

## DIGGING THEM OUT ALIVE<sup>1</sup>

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### INTRODUCTION

In this article we describe a collection of interrelated law and social work clinical courses. They were part of a major, multi-year criminal justice project in Maryland. The project has been a criminal justice laboratory, albeit unplanned, with results that we believe have national importance.<sup>3</sup> Our clients have been old “lifers,” long-incarcerated, life-sentenced prisoners.<sup>4</sup> During

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<sup>1</sup> In 1842, Charles Dickens toured the Eastern State Penitentiary. He was appalled by the solitary confinement of the prisoners and said, speaking of the prisoners generally: “He is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and horrible despair.” CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 242 (1842).

<sup>2</sup> Michael Millemann is a Professor of Law at the University of Maryland Francis King Carey School of Law. Rebecca Bowman-Rivas, an LCSW, is Manager of the Clinical Law Program’s Law and Social Work Services Program. Elizabeth Smith, an LCSW-C, was a Forensic Social Work Fellow in that program. The Open Society Institute-Baltimore (OSI-Baltimore) funded Smith’s position and another Fellow to help staff the Project we describe in this article. The Law and Social Work Services Program is a “field practicum placement” or “internship” for graduate students in the University’s School of Social Work. *See infra* note 167. Bowman-Rivas directs the program, teaches the social work students and helps to teach the law students, and generally collaborates with the clinical faculty. She also helped to supervise the two OSI-funded forensic fellows. The Program provides case management, referral, support and other services to clinic clients, and in some cases testifies in, or provides reports to courts. Elizabeth Smith was one of the seven students in 2013 when we began our work in the Project we describe in this article. We thank Angela Aloi, LGSW, the second forensic fellow, whose excellent research we used in this article. We deeply appreciate the excellent research and editorial work of Susan McCarty, Managing Research Fellow, and Jennifer E. Smith, Ryan H. Easley Research Fellow. We also thank Michael Bakhama for his editorial insights and edits, and Catherine Lee, a different Jennifer E. Smith, Jonathan Lim, and Ashton Zylstra for their excellent research. Finally, we express our deepest appreciation to our extraordinary partners in the project we describe in this article, including Becky Feldman and Brian Saccenti, whose leadership roles we describe *infra* notes 13 & 14, and Joanie Shreve, a social worker with the State Office of the Public Defender. *See supra* note 80. We had primary responsibility for different parts of this article, although we agree on all of the major points.

<sup>3</sup> “Clinic as laboratory” is an important but often overlooked role for clinics. As the result of the Project, many old, long-incarcerated, life-sentenced prisoners convicted of murder and rape were released from prison. Only a few have been returned to prison after more than three years. These results support challenges to over-incarceration, among other criminal justice and corrections policies and laws. *See infra* notes 17–23 and accompanying text. Several scholars have argued that the experiences of law clinics should be used to test justice theses or new legal services delivery methods. *See, e.g.,* Peggy Maisel & Natalie Roman, *The Consumer Indebtedness Crisis: Law School Clinics as Laboratories for Generating Effective Legal Responses*, 18 CLINICAL L. REV. 133 (2011); Martha F. Davis, *Institutionalizing Legal Innovation: The (Re)Emergence of the Law Lab*, 65 J. LEGAL EDUC. 190 (2015); Jacqueline St. Joan & Stacy Salomonsen-Sautel, *The Clinic as Laboratory: Lessons from the First Year of Conducting Social Research in an Interdisciplinary Domestic Violence Clinic*, 47 LOY. L. REV. 317 (2001); Gay Gellhorn et al., *Law and Language: an Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245 (1994).

<sup>4</sup> The National Institute of Corrections classifies prisoners over fifty as “aging” due to the stress of incarceration and typical lack of appropriate healthcare prior to and during incarceration. *See* JOANN B. MORTON, NAT’L INST. OF CORRECTIONS, AN ADMINISTRATIVE OVERVIEW OF THE OLDER INMATE 4 (1992), <https://static.nicic.gov/Library/010937.pdf>. All of the prisoners were over fifty. *See also* Meredith E. Young & Paul M. Brunet, *It’s About*

2013-18, we provided a range of legal services to over fifty,<sup>5</sup> and related social services to over 135. We did this in five sequential clinical law courses and a number of advanced clinical placements, and in six, year-long social work practicums and summer placements.<sup>6</sup> Three clinical law teachers, over fifty law students, a clinical social work supervisor, two forensic social work fellows, and over forty social work students participated in these courses and practices.<sup>7</sup>

We call these courses collectively “the Unger Clinic,” named for an historic Maryland Court of Appeals’ decision, *Unger v. State*.<sup>8</sup> We created the clinic to help implement *Unger* and to teach with the implementation experiences.

The Court of Appeals decided *Unger* in 2012. As the result of *Unger* and two subsequent decisions,<sup>9</sup> all Maryland prisoners who were convicted by juries before 1981 were entitled to new

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*Time: The Influence of Sociability—But Not Shyness—on the Categorization of Facial Expressions of Emotion*, 32 J. INDIVIDUAL DIFFERENCES 65 (2011).

<sup>5</sup> These legal services ranged from limited in some cases, e.g., finding records (but often a major task), conducting interviews, and assessing the cases; to more substantial services in most cases, e.g., also advising the clients, drafting and filing pleadings and attempting to negotiate releases; to the full required legal services in twenty cases, e.g., also negotiating releases and handling settlement hearings. See *infra* notes 111–113 and accompanying text (discussing the limited-scope legal services the clinic provided). See *infra* Part IV (describing the full scope of law and social services).

<sup>6</sup> The law courses have included two upper level Criminal Law Reform Legal Theory and Practice (LTP) courses, a first-year Criminal Law/Legal Theory and Practice course, two summer clinics, and eight advanced clinical placements in which the students acted as teaching assistants and “senior counsel” in cases. The differences between upper level LTP courses and clinics at the University of Maryland are matters of degree depending largely on the design of the individual professor. The variants are classroom time (usually more in LTP courses) and amount of practice experiences (usually more in clinics). Understanding that our LTP courses included substantial practice experiences, as well as substantial classroom components, we simplify our discussion by calling both the LTP courses and summer clinics the “Unger Clinic” or “clinic.” For a description of LTP courses generally, see Michael Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441 (2006); Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159 (1992); Richard Boldt & Marc Feldman, *The Faces of Law in Theory and Practice: Doctrine, Rhetoric, and Social Context*, 43 HASTINGS L.J. 1111 (1992); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Homer C. LaRue, *Developing an Identity of Responsible Lawyering Through Experiential Learning*, 43 HASTINGS L.J. 1147 (1992).

<sup>7</sup> The three law professors were Michael Millemann, Jerome Deise, and A.J. Bellido de Luna, then managing Attorney of the Clinical Law Program. The three social workers were Rebecca Bowman Rivas, Elizabeth Smith, and Angela Aloï. See *supra* note 2.

<sup>8</sup> *Unger v. State*, 48 A.3d 242 (Md. 2012) (applying retroactively a 1980 decision invalidating a jury instruction given in all criminal trials before the 1980 decision). See *infra* notes 73–78 and accompanying text.

<sup>9</sup> *State v. Waine*, 122 A.3d 294 (Md. 2015) (rejecting the State’s request that the Court reverse *Unger* or impose a “harmless error” limitation on it); *State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016) (rejecting the State’s argument that

trials. We call this “the Unger group.” The Court ordered new trials because, as grossly unfair and absurd as it may seem today, prior to 1981 State law required judges in criminal cases to instruct juries that they—*the juries*—had the ultimate responsibility *to determine the law*. Thus, judges told jurors that what they—*the judges*—said about the law was “*advisory*” only.<sup>10</sup> This instructional error was not just an erroneous application of law; it nullified the Rule of Law itself. Here is an example of an advisory-only instruction from a 1976 murder trial (with the trial judge referring to himself as “we”):

We say to you at the onset of these remarks that this is a Criminal Case and in such cases under the Constitutional Laws of the State, you ladies and gentlemen are *the judges* of not only the facts, as you are in every case, but on *the law* as well. It is your responsibility in this case to determine the facts, as you do in every case, but also *it is your responsibility to determine for yourselves what the law is*. Therefore, everything the court says to you in these remarks whether they touch on the facts or the law is *advisory upon you only*. *You ladies and gentlemen are free to find the law to be other than as the Court says it is and if they wish to do so, counsel will be permitted to argue to you that the law is other than as the Court says it is. We are going to give you our best opinion about the matter, but the final determination of it is solely in your hands.*<sup>11</sup>

This breathtaking instruction reduced to mere advice virtually all of the legal rules that should have governed criminal trials. This included the two foundations of our criminal justice: all defendants must be presumed innocent and the State must prove guilt beyond a reasonable doubt.<sup>12</sup>

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trial courts had discretion to refuse to reopen *Unger* prisoners’ post-conviction proceedings and thereby to deny them any procedural means to assert their *Unger* rights).

<sup>10</sup> This instruction was compelled by Article 23 of the Maryland Declaration of Rights, which states: “In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as fact, except that the Court may pass upon the sufficiency of evidence to sustain a conviction.” Article 23 was all but nullified, but not formally invalidated, by judicial interpretation in 1980 in *Stevenson v. State*, 423 A.2d 558 (Md. 1980). See *infra* notes 73–77 and accompanying text. Prior to 1981, the advisory-only instruction also was mandated by Maryland Rules adopted by the Maryland Court of Appeals. MD. R. 756b stated: “The court shall in every case in which instructions are given to the jury [this was all cases], instruct the jury that they are the judges of the law and that the court’s instructions are advisory only.” A subsequent rule, MD. R. 757b contained virtually identical text. A 1984 revision restructured the rule as Rule 4-325 and omitted the advisory-only jury instruction. MD. R. 4-325.

