–24 year range).

291 See generally GOODMARK, *IMPERFECT VICTIMS*, *supra* note 15.

292 See Prescott et al., *supra* note 13, at 1649 n.21 (discussing use of “violent offender” label as a pejorative label rather than to describe an identifiable group); see PFAFF, *supra* note 4, at 190–91 (“For almost all people who commit violent crimes ... violence is not a defining trait but a transitory state that they age out of. They are not violent people; they are simply going through a violent phase.”); Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1242, 1311–12 (2011) (advocating for reform in homicide sentencing in the context of dangerously overcrowded prisons, and concluding that “[a] hot, flat law of murder is less capable of assuring the dignity of either victims or their killers than one with a morally meaningful set of substantive murder crimes attached to a proper ladder of punishment.”); see THE FEMINIST ON CELLBLOCK Y (CNN 2017) (documenting prisoner-run program on toxic masculinity).

293 See generally Miller, *What’s Violence Got to Do With It?*, *supra* note 287.

294 See *id.* at 202.

295 *Id.*

296 Ristroph, *supra* note 9, at 616–18; SERED, *supra* note 21, at 7–8 (juxtaposing high rates of incarceration and high rates of violence in the United States).

healthcare, employment, and dignity, at their roots.²⁹⁷

People who commit acts of violence are not in a category apart. Professor Cecelia Klingele argues, based on social science research, that violence is in fact an innate human characteristic and that we all have some tendency to engage in violence.²⁹⁸ Those who have committed violent acts are not “other” at all, and they are as amenable to rehabilitation as anyone else.²⁹⁹ The situational nature of violence is further underscored when considering the violence committed by the purported “guardians of safety” within the system of incarceration.³⁰⁰ “Violent offenders” are often victimized by this violence once arrested and under the control of law enforcement and prison officers.³⁰¹

Telling and amplifying the stories of the people we have demonized as “violent offenders,” in all their very human messiness, can do work to de-essentialize the “offender” and the “violent offender.” By considering these individuals in the context of their own lives and circumstances, it will be possible to begin to reconsider the ways in which the stigmatizing label of “violent offender” does a disservice to public

297 See SERED, *supra* note 21, at 3.

298 See Klingele, *supra* note 19, at 860 (discussing violence as “statistically normative” in childhood and adolescence); *id.* at 861 (citing research that shows “[b]etween 30% and 40% of both men and women report having pushed, shoved, or hit their intimate partners at some point in their relationship.”); *id.* at 862 (quoting Susan T. Fiske et al., *Why Ordinary People Torture Enemy Prisoners*, 306 SCIENCE 1482 (2004) as suggesting that “[v]irtually anyone can be aggressive if sufficiently provoked, stressed, disgruntled, or hot.”).

299 *Id.* at 870 (arguing that people convicted of violent crime should be given more rather than less access to rehabilitative programs to “build core stress and conflict-management skills” and should do so “not because these individuals are intrinsically dangerous or different, but because managing aggression is an important human competency that can be mastered with practice”); see Skeem & Polaschek, *supra* note 41, at 1135–38.

300 Klingele, *supra* note 19, at 867–88 (“Throughout the criminal justice system, line level actors from police officers to correctional agents to judges are given vast legal authority to use or authorize physical force and other restraints on liberty over a population legally denominated as worthy of punishment.”); SKLANSKY, *supra* note 10, at 93 (describing the 2020 protests in the wake of George Floyd’s murder as highlighting “the degree to which the licit and illicit use of force in law enforcement remained widespread, even routine”); Alysia Santo et al., *Guards Brutally Beat Prisoners And Lied About It. They Weren’t Fired.*, N.Y. TIMES (May 19, 2023) <https://www.nytimes.com/2023/05/19/nyregion/ny-prison-guards-brutality-fired.html>.

301 Klingele, *supra* note 19, at 867–68; see also Hanan, *Invisible Prisons*, *supra* note 154, at 1193–94 (describing both sanctioned and unsanctioned violence in prison, and citing a 2009 study that showed nearly half of reported assaults were committed by prison guards).

safety and community. To urge that we listen to these stories may sound like providing excuses for their acts, but it is not. Refusing to listen does not help victims and does not help the public. It will not be possible to reduce violence if we do not consider what leads to its commission.

3. Counterstories and Counterstories

There are many different ways in which those most affected by criminal legal systems can become more active participants in the process of remaking the system. Professor Seema Saifee argues that incarcerated people are change agents who provide critical analysis and organizing in the movement for decarceration.³⁰² There will always be a need for outside partners as well, and those on the outside must help the rest of the voting public to see and hear those on the inside, who remain too often silenced and invisible.

To do that, it will be necessary to facilitate and amplify the stories of incarcerated individuals. Advocates on the outside can be the bridge, enabling more people to “get proximate,” as Bryan Stevenson suggests, and experience “fierce empathy,” as Binny Miller describes.³⁰³ It is only by knowing people, by hearing them and getting close to their stories, that we can understand that while the media portrays incarcerated people as monsters, most people in prison for having committed violent offenses are hurt people hurting people, or just simply people being hurt by the brutality of the criminal legal system without having even hurt anyone themselves.³⁰⁴ As Carter, Lopez, and Songster have written:

Complexity is inefficient; it slows down the carceral machinery; it takes resources. The system tries to remove the aspects of human beings that make us more than empty vessels and refuses to acknowledge our capacity to change and grow into responsible and contributing members of the human family. For the sake of efficiency, it develops a story of “criminals” and “violent offenders” that prevents us from being seen in the world as what all human beings are – uniquely flawed but also capable of flourishing, loving, and healing.³⁰⁵

302 See generally Saifee, *supra* note 44.

303 BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 14–18 (2014); Miller, *George Floyd and Empathy Stories*, *supra* note 228, at 293–95.

304 See ROBIN STEINBERG, THE COURAGE OF COMPASSION: A JOURNEY FROM JUDGMENT TO CONNECTION 208 (2023) (arguing that real change will only truly begin “when we finally see ourselves in the faces of those ensnared in our criminal justice system and when we see our children in their children.”).

305 Carter et al., *supra* note 43, at 334.

In the realm of community organizing and policy advocacy, storytelling offers generative possibilities for shifting popular understandings of violent offenders, for disrupting the offender/victim binary, and for moving beyond stock stories that reinforce and justify carceral responses to the very real problem of violence.³⁰⁶ As Richard Delgado has written, “Counterstories, which challenge the received wisdom . . . can open new windows into reality, showing us that there are possibilities for life other than the ones we live.”³⁰⁷ There has been a particular focus on the role of storytelling in validating the experience of “outgroups” and furthering legal reform to their benefit.³⁰⁸ Storytelling has played a role in racial justice work, elevating the voices of Black communities victimized by discriminatory policing and prosecution.³⁰⁹

Storytelling was also harnessed in the carceral moves that led to mass incarceration. In the 1970s, battered women advocates began to encounter some success in bringing attention to the ubiquity and severity of domestic violence as a phenomenon, in part through storytelling strategies.³¹⁰ The goals of the movement were lofty and important, and there have been beneficial consequences of this advocacy, including wide-ranging state and federal protections for survivors; education for the public, law enforcement, and the judiciary; greater awareness of the phenomenon of domestic violence and of the difficult choices that survivors face; greater inclination to believe survivors; and safehouses and other material supports for survivors.³¹¹ But there have also been a host of perverse consequences as tough-on-crime politicians co-opted the battered women’s agenda to bolster its law-and-order agenda, and in the view of some scholars and activists, “certain feminist legal theories

306 See *The Language Project*, THE MARSHALL PROJ., <https://www.themarshallproject.org/2021/04/12/the-language-project> (last visited Dec. 28, 2023) (the Marshall Project seeks to promote “people-first” terminology).

307 Delgado, *supra* note 240, at 2414.

308 *Id.* at 2437–38.