<sup>11</sup> Trial Transcript at 153–54, *State v. Jerome Chase*, No. K-75-1236 (Md. Cir. Ct. July 12, 1976) (emphasis added). There were no pattern jury instructions in Maryland until 1986. Therefore, each judge wrote his (then all judges but a few were men) own instructions informing the jury that they were ultimately responsible for determining the law.

<sup>12</sup> In this case, as well as generally in others, judges did instruct juries about the presumption of innocence and the State’s duty to prove guilt beyond a reasonable doubt, but nullified these instructions by advising the jury that its instructions were advisory. Prior to *Unger*, Maryland’s appellate courts said that there were limitations on the jury’s

The Maryland Office of the Public Defender (OPD) eventually determined that there were 237 prisoners in the Unger group. Almost all had been sentenced to life imprisonment with the possibility of parole.<sup>13</sup>

The Unger Clinic has been part of a larger project led by the OPD.<sup>14</sup> We call this “the Unger Project” and describe the other Project partners in Part II. The Project will be completed by the time this article is published. This enables us to write about the Project and clinic without fear that our words will be misused in litigation against those in the Unger group.

Integral to the success of this Project was the close and collegial collaboration of the OPD, the clinic, and other partners, all of whom contributed their experience and resources to meet the novel challenges involved in seeking relief for nearly two hundred lifers from decades-old convictions and sentences.<sup>15</sup> In particular, the social work component of the clinic, working closely with the OPD’s social work unit, has been the leader in creating an essential reentry program for the Unger group.<sup>16</sup>

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right to determine the law, e.g., it was not within the jury’s power to determine whether a statute had been repealed, *Nolan v. State*, 146 A. 268 (Md. 1929); or was unconstitutional, *Hitchcock v. State*, 131 A.2d 714 (Md. 1957); or to determine the admissibility of evidence or the competency of witnesses, *Jules v. State*, 36 A. 1027 (Md. 1897). *But see* *Guardino v. State*, 440 A.2d 1101, 1105 (Md. Ct. Spec. App. 1982) (stating these limitations were “not recognized in practice by many of the trial courts”). None of these limitations appeared in any of the instructions in our cases. In Part I.B., we discuss the history of this express jury nullification right and how over time it was rejected nationally, and finally in Maryland.

<sup>13</sup> Becky Feldman, now Deputy Public Defender of the Maryland Office of the Public Defender (OPD) and for much of the Project the Chief of the Post-Conviction Defender’s Division, has compiled the key Project data [hereinafter Feldman Data]. She provided this data and most of the factual information in this article. Although, when these sentences were imposed, life-sentenced prisoners were being paroled in significant numbers, after 1993 governors largely stopped approving paroles for lifers, effectively changing these sentences to life without parole. *See infra* Part VI.G.

<sup>14</sup> Becky Feldman, *supra* note 13, has been one of the two Project leaders. Brian Saccenti, Chief of the OPD Appellate Division, was the other. In all, over \_\_\_ assistant public defenders and \_\_\_ pro bono attorneys, the latter whom the OPD and we recruited, have represented *Unger*-eligible prisoners. This has been one of the most important OPD projects since the OPD’s creation in 1971. For a general description of the OPD’s work, see *infra* notes 79–81 and accompanying text.

<sup>15</sup> *See supra* note 14; *infra* notes 70–81 and accompanying text.

<sup>16</sup> *See infra* Part IV.C.

In this article, we describe the Project and the Unger Clinic’s work within it. We begin at the near end of this story, however, with the remarkable results of both the Project and the hard work of the Unger group and their families. As of July 1, 2018, *190 of the 237 had been released from prison*, 190 by negotiated settlement agreements that included periods of probation.<sup>17</sup> Another nine were resentenced to time served and were transferred to other prisons to serve unrelated sentences.<sup>18</sup> This is 88% of the *Unger* group.<sup>19</sup> Almost all would have died in prison but for *Unger*.<sup>20</sup>

To say those released have done well understates it considerably. On average, they have been free for more than three years. Only three have been reincarcerated (two for technical violations of probation, the third for a violation of probation based on a new conviction).<sup>21</sup> These successes

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<sup>17</sup> Feldman Data, *supra* note 13. The standard terms of the settlement agreements preserved the convictions but set aside the sentences and re-sentenced the petitioners to life in prison with all but time served suspended, resulting in immediate releases. The petitioner was placed on probation from one to five years and waived all other post-conviction rights he might have had (sometimes, but not always, preserving the right to assert actual innocence). If, after a hearing, a probationer were found to have violated probation, the judge could impose any of the suspended sentence up to and including the life imprisonment. After judges ordered new trials, the terms of the plea agreements were similar. In another form of settlement agreement, the petitioner agreed to a fixed term rather than the life sentence, making him (all of the Unger group but one were men) eligible for immediate parole or a “flat-time” release in a limited number of years. See *infra* Part IV.B.4 (explaining why we recommended these settlement agreements to our clients, why our clients accepted them, and why this was the most difficult part of giving the advice we gave).

<sup>18</sup> Feldman Data, *supra* note 13.

<sup>19</sup> Here is the complete accounting of the 237 as of August 16, 2018. Nine died before they could finally litigate or negotiate their Unger claims. One-hundred-ninety were released on probation by negotiated agreements. One-hundred-thirty-nine were released as a result of post-conviction settlements. Fifty won new trials, subsequently pled guilty and were released on parole and/or probation. Nine were released to detainers for other convictions and sentences. One was retried and acquitted. Six were retried, reconvicted or pled guilty; six of these seven were sentenced to new life sentences, no parts suspended, and one was sentenced to life with all but 100 years suspended. Six were awaiting new trials after reversals of their convictions and sentences (one or more of them may be released by plea agreements). Eleven, by agreement, pled guilty and were sentenced to terms that required additional but fixed periods of incarceration (some of them are now out). Six had pending post-conviction proceedings (one or more of them may be released by agreement). Six are pending retrials. Feldman Data, *supra* note 13. Ironically, Merle Unger, whose case established the right to a new trial, was one of those reconvicted and sentenced to life, no part suspended. See Yvonne Wenger & Ian Duncan, *Killer at Center of Prisoner Release Case Convicted Again*, BALT. SUN (July 11, 2013), <http://www.baltimoresun.com/news/maryland/crime/bs-md-unger-cases-20130711-story.html>.

<sup>20</sup> See Feldman Data, *supra* note 13; *infra* Part VI.G (describing the de facto, virtual elimination of parole for lifers in Maryland sentenced with the possibility of parole).

<sup>21</sup> Feldman Data, *supra* note 13. Neither of the technical violations caused injury to another person. The conviction was for second degree assault, with a minor injury. *Id.* In none of these cases did the judge re-impose the full suspended life sentence. See *supra* note 17. Rather, the three were given fixed terms of incarceration. None of the three had been active participants in the Unger community. See *infra* Part VI.A. When released, older prisoners generally have low recidivist rates, confirming that people “age out” of criminal activity. CAL. DEP’T CORRECTIONS & REHABILITATION, OFFICE OF RESEARCH, 2010 ADULT INSTITUTIONS OUTCOME EVALUATION REPORT 15 (2010) (citing D.A. ANDREWS

are particularly impressive because the 190 (including one acquitted after retrial) were not “cherry-picked.” Rather, they were over 84% of all prisoners in Maryland still confined in 2012 and convicted by juries before 1981.<sup>22</sup> Some had been recommended for parole; most, almost certainly, had not.<sup>23</sup> Thus, they should be generally representative of *the tens of thousands of older, long-incarcerated prisoners convicted of violent crimes across the country.*

In Part I, we offer one client’s story to show the ways in which the advisory-only instruction gave juries a wholly arbitrary and unreviewable quasi-judicial role that inevitably produced ad hoc, inconsistent and unjust verdicts.<sup>24</sup> We also briefly review the history and subsequent national rejection of the jury’s right to determine the law before 1980, and finally in Maryland in 1980.

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& J. BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (4th ed. 2006)); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 556–61 (1983) (criminal propensity tends to peak in the late-teens). Over 40% of released inmates recidivate within three years of release, compared to 7% of released prisoners who are fifty through sixty-four, and 4% who are sixty-five or older. OSBORNE ASS’N, *THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA’S AGING PRISON POPULATION* 5 (2014) (citing PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS* (2011)). These data are true for those convicted of violent crimes and sentenced to life. Dana Goldstein, *The Misleading Math of “Recidivism,”* MARSHALL PROJECT (Dec. 4, 2014); CAL. DEP’T CORRECTIONS & REHABILITATION, *supra*, at 15, 26; ROBERT WEISBERG ET AL., STANFORD LAW SCH. CRIMINAL JUSTICE CTR., *LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA* 17 (2011); Cindy Snyder et al., *Older Adult Inmates: The Challenge for Social Work*, 54 SOC. WORK 117 (2009); OSBORNE ASS’N, *supra*, at 2; HUM. RTS. WATCH, *OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES* 73, 75 (2014); ACLU, *AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* viii, 47 (2012).

<sup>22</sup> For this calculation, we omit the nine who died before they obtained final decisions on their Unger claims, reducing the relevant group to 227 (237 minus nine). See *supra* note 19.