309 See, e.g., Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994-1995); Vanita Gupta, *Critical Race Lawyering in Tulia, Texas*, 73 FORDHAM L. REV. 2055 (2005); Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1599 (2015).

310 See, e.g., Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990); Leigh S. Goodmark, *Telling Stories, Saving Lives: The Battered Mothers’ Testimony Project, Women’s Narratives, and Court Reform*, 37 ARIZ. ST. L. J. 710 (2005); Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993).

311 Murphy, *supra* note 310, at 1259–74.

moved toward authoritarian policies and obdurate views of right and wrong.”³¹² Second wave feminism’s failure to adequately grapple with intersectionality is part of what led to this “carceral feminism.”³¹³

While feminists’ calls were heeded in part because of interest convergence with law-and-order politicians, it is also the case that legal storytelling promoted by feminist scholars contributed to the prominence of victim’s rights narratives in discourses around criminal legal system policies. The stories of battered women and other victims began to take center stage, with an increased role for victim impact statements during the sentencing phase of trial, as well as a plethora of other measures aimed at amplifying the voices of victims of violence.³¹⁴ Eventually, the counterstories of victims became the dominant stories in the realm of criminal policymaking—but only certain victims: “attractive,

312 See Aya Gruber, *A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 591, 610–11 (2012); see also Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOOD HALL L.J. 151, 155–59 (1998) (“For the most part, this history has been one of appropriation and distortion of feminist goals and techniques for purposes quote other than feminist ones, and of the women’s movement making a virtue out of the necessity of working within an oppressive system.”); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 805 (2001) (“Not only does a focus on crime control deflect attention from other anti-domestic violence strategies, crime control policies result in greater state control of women, particularly poor women.”); GOODMARK, IMPERFECT VICTIMS, *supra* note 15, at 2 (describing society’s reliance on criminal sanctions to respond to gender-based violence leading to unintended consequences of “increased rates of arrest, prosecution, conviction, and incarceration of those who the changes were meant to protect: victims of violence.”).

313 See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991) (analyzing the marginalization of women of color within both antiracist and feminist discourses through an exploration of their experiences with regard to battering and rape); GRUBER, *supra* note 141, at 7 (citing sociologist Elizabeth Bernstein for coining the term “carceral feminism” in 2007); Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women’s Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 282 (1997) (describing “how, through [mandatory arrest policy] advocacy, advocates and the battered women’s movement more generally emphasize[d] the universality of domestic violence and minimize[d] the significance of race and class differences, to the detriment of many battered women.”).

314 See generally Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937 (1985); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); cf. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2109 (1989) (noting “the ordering of interests inherent to law,” which means that some stories are given greater value or attention than others).

middle class, and white.”³¹⁵

It is perhaps more radical, and less comfortable, to emphasize the counterstories of those categorized as offenders. When we do hear their stories, they are within the narrow context in which we can consider them victims—for example, victims of a racist system, or victims of the prison industrial complex. The stories of what led to their incarceration is rarely part of that story. And it is understandable why individuals would not want to tell that part of their story. Incarcerated individuals may fear that they will be categorized as dangerous and bad “offenders,” rather than as people who have done wrong, and that people will stop listening to them. But their stories are important and are essential to making progress on systemic reform. Stories can help interrogate and redefine “violent offense” and “violent offender,” and also disrupt the victim/offender binary. They can help us understand the whole person—the good, the bad, and the ugly—the context that created them and the choices they made.³¹⁶

Decarceral and criminal legal system reform advocates have begun harnessing the power of stories in the ways this Article urges. The Marshall Project publishes on its website *Life Inside*, which consists of essays written mostly by incarcerated people, as well as their family members and people who work in the system.³¹⁷ The stories discuss aspects of living in prison, bringing to light what the experience of incarceration is actually like.³¹⁸ In *Silenced: Voices from Solitary in Michigan*, the letters of people in solitary confinement are published, telling their stories about their experiences in solitary.³¹⁹ As articulated on the website, “Solitary is a microcosm of the system, a prison inside a prison where we cage people deemed most expendable to our society. But they’re not expendable. They are not ‘bogeymen.’ They are profoundly

315 See Lynne Henderson, *Co-Opting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579, 584–88 (1998) (analyzing the image of victims of violent crimes as silencing and obscuring victims who are poor, Black, fight back and/or may have criminal records themselves); GRUBER, *supra* note 140, 96–111; GOODMARK, IMPERFECT VICTIMS, *supra* note 15, at 9–10 (describing the requirement that survivors of violence be “perfect victims”—“blameless,” “meek,” and “passive”). See generally Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529 (2021) (analyzing the role of the media in constructing the “ideal” and “non-ideal” victim along race and class lines); SERED, *supra* note 21, at 22.

316 See generally, Carter et al., *supra* note 43.

317 *Life Inside*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/tag/life-inside> (last visited Dec. 28, 2023).

318 *Id.*

319 *Silenced: Voices from Solitary in Michigan*, SILENCED, <https://silenced.in/michigan/> (last visited Dec. 28, 2023).

human. They are being tortured. They are being silenced.”³²⁰

The AFSC Criminal Justice Program recently launched *Let Me Tell You*, a website featuring first-person stories by and about people serving life and long-term sentences in Michigan.³²¹ The tag line is “Every Sentence Has a Story” and the text reads “When you learn someone has spent decades—or longer—in prison, it’s tempting to judge them. But, each one of the 13,000 people in Michigan serving life or long-term sentences shares with us a common humanity.”³²² The stories are tagged with various categorizations, including change/growth, creativity, family, food, freedom dreams, friendship, life in prison, memories, mental health, solutions, and spirituality.³²³ AFSC has yet another story-based project called *Changing the Narrative: The Case for Commutations in Michigan*.³²⁴

The Bail Project features on its website the stories of its clients, focusing on the details of their lives and sometimes the circumstances that got them into trouble.³²⁵ Ear Hustle is a podcast co-produced by incarcerated and formerly incarcerated people, with the tag line: “The daily realities of life inside prison shared by those living it, and stories from the outside, post-incarceration.”³²⁶ Safe and Just Michigan has launched a web-based project, *Life Beyond Life*, which shares the stories of juvenile lifers.³²⁷ Another feature, *Inside Voices*, features the letters of incarcerated people both in the print newsletter that is distributed to incarcerated members and on their website for those on the outside.³²⁸ Right to Write is a project of the alternative media source Prism designed to enable incarcerated writers “to share their reporting and perspectives across our verticals and coverage areas.”³²⁹ A growing number of

320 *Id.*

321 LET ME TELL YOU, <https://letmetellyoumi.org/> (last visited Dec. 28, 2023).

322 *Id.*

323 *Id.*

324 AM. FRIENDS SERV. COMM., <https://afsc.org/video/changing-narrative-case-commutations-michigan> (last visited Dec. 28, 2023).

325 *Client Stories*, THE BAIL PROJ., <https://bailproject.org/category/stories/> (last visited Dec. 28, 2023).

326 EAR HUSTLE, <https://www.earhustlesq.com/> (last visited Dec. 28, 2023). Other podcasts include 70 Million, Surviving the System, Beyond Prisons, Decarceration Nation, and The Appeal.

327 *Life Beyond Life*, SAFE & JUST MICHIGAN, <https://www.safeandjustmi.org/life-beyond-life/> (last visited Dec. 28, 2023).

328 *Inside Voices – January 2023*, SAFE & JUST MICH. (Jan. 27, 2023), <https://www.safeandjustmi.org/2023/01/27/inside-voices-january-2023/>.