<sup>23</sup> Because the Parole Commission does not make this information publically available, we are relying on what clients told us and information obtained in a freedom-of-information act request by a reporter. The successes are very impressive for another reason. The 190 (including the one acquitted) were released directly into the community from medium and maximum security prisons, without the reentry benefits and public safety “testing” of a step-down approach. This is because in Maryland lifers are almost all ineligible for minimum security facilities, including residential community centers and work-release programs. There is a recent and very limited exception to this, which the State created in response to litigation on behalf of lifers who were juveniles when they committed their crimes. Those inmates may now be “classified to minimum or pre-release security if the [Maryland Parole Commission] recommends that the inmate participate in ‘outside testing and/or work release.’” Md. Restorative Just. Initiative v. Hogan, No. ELH-16-1021, 2017 U.S. Dist. LEXIS 15160, at \*10 (D. Md. Feb. 3, 2017). There are no data yet about the extent to which the Commission will exercise this discretionary authority.

<sup>24</sup> This is in the nature of story-telling. Applied legal storytelling is central to law practice; “[it] is the backbone of the all-important theory of the case, which is the essence of all good lawyering.” Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING 3 (2008). In the clinic, we organized our advocacy around stories, from the theories of the prosecution and defense at trial, through the stories of redemption in our settlement memoranda. The clients’ experiences were also the context for much of our classroom teaching. See generally J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD

In Part II, we describe the Unger Project and its partners. They included not only the OPD, our clinic, and volunteer pro bono lawyers, but also a criminal justice reform organization led by an extraordinary, wrongfully convicted ex-prisoner, Walter Lomax, who was exonerated after thirty-eight years in prison. The released prisoners and their families, with the help of Lomax and the social workers and social work students, have built a free-world community.<sup>25</sup> We believe that the strength of this community has been an important reason for the released prisoners' successes.

In Part III, we explain why we created the clinic, how we structured it, why the social work component was so important, why we accepted so many cases, and what the clinic's roles were in the Project.

In Part IV, we describe the clinic's work, the challenges we faced providing legal and social services to our clients, and how we overcame those challenges.

In Part V, we offer a student perspective on the 2013 clinic.

In Part VI, we describe some of what we learned and taught about in the clinic. Each client had up to a half-century of relevant experiences, and needs produced by these experiences. Multiplied by the large numbers of clients, the collective experiences generated an extraordinary range—at times, a virtual tsunami—of educational opportunities and (for us) responsibilities. These included education in many law and social work skills and cross-cultural communication and relationships. The client experiences and classes also introduced students to professional responsibility issues (including those arising in interdisciplinary projects); reentry issues (and the holes, often gaping,

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247 (2015); Anthony G. Amsterdam, *Telling Stories and Stories about Them*, 1 CLINICAL L. REV. 9 (1994); Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing through Storytelling*, 14 CLINICAL L. REV. 509 (2008); Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271 (1998). Although all of the information in Part I is in the public domain, we acknowledge the additional privacy issues that arise in telling client's stories and have obtained express client consent to discuss the public information in this segment. *See infra* note 27.

<sup>25</sup> *See infra* Part VI.A. We use the word "community" not in the geographical sense, but instead to mean a network of shared events, friendships, and tangible and intangible support for and commitments to one another.

in reentry programs and services ); criminal justice issues (including how the purposes of incarceration have changed in the last half-century, the unreliability of old convictions, the cynical politics of parole, and the gross over-incarceration of the elderly); instrumental substantive law issues; and what we abbreviate as basic Critical Legal Studies' issues. In the last respect, our clients have experienced the powerful impacts of race, class, and politics on their lives, from arrest and conviction through decades of imprisonment.<sup>26</sup>

In the Conclusion, we describe, in retrospect, some things we would do differently if we had it to do over; discuss the potential importance of the clinic model we used, especially in responding to the civil and criminal access to justice problems that are common-place throughout the country; and explain why this has been such an important and deeply rewarding experience for our students and for us. For us, it expresses the reasons we chose our professions and is a highlight of our lives' work.

## **I. ONE CLIENT'S STORY AND THE ORIGINS OF THE JURY'S RIGHT TO DETERMINE THE LAW**

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<sup>26</sup> See *infra* Part VI.B. & E. *Id.* Race is not known for all of the Unger group members released, but for those for whom it is known, 84% are or were African Americans (eleven died after their releases). *Id.* There is no reason to believe that these data are not representative of the full Unger group. This figure is grossly disproportionate to the comparative percentages of blacks and whites arrested for homicide at the times of the Unger group's trials. See, e.g., RACE, CRIME, AND JUSTICE: A READER 246 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (discussing historical homicide offending rates by race and citing many studies conducted on the matter during the time frame in question). See also FBI UNIFORM CRIME REPORT 117 (1965) (showing the total number of homicide arrests by race in the year 1965, and indicating that while there were 4648 arrests of white persons for criminal homicide that year, there were only 4245 arrests of black persons for homicide that year). For interesting reading on the racial and ethnic disparities in crime and the criminal justice system in the United States, see AM. SOCIOLOGICAL ASS'N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM (2007).



### A. *Bobby's Story*<sup>27</sup>

There are many common themes in our clients' stories.<sup>28</sup> Bobby's case presents some of them and is a particularly good—meaning awful—example of the application of the jury's right to determine the law.

In 1977, Bobby, then fifteen years old and in the ninth grade, shot and killed his grandfather. He believed, reasonably we think, his grandfather was going to kill him.<sup>29</sup>

Bobby's father left home when he was a child and his mother died in a mental institution.<sup>30</sup> Several months before the shooting, Bobby's grandmother had brought him and his younger sister to Caroline County (on Maryland's Eastern Shore) to remove him from the dangers of Baltimore City.<sup>31</sup>

At trial, Bobby admitted shooting his grandfather. He testified that the grandfather, who was

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<sup>27</sup> All of the facts in this part are from public documents, the transcript, and filed settlement agreement in this case. We tell this story, however, mindful of the ethical principles governing storytelling. Consistent with respect for the client's privacy, we have asked for his permission to include this segment and he has agreed. A basic requirement of academic storytelling, obviously, is that the statements of facts in the story must be true. We hold ourselves to the same high standard in this respect that lawyers have in making statements of facts to tribunals. *See generally* Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000); Tarr, *supra* note 24, at 271.

<sup>28</sup> The disturbing common features of the clients' stories include the effects on convictions and sentences of race bias, Part VI.B., the cursory nature of many trials, Part VI.D., the lack of any, or of minimally adequate, sentencing hearings, Part VI.D., the de facto virtual elimination of parole, Part VI.G., and the significant reduction or elimination of rehabilitative programs, Part VI.E. There also were positive and inspiring common stories of redemption and personal growth in the clients' stories. The majority of our clients obtained their GEDs in prison, a number obtained college degrees, and some masters' degrees. The college and masters' education was funded by Federal Pell Grants until Congress disqualified prisoners from receiving them in 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 20411, 108 Stat. 1796, 1828 (1994) (codified at 20 U.S.C. § 1070a(b)(6) (2012)) (amending the Higher Education Act of 1965 to eliminate Pell Grant eligibility for prisoners incarcerated in a state or federal penal institution). This education likely has contributed to the low recidivism rate. *See* Ryang Hui Kim & David Clark, *The Effect of Prison-Based College Education Programs on Recidivism: Propensity Score Matching Approach*, 41 J. CRIM. JUST. 196 (2013). Many did exemplary work in prison jobs and vocational training programs and participated in and helped to create a variety of programs, particularly programs for at-risk youth. This was especially true in the 1960s and 1970s when prisons were more open to the public. The majority had excellent disciplinary records, with many having no, or only a few, minor infractions in the last fifteen-to-twenty years of their incarcerations.

<sup>29</sup> Trial Transcript, *State v. Martin*, Caroline County, Case No. 1040 (1977) [hereinafter Trial Tr.].

<sup>30</sup> Sentencing Transcript, *State v. Martin*, Caroline County, Case No. 1040 (1977) at 5–6 [hereinafter Sentencing Tr.].

<sup>31</sup> *Id.* at 6.

an alcoholic and abusive when drunk, “beat . . . slapped, [and] whipped” him “practically all the time [Bobby] was living with him,”<sup>32</sup> causing physical injuries, including bruises to his face,<sup>33</sup> and that his grandfather also beat Bobby’s mother (the grandfather’s daughter) and Bobby’s grandmother (the grandfather’s wife).<sup>34</sup> The grandmother strongly corroborated Bobby’s testimony.<sup>35</sup>

On the day before the shooting, the grandfather accused Bobby of stealing his ring. When Bobby denied taking it (the truth), the grandfather hit Bobby in the face.<sup>36</sup> Upon returning home from school the next day, Bobby and his sister found a note from the grandfather that said: “Bobby put my Ring Back or I’ll Kill you.”<sup>37</sup> Bobby had no ring to give back and both he and his younger sister testified they believed that their grandfather would deliver on this threat.<sup>38</sup>

Bobby testified that he retrieved the grandfather’s shotgun from the closet, did not load it or check to see whether it was loaded, and, because he was sure he would be killed if he did nothing, pulled the trigger when the grandfather arrived home from work that evening.<sup>39</sup>

Following the close of evidence, the trial court instructed the jury that they were the judges of the law, directing them to “*apply your own minds in a conscientious manner* to determine what the law of Maryland is relative to the facts in this case,” to “*apply your common sense* to what you may already know the law to be . . . in cases such as this, and to what the counsel and the Court

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<sup>32</sup> Trial Tr. at 213–14.

<sup>33</sup> *Id.* at 214.

<sup>34</sup> *Id.* at 215–16.

<sup>35</sup> The grandmother testified that her husband “used to hit Bobby all the time,” and would “take [a] gun out” from his collection of guns and rifles, when he was drunk and abusive. She said that Bobby “would always listen” and “never argued with [the grandfather]” and “never said a word,” but instead would “just stand there” and take it when the grandfather was physically abusing him. The grandmother often left the grandfather for periods after he beat her. Tragically, she left immediately before Bobby shot the grandfather, removing Bobby’s only protector from the home. Trial Tr. at 218, 277–79.

<sup>36</sup> *Id.* at 218–21.

<sup>37</sup> *Id.* at 109, 113, 174–75, 224–25.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 226–27.

tell you the law is.”<sup>40</sup> To “reach this determination [of the law],” the judge added, “you may consider what the judge has to say on the subject [and] what the attorneys for both sides have to say,” and the attorneys “may read and argue the law to you in their forthcoming addresses.”<sup>41</sup>

In effect, the jury was to act as an appellate court, to determine the law from the judge’s instructions and from the competing legal arguments of the lawyers, including those that directly contradicted what the court said. But this was like a court in a totalitarian country, without legal training and not required to consider and apply precedent or to write an opinion in which it announced and justified its legal decisions, and whose legal rules were not subject to review.

The prosecutor in Bobby’s case asked the judge for an “overt act” self-defense instruction based on *out-of-state* law. He contended that use of deadly force was not justified unless the victim engaged in an overt act immediately before the killing.<sup>42</sup> The judge properly refused to give this instruction because there was not then, and is not now, a requirement in Maryland law that a victim must make a threatening overt act immediately before one can lawfully use deadly force.<sup>43</sup>

Nevertheless, without objection, the prosecutor asked the jury in his closing argument to adopt the “overt act” rule that the court had rejected, and in support, read to them from various judicial opinions, including *from Pennsylvania and California*, and quoted from *Wharton’s Criminal Law*.<sup>44</sup> He asked the jury, as the judge of the law, to impose this “common sense” requirement in Bobby’s case,<sup>45</sup> echoing the judge’s instruction that the jurors should “apply [their] common sense

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<sup>40</sup> *Id.* at 309–10. (Emphasis added.)

<sup>41</sup> *Id.* at 310.

<sup>42</sup> *Id.* at 322–23.

<sup>43</sup> *See, e.g.,* *Guerriero v. State*, 132 A.2d 466, 467 (Md. 1957); *Gunther v. State*, 179 A.2d 880, 882 (Md. 1962).

<sup>44</sup> Trial Tr., at 335–42.

<sup>45</sup> *Id.* at 324–47.

. . . to what *the counsel* and the Court *tell you the law is.*<sup>46</sup> Applying this “common sense” guideline, the jurors were invited not only to adopt a new (for Maryland) rule of self-defense, but also allowed to rethink our most hallowed rules of criminal procedure.

The trial took two days.<sup>47</sup> Bobby is an African-American; the jury likely was all or disproportionately white.<sup>48</sup> Defense counsel did not present any expert testimony on Bobby’s mens rea, although prison testing revealed Bobby was functioning at the time at a fourth grade level.<sup>49</sup> Nor did defense counsel assert a “battered child” defense<sup>50</sup> or imperfect self-defense, which, if accepted, would have resulted in a manslaughter conviction and a ten-year (maximum) sentence.<sup>51</sup> These were defenses that courts outside of Maryland had recognized by 1977 and Maryland’s highest court would recognize after Bobby’s trial.<sup>52</sup>

The jury was out sixty-eight minutes before convicting Bobby of first-degree murder.<sup>53</sup>

At sentencing, the court heard very brief arguments from counsel (less than four pages in the transcript), and wrongly stated, with no objection from defense counsel, that its only sentencing option was either to impose a life sentence with no part suspended or to fully suspend the sentence and place Bobby on probation.<sup>54</sup> The Maryland Court of Appeals, however, one year before Bobby’s trial, had specifically held that there was no such all-or-nothing sentencing requirement for murder in Maryland law and sentencing courts could suspend as much or as little of a life

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<sup>46</sup> *Id.* at 310. (Emphasis added.)

<sup>47</sup> *Id.* at 1–365. The trial began at 10 AM, April 25, 1977 and concluded in the evening of April 26, 1977.

<sup>48</sup> *See infra* Part VI.B.

<sup>49</sup> Trial Tr. at Index & Exhibits; Sentencing Tr. at 6–7. Defense counsel asked for a pretrial psychiatric examination, and the judge granted the request.

<sup>50</sup> In 2004, the Maryland Court of Appeals recognized the right of defendants to introduce evidence of “battering” as a child in murder prosecutions. *State v. Smullen*, 844 A.2d 429 (Md. 2004).

<sup>51</sup> In 1984, the Maryland Court of Appeals recognized this partial defense to murder, reducing murder to manslaughter. *State v. Faulkner*, 483 A.2d 759 (Md. 1984).

<sup>52</sup> *State v. Faulkner*, 301 Md. 482 (1984) (imperfect self-defense); *State v. Smullen*, 380 Md. 233 (2004) (battered child defense).

<sup>53</sup> Trial Tr. at 361.

<sup>54</sup> Sentencing Tr. at 14.

sentence as they wished.<sup>55</sup> Defense counsel, like the court, did not know about this decision, and did not call any witnesses or make a substantial argument at sentencing in a case that cried out for sentencing advocacy. His representation was patently ineffective.<sup>56</sup>

The trial judge ordered the fifteen-year old Bobby and his lawyer to stand for delivery of the sentence and began by saying: “There is no higher crime known since before the Bible” than “taking another’s human life.”<sup>57</sup> To emphasize this biblical point for the courtroom observers, he said: “we mentioned the Bible,”<sup>58</sup> clearly indicating that the Bible was a basis of his sentence.

Speaking to Bobby, the judge listed what should have been strong mitigating factors: “Your father left your mother when you were about two years old,” “your mother died in an insane asylum,” and “we sent you to [a forensic facility for a sanity evaluation],” where they found “you were mentally competent” but “of dull to normal intelligence.”<sup>59</sup> The judge then asked Bobby: “Is there anything you would like to say before we . . . sentence you?”<sup>60</sup> Bobby struggled to answer, obviously unprepared, asking the court to consider “the good stuff” in his life.<sup>61</sup> After Bobby made many false starts and stops,<sup>62</sup> the judge, in apparent frustration at the now crying fifteen-year old defendant, asked “would someone give him a Kleenex.”<sup>63</sup> Without recessing so Bobby could stop crying, the judge sentenced Bobby to life imprisonment, observing, wrongly again and without a word from defense counsel, that “[t]he court has no [sentencing] choice” other than this.<sup>64</sup>

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<sup>55</sup> *State v. Wooten*, 352 A.2d 829 (Md. 1976). The significant majority of the defense lawyers in our clients’ cases were unaware of *Wooten* as well.

<sup>56</sup> *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003) (finding failure of defense counsel to investigate and present mitigating evidence at sentencing was ineffective assistance of counsel).

<sup>57</sup> Sentencing Tr. at 5.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 5–7.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* Bobby only had a minor juvenile adjudication and otherwise had led a good life in school and outside as a child.

<sup>62</sup> Represented by a number of ellipses in the transcript. *See* Sentencing Tr. at 7–9.

<sup>63</sup> *Id.* at 14.

<sup>64</sup> *Id.* at 14. *See State v. Wooten*, 352 A.2d 829 (Md. 1976).

There are less than seventeen pages of sentencing hearing transcript in this case. It likely took less than forty-five minutes.

Bobby came to us *thirty-six years later* in 2013. He was then fifty-one years old. In his settlement agreement, which the trial court approved in 2013 releasing him, the State stipulated to the following facts:

Petitioner has an excellent prison record. He has been infraction-free for the past decade. While in prison, Petitioner has made great strides in his education. At the time of the crime, he was attending the 9th grade. At intake, the results of a grade equivalency test showed that he was functioning at an overall 4.4 grade level. Since then, he has received his high school diploma; earned 15 credits from the Community College of Baltimore; and earned an additional 51 credits at the University of Maryland, Eastern Shore. He would have received a college degree, but in 1994, when Congress repealed Pell Grants for prisoners, he could no longer take college courses.

Petitioner has also been extremely active in various programs while in prison. In addition to working jobs in wood shops, sanitation, and institutional laundry, he has completed basic training courses in carpentry, masonry, welding, and mechanical drafting, and has worked in the electricity shop and the sheet metal shop.

Supervisors and teachers have praised his work, e.g., he “has always gone out of his way to be helpful and has never refused to assist anyone who asked for his help” (Director of the Halfway House at Patuxent Institution, where Petitioner worked on the sanitary detail); “He came to class well prepared, participated in all class discussions and activities, and scored well on quizzes and tests;” and, he “was an outstanding student with an interest in educational growth. The student was well-liked and an asset to the slow learner.” (From Reports of Student Progress).

He also completed an Alternatives to Violence workshop; was a leader in starting a Lifer’s group at ECI; in the early 1990s, volunteered as a Jessup Jaycee (at the then Maryland House of Correction); participated in the Reason Straight Program (at Patuxent Institution); completed a Counseling Training Program; and has participated in Narcotics Anonymous as a program facilitator and various Social Work Programs, where he has worked on problem solving, decision-making, and communication skills.<sup>65</sup>

Bobby was discharged from probation in 2016 and now is living in Baltimore City.