329 *Right to Write*, PRISM, <https://prismreports.org/tag/right-to-write-r2w/> (last visited Dec. 28, 2023).

podcasts, websites, and other media are also telling these stories and offering a different vision of who people that interact with the criminal legal system are, and what their lives are like.³³⁰ These stories are even being told in academic journals.³³¹

4. Will They Hear What Is Being Said?

Telling stories to the public about the basic humanity of people who may have done bad things is necessary to educate the voters who ultimately influence what types of criminal legal system policies are enacted. Advocacy organizations can publish compelling and compassionate stories on their websites, but the scope of their readership is limited and self-selective. To reach a broader audience, it is necessary to pitch stories to the news media. But the media is accustomed to telling stories focused on the purported threat of crime and criminals, which impacts public perceptions.³³² It is possible to write stories that respect both the perpetrator and the victim as complex human beings, and advocating for media outlets to do so can have an impact.

Attempts to rewrite the narrative about how and why people commit violent crimes and are categorized as violent offenders may fall short if the public does not feel sufficiently secure and is not receptive to such a message. By way of illustration, it is worth considering that following the murder of George Floyd and the BLM protests of summer 2020, the movement to defund the police gained considerable traction among a broader swath of the American public than might have

330 THE FEMINIST ON CELL BLOCK Y, (CNN 2017); Marcus Kondkar et al., *They Know What They Did. They'd Like You to Know Who They've Become*, N.Y. TIMES, (Aug. 1, 2023), <https://www.nytimes.com/2023/08/01/opinion/louisiana-angola-prison-mass-incarceration.html> (video featuring people serving life without possibility of parole sentences at Angola Prison in Louisiana talking about their personal growth and making meaning of their lives); Cf. Lilly Quiroz, *John Legend Knows The Obstacles of Life After Prison. He Wants You to Know Them Too*, NPR (May 4, 2023), <https://www.npr.org/2023/05/04/1173870744/john-legend-knows-the-obstacles-of-life-after-prison-he-wants-you-to-know-them-t> (interview with John Legend about his short documentary about prison re-entry challenges in which he highlights the importance of storytelling as a way to “change people’s hearts and minds”).

331 See, e.g., Kimberly Thomas, in Conversation with Dennis Berkey, et al., *Voices from a Prison Pandemic: Lives Lost from COVID-19 at Lakeland Correctional*, 19 OHIO ST. J. CRIM. L. 157 (2021); Carter et al., *supra* note 43.

332 See Lynch, *supra* note 272, at 97–100; Cf. Itay Ravid, *Judging by the Cover: On the Relationship Between Media Coverage on Crime and Harshness in Sentencing*, 93 S. CAL. L. REV. 1121, 1174–77 (2020).

previously seemed possible.³³³ Yet by 2021, with reported increases in gun violence and homicides in select urban centers, the general public became more circumspect about whether fully funded and empowered police forces were necessary to ensure public safety.³³⁴

American society has been conditioned to reflexively seek carceral solutions; undoing that reflex will take considerable work and time. It will also require continued interrogation of the perpetual intertwining of crime and race in American history. The dehumanization of “criminals” is consistent with and reflective of the long American tradition of dehumanizing Black people.³³⁵ The soul-searching required to exorcise this strain of the American psyche is no small thing. But it is necessary and long overdue.

CONCLUSION

For the average person, the term “murderer” conjures up the image of someone who is frightening, violent, and dangerous. If a person has killed before, how do we know they will not kill again? It is easy to think this way, particularly after a half century of acculturation to the tough-on-crime mindset in the United States. We have been taught to fear crime and fear criminals.³³⁶ This Article provides some suggestions for how we can begin to rethink attitudes toward those who have been

333 See BLACK LIVES MATTER, <https://blacklivesmatter.com/defund-police/> (last visited Dec. 28, 2023); Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

334 Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RSCH. CTR. (Oct. 26, 2021), <https://www.pewresearch.org/short-reads/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area/>.

335 MUHAMMAD, *supra* note 269, at 22–34 (discussing impact of 19th century scientific racism on ideas about Black criminality); Lynch, *supra* note 272, at 97–100; SKLANSKY, *supra* note 10, at 61–63; SERED, *supra* note 21, at 10–11 (describing the racially-inflected “imagined monstrous other”); see Carter et al., *supra* note 43, at 327 (“We saw how we became the ‘other,’ not belonging to the human family, thereby somehow deserving to be thrown away and discarded forever.”).