### ***B. An Abbreviated History and Rejection of the Jury’s Right to Determine the Law***

One of the first student questions was where did this bizarre right of the jury to determine the law come from. The “principal theories” are that it came from “the [colonialists’] fear of tyrannical

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<sup>65</sup> Joint Settlement Agreement at ¶ D, *Martin v. State*, Caroline County, Case No. 1040 (Oct. 29, 2013).

Crown judges, the large number of judges without legal training, and the capacity of a highly democratic tribunal, such as a jury, to decide matters, legal as well as factual, in small agricultural communities.”<sup>66</sup> Specifically, the jury was viewed as “an obstacle to oppressive government” and as such “unquestionably ha[d] jurisdiction of both fact and law.”<sup>67</sup> Also, there was pervasive distrust of English law, a widespread belief in natural law, and a commitment to the sanctity of individual conscience.<sup>68</sup> These factors explain why fifteen states—nine by constitutional provision or statute and six by common law rule—adopted provisions and rules making juries judges of law.<sup>69</sup>

The history, however, does not explain why the jury’s right to determine the law survived so long in Maryland. By the end of the eighteenth century there was a United States government, a Federal Constitution, democratically elected federal and state legislatures, and an American rule of law. There were no Tory judges, and the judges, even those who were elected, had considerable independence. In response to these dramatic changes, federal and state courts throughout the nineteenth-century rejected the legal right of juries to determine the law.<sup>70</sup>

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<sup>66</sup> *Wyley v. Warden*, 372 F.2d 742, 746 (4th Cir. 1967). See generally DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* (2016).

<sup>67</sup> THE FEDERALIST NO. 81 (Alexander Hamilton); HALE, *supra* note 66, at 114.

<sup>68</sup> See Jenny E. Carroll, *The Jury’s Second Coming*, 100 GEO. L.J. 657, 673 (2012) (“[A]llowing jurors to weigh both law and fact would have been consistent with many of the Founders’ . . . notions of law. Natural law was the dominant theory du jour. Under this theory, law was not handed down but embodied in each man. Each person’s common sense and conscience was as legitimate a legal compass as a judge’s edict or precedent.”).

<sup>69</sup> Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1157–58 (2011). See also Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989).

<sup>70</sup> In 1835, Justice Story, sitting as a Circuit Court trial judge, told the jury that it was “the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law . . . . This is the right of every citizen; and it is his only protection.” *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545). Justice Story further explained:

If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the jury, actually was.

*Id.* In 1895, the Supreme Court agreed. *Sparf v. United States*, 156 U.S. 51 (1895). After observing that whether the jury was bound by the judge’s instructions had not been “concluded by any direct decision of this court,” the Court held that a judge’s instructions in federal criminal cases were binding. *Id.* at 64. Quoting Mr. Justice Curtis, the Court said that the “power and corresponding duty of the court, authoritatively to declare the law, is one of the highest

By 1967, every jurisdiction but Maryland had rejected or severely restricted the legal right of juries to determine law.<sup>71</sup> Maryland's failure to reform the law was especially relevant in our clinic, called "Criminal *Law Reform*/Legal Theory and Practice."<sup>72</sup> The answers to the "why so long" question appear to be the State courts' uncritical allegiance to history and precedent, and near the end, their adherence to a dying conception of state's rights in our Federalism.

The U.S. Supreme Court's decision in *In re Winship* in 1970 imposing the Constitutional requirement that states prove guilt beyond a reasonable doubt, should have been the end.<sup>73</sup> Telling juries that the judges' instructions were just good advice was no longer constitutionally possible.

It was not until 1980, however, in *Stevenson v. State*, that the Maryland Court of Appeals concluded that the unqualified forms of the instruction were unconstitutional and prohibited such instructions in future trials.<sup>74</sup> The Court denied *Stevenson* relief, however, in a hyper-technical

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safeguards of the citizen." *Id.* at 107 (quoting *United States v. Morris*, 26 F. Cas. 1323, 1336 (C.C.D. Mass. 1851) (No. 15,815)). The *Sparf* Court added that if "the jury in criminal cases are not bound to take the law from the court, it is impossible to deny their absolute right in a case depending entirely upon an act of Congress, or a statute of a State, to determine, upon their own responsibility, whether that act or statute is or is not law, that is, whether it is or is not in violation of the Constitution." *Id.* at 71–72.

<sup>71</sup> See *Wyley v. Warden*, 372 F.2d 742, 747 (4th Cir. 1967) ("Among the fifty states, Maryland and Indiana today stand alone in their adherence to [the right of juries in criminal cases to determine the law]. Even Indiana has substantially attenuated its provision by judicial modification, holding as early as 1889 that a trial court in a criminal case 'is not required to neutralize the effect of its instructions by telling the jury that they are at liberty to disregard them, and to decide the law for themselves.'") (citing *Bridgewater v. State*, 55 N.E. 737, 739 (Ind. 1899) (The *Wyley* court mistakenly cited the date of *Bridgewater* as 1889.)). We observe, however, that the Indiana judicial limitation would not preclude *Unger*-like challenges to trial instructions if they gave juries broad rights to disregard the law.

<sup>72</sup> See *Slansky v. State*, 192 Md. 94 (Md. 1949); *Beard v. State*, 71 Md. 275 (Md. 1889). In addition, it likely was important to the continuation of the practice, if not the origins, that it was criminal trials, not civil trials, in which juries were being directed to determine the law. It is hard to imagine this delegation of responsibility surviving long in, let's say, major commercial litigation in which millions of dollars were at stake. The low status of criminal defendants, and the class and race of many, by comparison, likely contributed to the endurance of the archaic practice.

<sup>73</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>74</sup> *Stevenson v. State*, 423 A.2d 558 (Md. 1980). In *Stevenson*, the Court held that a judge in a criminal trial may instruct the jury that instructions about the law are advisory only with respect to the "law of the crime," for example, the elements of a crime, and "the legal effect of the evidence," i.e., whether it satisfies the proof-beyond-a-reasonable-doubt test. *Id.* at 564. (The latter, however, appears to be an application of law to facts, not a determination of law.) As to all other points of law, such as, the presumption of innocence and State's burden of proof beyond a reasonable doubt, the judges must instruct the jury that the judge's instructions are binding. *Id.* at 565. Failure to do so violates a defendant's right to due process guaranteed by the Fourteenth Amendment of the United States Constitution. *Id.* at 569–70. In *Unger*, the Majority questioned whether the narrow exception in *Stevenson* allowing juries to determine legal issues related to the law of the crime was constitutional, but did not resolve the issue. *Unger v. State*, 48 A.3d



analysis that was plainly result-driven. The Court held that although defense counsel had objected to the advisory-only instruction and proposed a substitute instruction, the proposed instruction was inaccurate, so defense counsel had waived Stevenson’s challenge to the advisory-only issue.<sup>75</sup>

None of the defense lawyers in our fifty-six trials had even objected to the advisory-only instructions. They accepted them, in major part, because the Court of Appeals had upheld them over many years.<sup>76</sup> This instruction simply had become an article of faith, not logic, in criminal trials. Among the first lessons of the clinic, rooted in this—many would say shocking—history, was the lawyer’s need to rethink and challenge accepted laws that are archaic no matter how deeply entrenched they may be.

For over three decades, Maryland courts applied the waiver holding in *Stevenson* to refuse to consider post-conviction challenges to advisory-only instructions by some of the 237.<sup>77</sup>

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242, 246 (2012). As a practical matter, there are few if any “law of the crime” issues left unresolved, and for those that are, there is no logic, as the Court in *Unger* suggests, in remitting those to the jury for decision.

<sup>75</sup> *Stevenson*, 423 A.2d at 560–61. The result that the Court likely wished to avoid was having to consider whether *Stevenson* should be applied retroactively, possibly requiring hundreds of new trials.

<sup>76</sup> *See Unger*, 48 A.3d at 249. Some might argue that defense counsel may not have objected to the right of juries to determine the law because that right played to the advantage of some defendants, especially those who had “equitable” facts and defenses not accepted by the law. All of the factors in our cases, however, pointed to harsher, not more forgiving, outcomes from the right of juries to determine the law. The substantial majority of our clients were convicted of murder. These were not, e.g., “symbolic speech” trespassers on the property of an unpopular government to express popular messages. Instead, there was a violent act (or acts), an almost always sympathetic dead victim, and usually grief-stricken survivors. Also, juries would have included people who, before they were selected, had skepticism about some core rights, especially some of those the Warren Court was contemporaneously recognizing in its very public and controversial “Criminal Law Revolution.” *See, e.g.*, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-1977 (Bureau of Nat’l Affairs ed., 1978); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968). (Millemann remembers growing up in Oregon, and when traveling through California, saw many highway signs urging passers-by to “Impeach Earl Warren.”) The advisory-only instructions, reinforced by prosecutors’ pleas to juries to apply their “common sense,” invited these skeptical jurors to apply their own rules, perhaps just silently and individually. In addition, the times in which these trials of overwhelmingly black Unger defendants by all-white or disproportionately white juries took place were racially charged. *See infra* Part VI.B. These juries would not have been inclined to remake the laws in the favor of black homicide defendants. In sum, the tactical reasons to object to the advisory-only instructions in our cases were compelling.

<sup>77</sup> The one brief exception to this was the Court of Special Appeals decision in 2006, foreseeing *Unger*, when it rejected the waiver argument. *State v. Adams*, 912 A.2d 16 (Md. Ct. Spec. App. 2006). However, the Court of Appeals reversed this holding in 2008. *State v. Adams*, 958 A.2d 295 (Md. 2008).

In 2012, the Court in *Unger* reversed field, overruling all or parts of three prior opinions.<sup>78</sup> It reaffirmed *Stevenson*'s holding that broad advisory-only instructions are unconstitutional. More important, it held that the past failures of defense counsel to object did not bar today's challenges to the instructions and that *Stevenson*'s prohibition of these instructions applied retroactively.<sup>79</sup> These holdings led to the Unger Project and our decision to establish the Unger Clinic.

## II. THE UNGER PROJECT

After the *Unger* decision the OPD created an Unger "team;" compiled an "*Unger*-eligible List" and sent questionnaires to those prisoners on it (OPD updated that list continually); assigned OPD lawyers and social workers to some prisoners on the list;<sup>80</sup> developed a template for the essential pleading (a motion to reopen post-conviction proceedings, which we simplify as "PC motion");<sup>81</sup> began to try to locate the documents in these old cases; and filed and litigated the initial PC motions. When judges denied the motions, which a number did, OPD filed applications for leave to appeal and handled the appeals.<sup>82</sup> OPD lawyers won some PC motions, however, and the early successes opened the door to negotiations, especially in Baltimore City.

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<sup>78</sup> *Unger*, 48 A.3d at 261 (stating "[t]hose portions of the Court's *Stevenson*, *Montgomery*, and *Adams* opinions, holding that the interpretation of Article 23 in *Stevenson* and *Montgomery* was not a new State constitutional standard, were erroneous and are overruled.").

<sup>79</sup> *Id.* at 261.

<sup>80</sup> The OPD social work leaders have been Lori James-Townes, Director of Social Work, Leadership and Program Development, and Joanie Shreve, who manages the provision of social services for the appellate and post-conviction divisions.

<sup>81</sup> The word "template" is misleading. This was not a simple fill-in-the-box form. Instead, it was a comprehensive motion and integrated memorandum of law. It was a framework by which we organized and taught about post-conviction and criminal law in the courses. If we had never represented a single client, we could have taught a good post-conviction course using the contents of the template as an outline.

<sup>82</sup> Appeals from post-conviction proceedings are by leave of the Court of Special Appeals, Maryland's intermediate appellate court. MD. CODE ANN., CRIM. PROC. §7-109.

The second major Project partner has been the Maryland Restorative Justice Initiative<sup>83</sup> and its Executive Director, Walter Lomax. At our request, he also chaired the Unger Project Advisory Committee, comprised of representatives of programs that had roles in providing reentry services.

In 1968, Mr. Lomax was wrongly convicted of felony murder. He spent thirty-eight years in prison until released by court order in 2006.<sup>84</sup> He was formally exonerated in 2014.<sup>85</sup> He was a leader in prison and knew many in the Unger group in prison and their families. He has been a Project leader, including as a teacher, mentor, counselor, friend and occasional “Dutch uncle” to those released.

Our clinic has been a third Project partner.<sup>86</sup>

The Project has evolved in response to the reactions of trial courts, prosecutors, and the State to *Unger*. When it was decided, we and the OPD believed *Unger* required new trials for all prisoners whose juries were given the advisory-only instructions. Because the instruction was mandatory and given in all criminal trials before 1981,<sup>87</sup> this meant, we believed, all prisoners convicted by juries before 1981 were entitled to new trials.<sup>88</sup> From 2012 through 2016, the Unger Project

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<sup>83</sup> This also is a project supported by the Open Society Institute-Baltimore.

<sup>84</sup> In the 2006 Opinion, Judge Gale E. Rasin found that Mr. Lomax’s trial and post-conviction lawyers had been ineffective. *See* Order Granting Reopening, Granting Post Conviction Relief, and Issuing a New Time-Served Sentence, Lomax v. State, Post Conviction No. 4936, (Md. Cir. Ct. Dec. 19, 2006).

<sup>85</sup> The Conviction Integrity Unit of the Baltimore City State’s Attorney’s Office conducted its own investigation, discovered extensive evidence of innocence that had never been provided to the defense, and consented to the entry of an Order of Actual Innocence. *See* Order of Judge Charles Peters granting Petition for Writ of Actual Innocence, Lomax v. State, No. 1754-56 (1968 Docket) (Md. Cir. Ct. Apr. 2, 2014); Maryland State’s Answer to that Petition, Lomax v. State, No. 1754-56 (1968 Docket) (Md. Cir. Ct. Apr. 2, 2014). When the judge exonerated Lomax on April 2, 2014, Lomax turned to his sister in the third row of the audience and said “the best is yet to come.” Personal observation of Michael Millemann. For more information about Mr. Lomax, see *Walter Lomax*, OPEN SOC’Y INST. – BALTIMORE, <https://www.osibaltimore.org/author/walterlomax/> (last visited July 5, 2018).

<sup>86</sup> We and the OPD recruited over twenty private pro bono attorneys to represent Unger petitioners, and they have provided essential legal assistance as well. At our and OPD’s request, an outstanding private, pro bono lawyer, Andrew D. Levy, argued for one of the Unger group in *Waine v. State*, *supra* note 9, in which the State sought to reverse or seriously limit *Unger*. He did an outstanding job and his client (for all of the still-confined Unger clients) won. *Id.*

<sup>87</sup> *See supra* note 10.

<sup>88</sup> In late 1980, the Maryland Court of Appeals prohibited future such instructions. *Stevenson v. State*, 423 A.2d 558 (Md. 1980). *See supra* notes 73–77 and accompanying text.

pressed and eventually won the right-to-new-trial argument over the protracted opposition of many prosecutors in trial courts, and of the State in the two post-*Unger* Court of Appeals' cases.<sup>89</sup>

The legal right that was established was to a new trial, not to release. At that new trial a prosecutor could introduce the original trial-transcribed testimony of any State witnesses who had died or were otherwise unavailable.<sup>90</sup>

Over the more than six years since *Unger* was decided, however, prosecutors have retried only eight of these cases, obtaining new convictions in seven. (There was an acquittal in one retrial.<sup>91</sup>) Over time, most prosecutors came to see that there simply was no public safety reason to re-prosecute the vast majority of these old crimes. That would have diverted scarce resources from the prosecutions of today's crimes, including murder, in which there are real threats to public safety.

In addition, prosecutors doubted that they could win convictions in some cases even with use of the trial transcripts. It was the modern rules of criminal procedure that applied in the retrials, not the old, more prosecution-favorable rules,<sup>92</sup> and the juries sitting in the retrials would not be all, or disproportionately, white.<sup>93</sup>

So over time, prosecutors and defense counsel have negotiated the releases on probation of 190 *Unger* petitioners.<sup>94</sup> As trial courts approved the settlement agreements, the prisoners, often in small groups, periodically were released.

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<sup>89</sup> See *supra* note 9.

<sup>90</sup> This is an exception to the hearsay rule. See MD. R. EVID. 5-804.

<sup>91</sup> Feldman Data, *supra* note 13; *supra* note 19.

<sup>92</sup> See Part VI.D.

<sup>93</sup> See Part VI.B.

<sup>94</sup> See *supra* note 19. In Baltimore City, prosecutors took the lead, and began negotiating settlement agreements within six months of the *Unger* mandate, after City judges granted several petitioners new trials. Other prosecutors flatly refused to negotiate releases, some for four years or more, and sought leave to appeal the cases they lost. They agreed to negotiate releases only after the Court of Appeals reaffirmed *Unger* in 2015, and in 2016 made it clear that trial judges did not have discretion to refuse to reopen the post-conviction proceedings of prisoners asserting *Unger* claims. *State v. Waine*, 122 A.3d 294 (Md. 2015); *State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016).

### III. THE UNGER CLINIC

#### A. Why We Created the Unger Clinic and Through It, Assumed a Substantial Role in the Unger Project

We created the clinic to help the OPD respond to the extraordinary needs for legal and social services that the *Unger* decision produced and to take advantage of the rich educational opportunities the Project offered.<sup>95</sup> We knew from past involvement in teaching with prisoner cases (including capital cases) that the experiences would challenge stereotypes and help students learn important, and for some transformative, lessons about themselves and the professions they would be entering.<sup>96</sup> That the clients would be old lifers, many of whom had given up hope of ever being released, presented special challenges and wonderful opportunities for us and the students, but especially for the social workers and social work students.

In 2012, on average, those in the Unger group were in their early sixties (fifty-two to eighty), and had been locked up for over thirty-five years (thirty-three to sixty).<sup>97</sup> The substantial majority

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<sup>95</sup> In Part VI, we summarize what we learned and taught through the clinic. We anticipated many, but not all of the extraordinary educational opportunities of the clinic.

<sup>96</sup> Many of our teaching goals were expressed in the 2007 Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law*, including teaching with “the rich complexity of actual situations that involve full-dimensional people,” “think[ing] through the social consequences or ethical aspects of” cases, and responding to “students’ desire for justice, moral concerns, and compassion.” WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 21 (2007). The Report recommends that courses integrate doctrine and analysis, lawyering skills, and the exploration of professional identity and values, and feature faculty collaboration to “produce such integrative results in students’ learning.” *Id.* at 19. We sought to do these things in the Unger Clinic.