336 See Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165 (arguing that the growth in home ownership and suburbanization during the post-WWII period led to greater fear of crime and support of law-and-order policies). But see O’Hear & Wheelock, *supra* note 15, at 1038 (reporting empirical study results finding association between punitiveness and racial resentment, authoritarianism, and political conservatism but no association between punitiveness and prior victimization, county-level crime trends, or fear of crime).

convicted of violent offenses, and ways forward to a less violent *and* less punitive future.

For those concerned with public safety, the quantitative data about the low rates of violent recidivism cannot overcome the emotional resistance to policies that reflect that reality. Although the data supports less punitive policies, that data is not value neutral. If divorced from a commitment to decarceral principles, the data tends to lead to other forms of carceralism. Furthermore, data will never be enough to change the approach to offenses categorized as serious, violent, or sexual. We need approaches that also address the emotional response to these sorts of offenses—both the fear of being victimized and the retributivist impulse for those who commit violence to get their due.³³⁷

While concerns about recidivism and public safety tend to dominate debates about releasing people from incarceration, the retributivist justification for punishment is equally salient in the minds of some.³³⁸ This Article does not discount the importance of accountability, which is a necessary component of a community response to harm, at least where the person has in fact committed harm against the another. The Road to Redemption Committee described by Lopez, Songster, and Carter holds accountability to be central to its work.³³⁹ Accountability does not, however, necessitate demonizing and dehumanizing those who have caused harm. Rehumanizing those who have been classified as violent offenders will be a necessary predicate to any deep and broad policy change.³⁴⁰ Some people who ascribe to politically conservative and authoritarian ideals may never be persuaded, but there is a larger subset of people who may be persuaded if they can be convinced of the basic humanity of those who have committed offenses.³⁴¹ The path to a more

337 SERED, *supra* note 21, 17–49; Bandes, *supra* note 314, at 390–410 (arguing that “[t]he victim impact statement dehumanizes the defendant and employs the victim’s story for a particular end: to cast the defendant from the human community.”).

338 See, e.g., Thom Brooks, *Retribution*, in *THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY AND SCIENCE OF PUNISHMENT* (Farah Focquaert, et al., eds. 2021).

339 Carter et al., *supra* note 43, at 318–330.

340 It can also be personally healing. See, e.g., Eren Orbey, *A Daughter’s Quest to Free Her Father’s Killer*, *NEW YORKER* (Jan. 17, 2022), <https://www.newyorker.com/magazine/2022/01/24/a-daughters-quest-to-free-her-fathers-killer>.

341 See DeAnna Hoskins & Zoe Towns, *Opinion: How The Language of Criminal Justice Inflicts Lasting Harm*, *WASH. POST* (Aug. 25, 2021), <https://www.washingtonpost.com/opinions/2021/08/25/criminal-justice-language-bias-lasting-harm/?variant=116ae929826d1fd3> (describing results of national studies showing that the use of labels such as “felon” and “habitual offender” made negative and dehumanizing associations significantly more likely among survey respondents); see also O’Hear & Wheelock, *supra* note 15, at 1038 (reporting empirical study

nuanced understanding of violence is through telling and amplifying the messy and all-too-human stories of those we have classified superficially and misleadingly as “violent offenders.”

results that punitiveness toward violent crime was found to be associated with political conservatism, racial resentment, and authoritarianism, and to have no connection with prior victimization, fear of crime, or county-level crime trends); James A. Mercy et al., *Public Health Policy for Preventing Violence*, 12 HEALTH AFFS. 7 (1993) (suggesting the need for a shift in how we think about violence with greater focus on prevention). *But see* Aaron Gottlieb, *The Effect of Message Frames on Public Attitudes Toward Criminal Justice Reform for Nonviolent Offenses*, 63 CRIME & DELINQ. 636, 652 (2017) (finding through public opinion study that messaging aimed at increasing support for criminal justice reform based on changing perceptions about the character of criminal offenders is not effective).