<sup>97</sup> Feldman Data, *supra* note 13. The oldest of the 237 was Charles Edret Ford, an African-American convicted of murder in 1952 in Charles County, Maryland. He was eighty-four when he was released on March 23, 2016. He always maintained his innocence. See Joseph Norris, *Man Free at Last After 64 Years in Prison*, THE BAYNET.COM (Mar. 24, 2016), <http://www.thebaynet.com/articles/0316/manfreeatlastafter64yearsinprison.html>. Ford’s lawyer “said that due to [a news] article [about the case], Ford has reconnected with a great-niece in Washington, D.C. She is attempting to get a bed for her great-uncle in a nursing home close to where she lives.” *Id.* As the judge ordered Ford released, “Ford began to weep openly in the courtroom . . . tears of joy.” *Id.* At an earlier hearing, Ford’s defense counsel said: “When Mr. Ford went to prison I was in first grade. He was judged by an all-white jury. His attorney . . . was not a trial lawyer. He had alibi witnesses who weren’t called. The two witnesses who did testify contradicted each other. . . . The only reason they gave him a life sentence is because it was a black on black crime. . . . If it had been black on white, he would have gotten the death penalty. This was the South. To say he had a fair trial, it simply is not true.” Joseph Norris, *Man Imprisoned for 64 Years Released to Nursing Center*, THE BAYNET.COM (Dec. 19, 2015), <http://www.thebaynet.com/articles/1215/man-imprisoned-for-64-years-released-to-nursing-center.html>.

were convicted of murder, many of felony murder; the others of sexual offenses.<sup>98</sup> All but one were men.<sup>99</sup> A grossly disproportionate number, over 80%, were African-Americans.<sup>100</sup> Many had been teenagers when arrested for their crimes.<sup>101</sup> Some had grandchildren as old as our students. Some had great grandchildren.

Deciding to create *an Unger Clinic*, of course, did not predetermine the nature or structure of the clinic. Several additional decisions did. The first was to make the clinic interdisciplinary, combining social and legal work and education. This was critically important in ways we did not fully anticipate.<sup>102</sup> The second was to adopt the legal theory and practice model for the law courses.<sup>103</sup> The third was to take on major client responsibilities.

The last led to our longer-term commitment to the Project. How long? This was impossible to say at the beginning. We could not accurately predict how implementation of *Unger* would unfold, how long it would take, and what would be necessary to fully implement it. We knew that all trial judges would not agree on what *Unger* meant. It left open legal issues that we thought had clear answers, but that would not be fully resolved for four years.<sup>104</sup>

We also did not know how prosecutors would react to *Unger*. We thought then, and the post-*Unger* experiences have confirmed, that the State had no public safety justification to retry the vast

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<sup>98</sup> Feldman Data, *supra* note 13. Maryland has strict liability rules for felony murder that make a minor accomplice as guilty as one who kills with his own hand. *See, e.g., Watkins v. State*, 744 A.2d 1 (Md. 2000) (finding an accomplice to the felony is guilty of murder when a co-felon kills another in furtherance of the felony even if the accomplice could not reasonably have foreseen the killing).

<sup>99</sup> Feldman Data, *supra* note 13.

<sup>100</sup> *Id.* *See supra* note 26.

<sup>101</sup> Approximately one-fifth were incarcerated before the age of twenty-one. Feldman Data, *supra* note 13.

<sup>102</sup> *See infra* Part II.B.

<sup>103</sup> *See supra* note 6. We discuss this more fully in Part III.C. In short, the LTP model gave us an additional classroom hour and added classroom depth for the analysis of the many issues that arose. *See infra* Part VI.

<sup>104</sup> These included whether the *Unger* new trial right would be limited by the laches and “harmless error” doctrines. *See State v. Waine*, 122 A.3d 294 (Md. 2015) (answering “no” to both questions). These also included whether prisoners would be entitled as of right to reopen long-ago concluded post-conviction proceedings to assert their *Unger* claims. *See State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016) (answering “yes,” it was a right, not a discretionary decision of the judge).

majority of these old cases. We knew, however, some prosecutors would disagree, and a few might see this as a good opportunity to talk tough about “murderers” and “rapists,” even ones getting around in wheelchairs or with walkers.<sup>105</sup> Thus, we could not anticipate how many retrials there would be and how many lifers would be released through negotiations or acquittals after retrials.

We did know two things, however. This was an once-in-a-lifetime opportunity to help many old lifers get out of prison, and with this work, we could teach a broad array of important things about law and social work.

Indeed, we knew that the uncertainties about *Unger*, themselves, would provide important educational opportunities as well as challenges. Our major commitments would give us the opportunity to help the OPD plan the Project and to make the inevitably necessary mid-game changes to accommodate unforeseen events. We could then teach about how to plan for, and respond to indeterminacy, important parts of clinical education.<sup>106</sup>

In late 2012, for the first course that began in the spring semester 2013, we accepted forty-eight case referrals.<sup>107</sup> In the fall of 2013, we accepted eight more. We took this volume because the needs were great, and on the law side of the clinic, we were limiting the scope of our services.

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<sup>105</sup> We are not saying public safety was not a factor to consider in a few of the 237 cases, or that there were not other legitimate factors that might influence prosecutor’s decisions. For a discussion of factors prosecutors considered in determining whether to settle *Unger* cases, see *infra* Part III.C.3.

<sup>106</sup> For the value of teaching with indeterminacy, see, e.g., Susan Bennett, *Problem Solving in Clinical Education: Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45 (2002); Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998); Robert D. Dinerstein & Elliot S. Milstein, *Learning to Be a Lawyer: Embracing Indeterminacy and Uncertainty*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 327 (Susan Bryant, Elliot S. Milstein & Ann C. Shalleck eds. 2014); W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (Rutgers Univ. Press 1981); Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511 (2006); Spencer L. Simons, *Navigating Through the Fog: Teaching Legal Research and Writing Students to Master Indeterminacy through Structure and Process*, 56 J. LEGAL EDUC. 356 (2006).

<sup>107</sup> The University of Maryland Carey School of Law’s academic year consists of a thirteen-week fall semester, running late August to early December, and a thirteen-week spring semester, running early/mid-January to late April/early May. A summer semester is also offered, with limited class offerings, from mid-/late May to mid-/late July. For most of the years we are discussing, there was a full summer clinic. The University of Maryland School of Social Work, MSW Program, operates on a similar two-semester schedule.

As to the need, neither overburdened public defenders nor volunteer lawyers could provide *timely* legal representation to *all* of the *Unger*-eligible prisoners. Many of the clients were in their sixties or seventies, and a number were in poor health. They did not have years to wait for lawyers; some, not even months. Indeed, nine died before they could complete their *Unger* litigation, and eleven died after their releases, one tragically in the early morning hours the day after his release.<sup>108</sup>

Filing pro se was not a realistic option. The prisoners who filed pro se immediately after *Unger* was decided lost.<sup>109</sup> The early wins were by prisoners who had lawyers.<sup>110</sup> This stark and indefensible reality provided students with early lessons about the importance of counsel and the thoughtless, reflexive reactions of many judges to prisoners litigating pro se.

Of course, we worried about our capacity to provide competent legal services to so many lifers and to teach effectively with so many cases. The compromise we reached with OPD, and offered to our clients, was to provide limited-scope legal representation.<sup>111</sup> We promised to try to locate

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<sup>108</sup> Feldman Data, *supra* note 13. In an email dated June 21, 2013, Brian Saccenti, a Project leader, *see supra* note 14, described the death of Yusuf Rasheed, one of OPD's *Unger* clients, who was released by settlement agreement on June 20, 2013: "Mr. Rasheed had been incarcerated on a life sentence since 1976. [Yesterday, he was released.] His wife of many years graciously made the point to talk to the prosecutors after the hearing, to shake their hands and thank them for their compassion and willingness to give Mr. Rasheed a second chance. He was released from the courthouse with his medications, and he had an appointment with the VA today to discuss his health and medications. Shortly after 6 p.m., he walked out of the courthouse a free man, into the arms of his wife. Yesterday evening, he and his wife went to dinner with friends and family, there to welcome him home. Afterward, he and his wife went home and went to sleep. Around 4:30 am, he woke up to use the bathroom, told his wife he loved her, and went back to sleep. Shortly before dawn, Mr. Rasheed passed away as the result of a suspected heart attack. Right now, everyone's trying to absorb this and to try to make some sense of it, and take some comfort from the knowledge that his last day was also one of his very best." Email from Brian Saccenti, Chief of the OPD Appellate Division (June 21, 2013) (on file with author).

<sup>109</sup> *Id.* There are no hard data on this, but Brian Saccenti, *supra* note 14, estimates there were five to ten pro se litigants who lost. Telephone Conversation Between Brian Saccenti and Michael Millemann (July 31, 2018). The Appellate Division of OPD monitored this and were able to enter appearances and file motions for reconsideration (two cases), or applications for leave to appeal (most of the rest). The OPD obtained lawyers for all of the originally pro se litigants before their cases were finally decided. *Id.*

<sup>110</sup> Feldman Data, *supra* note 13.

<sup>111</sup> For information on limited-scope representation, see, e.g., James G. Mandlik, Note, *Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation*, 127 YALE L.J. 1828 (2018).



trial transcripts and post-conviction records (which proved to be extremely difficult and time-consuming in many cases),<sup>112</sup> investigate the cases, advise the clients, draft and file their PC motions, try to negotiate settlement agreements, and in those cases that settled, handle the settlement hearings. As it turned out, we wound up negotiating the releases of twenty clients, thus providing them the complete representation they needed.

If we could not negotiate releases, we agreed that we would refer the cases back to a selected group of assistant public defenders to handle the PC motion hearings if courts granted them. This arrangement, we believe, was ethical and served the interests of our clients, students, faculty, and OPD.<sup>113</sup>

The needs for social work services were great as well. There was a Rip Van Winkle quality to the Unger group, and they would need special help getting ready for, and adjusting to, the worlds they had left behind. As benchmarks, the last free-world memories were for one client the last days of the Truman Administration;<sup>114</sup> and for others, the early days of the then new Medicare program,<sup>115</sup> the assassination of Dr. Martin Luther King and the violent responses to it throughout the

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<sup>112</sup> See *infra* Part IV.B.1.

<sup>113</sup> We discussed in class our limited-scope retainer agreements. There is no doubt that the provision of limited-scope (aka “unbundled”) representation is ethical in Maryland (as well as nationally) when it “is reasonable under the circumstances and the client gives informed consent.” Md. Rule of Prof’l Conduct, 1.2. See Mandlik, *supra* note 111. In fact, we and the OPD *together* were offering complete representation, through appeals and new trials if necessary, something few lawyers do. We also agreed to refer cases back to the OPD if our investigation demonstrated that the prisoner had never before filed a post-conviction petition. We gathered and reviewed documents in these cases and interviewed the prisoners. Surprisingly, there were three such cases. These cases posed complex issues that required more expertise than we could develop in one semester, at least with this volume of cases. We referred back some other cases as well, e.g., in some the clients did not have transcripts and OPD was developing the lead memorandum of law on this issue.

<sup>114</sup> President Harry S. Truman became President in April 1945 following the death of President Franklin D. Roosevelt. He served nearly eight years until January 20, 1953. *Harry S. Truman*, MILLER CENTER: UVA, <https://miller-center.org/president/truman> (last visited July 6, 2018).

<sup>115</sup> The bill creating the original Medicare program was signed into law on July 30, 1965 by President Lyndon B. Johnson. *History: CMS’ Program History*, CTRS. MEDICARE & MEDICAID SERVS. (June 20, 2018), <https://www.cms.gov/About-CMS/Agency-information/History/>.

country,<sup>116</sup> the swearing-in of Thurgood Marshall as the first African-American Supreme Court Justice,<sup>117</sup> and the Soviet Union's invasion of Czechoslovakia.<sup>118</sup> Many were incarcerated during both the escalation and the end of the Vietnam War,<sup>119</sup> Watergate,<sup>120</sup> and President Nixon's resignation.<sup>121</sup> All watched from prison the first-term swearing-in of Ronald Reagan as the country's fortieth president<sup>122</sup> and the fall of the Soviet Union.<sup>123</sup>

It was not just the passage of time that was challenging. Most had come to prison without any experience of success, and imprisonment for so long had further damaged many. Imprisonment often produces cognitive impairments,<sup>124</sup> trauma and stress, particularly in older prisoners,<sup>125</sup> as

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<sup>116</sup> Martin Luther King, Jr. was assassinated on April 4, 1968 in Memphis, Tennessee. His death sparked riots across the country, including Baltimore, where six people died and looting and fires caused \$12 million in property damage. Lori Sears, *50 Years Ago: The Sun's Coverage of Martin Luther King Jr.'s Assassination and the Baltimore Riots*, BALT. SUN (Apr. 4, 2018, 6:00 AM), <http://www.baltimoresun.com/features/retro-baltimore/bs-fe-retro-mlk-baltimore-riots-front-pages-pictures-20180403-story.html>.

<sup>117</sup> Justice Thurgood Marshall was appointed to the U.S. Supreme Court by President Lyndon B. Johnson in 1967. *Thurgood Marshall*, OYEZ, [https://www.oyez.org/justices/thurgood\\_marshall](https://www.oyez.org/justices/thurgood_marshall) (last visited July 6, 2018).

<sup>118</sup> The Soviet Union invaded Czechoslovakia in August 1968. *A Look Back. . . The Prague Spring & The Soviet Invasion of Czechoslovakia*, CIA: NEWS & INFORMATION (Apr. 30, 2013, 12:06 PM), <https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/a-look-back-the-prague-spring-the-soviet.html>; Tad Szulc, *Czechoslovakia Invaded by Russians and Four Other Warsaw Pact Forces*, N.Y. TIMES, Aug. 21, 1998, at A1.

<sup>119</sup> The conflict in Vietnam escalated throughout the mid-twentieth century, with the U.S. supporting anticommunist forces during this period. U.S. forces officially entered the conflict in 1964 with passage of the Gulf of Tonkin Resolution. Although North and South Vietnam, the Vietcong, and the U.S. signed the Vietnam peace agreement in 1973, U.S. involvement in the war ended in 1975 with the fall of Saigon. *Vietnam War Timeline*, HISTORY.COM (2017), <https://www.history.com/topics/vietnam-war-timeline>; Ronald H. Spector, *Vietnam War*, ENCYCLOPEDIA BRITANNICA (last updated Jan. 11, 2018), <https://www.britannica.com/event/Vietnam-War>.

<sup>120</sup> The Watergate Scandal began in June 1972 when five men were arrested for breaking into the Democratic National Committee headquarters at the Watergate Hotel and culminated with President Richard Nixon's resignation on August 8, 1974. Rick Perlstein, *Watergate Scandal*, ENCYCLOPEDIA BRITANNICA (last updated June 10, 2018), <https://www.britannica.com/event/Watergate-Scandal>.

<sup>121</sup> *Id.*

<sup>122</sup> President Ronald Reagan's first inauguration was held January 20, 1981. *Inauguration Facts*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, <https://www.reaganlibrary.gov/sreference/inaugurations> (last visited July 8, 2018).

<sup>123</sup> The Soviet Union officially dissolved in December 1991. *Soviet Union*, HISTORY.COM (2017), <https://www.history.com/topics/history-of-the-soviet-union>; Serge Schmemmann, *End of the Soviet Union*, N.Y. TIMES, Dec. 26, 1991, at A1.

<sup>124</sup> R. Lapornik et al., *Long-term Imprisonment Leads to Cognitive Impairment*, 82 FORENSIC SCI. INT'L 121 (1996).

<sup>125</sup> See Tina Maschi et al., *Trauma and Stress Among Older Adults in the Criminal Justice System: A Review of the Literature with Implications for Social Work*, 54 J. GERONTOLOGICAL SOC. WORK 390 (2011).

well as a profound dependence sometimes called “prisonization.”<sup>126</sup> This dependence often is accompanied by PTSD-like symptoms, for example, emotional numbness (the “prison mask”), nightmares, anxiety, hyper-vigilance, and a sense of alienation.<sup>127</sup>

Even the prisoners who did not suffer from acute symptoms like these would need some support in living independently. Prisons suppress and punish most forms of independence; so none of our clients in the past three-to-five decades would have had experiences making autonomous decisions.<sup>128</sup> On the other hand, people in prison can grow personally, mature, commit themselves to self-improvement, begin to develop their human potential, and often find spiritual faith.<sup>129</sup> We saw in our clients both phenomena: the damage from incarceration and impressive personal growth.

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<sup>126</sup> CRAIG HANEY, THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT 5 (2002), <https://aspe.hhs.gov/system/files/pdf/75001/Haney.pdf>. This often is coupled with an enhanced sense of entitlement and lack of understanding about post-release time frames, which can make appointments and requests for assistance difficult to manage for case workers and providers. See Marieke Liem & Maarten Kunst, *Is There a Recognizable Post-Incarceration Syndrome Among Released “Lifers”?*, 36 INT’L J.L. & PSYCHIATRY 333 (2013); Brie A. Williams et al., *Coming Home: Health Status and Homelessness Risk of Older Pre-release Prisoners*, 25 J. GEN. INTERN. MED. 1038 (2010); Elisabeth Dettbarn, *Effects of Long-Term Incarceration: A Statistical Comparison of Two Expert Assessments of Two Experts at the Beginning and the End of Incarceration*, 35 INT’L J.L. & PSYCHIATRY 236 (2012).

<sup>127</sup> HANEY, *supra* note 126, at 7–12.

<sup>128</sup> In prison, every moment is controlled and there is no privacy or refuge. Although some control is essential to prison security, this degree of virtually complete control prevents prisoners from developing the autonomous decision-making skills and independence necessary to succeed in the free world. See, e.g., *24 Hours in Prison*, N.C. DEP’T PUB. SAFETY, <https://www.doc.state.nc.us/dop/hours24.htm> (last visited July 13, 2018) (providing a sample daily schedule for prisoners in minimum, medium, and close security prisons); MARYLAND DIVISION OF CORRECTIONS, INMATE HANDBOOK (2007), [https://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007\\_Inmate\\_Handbook.pdf](https://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007_Inmate_Handbook.pdf) (providing information to inmates including institutional living and general inmate information); Glenn D. Walters, *Changes in Criminal Thinking and Identity in Novice and Experienced Inmates*, 30 CRIM. JUST. & BEHAV. 399 (2003) (discussing impacts of prisonization and prison structure on inmates).

<sup>129</sup> Esther F.J.C. van Ginneken, *Making Sense of Imprisonment: Narratives of Posttraumatic Growth Among Female Prisoners*, 60 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 208, 209 (2016). The author warns, however: “There is a danger that even a cautious suggestion of imprisonment as a positive experience for *some* people in *some* circumstances will be taken as an argument in favour of incarceration. This would be unwarranted and undesirable, given the well-documented harmful effects of separation, isolation, and institutionalisation.” *Id.* at 209 (emphasis in original). The author defines “posttraumatic growth” as “positive change following an adverse event.” *Id.* She argues that the “experience of imprisonment can have a profound impact on self-identity. Entry into prison is associated with assaults on the self, through displacement, loss of personal possessions, and other degradation rituals. Moreover, prisoners are anxious about deterioration and losing their sense of identity.” *Id.* at 210 (citations omitted). The author notes that: “Imprisonment does not necessarily constitute a discrete traumatic event; it often is part of a cumulative history of traumatic episodes and troubled lives.” *Id.* at 214.

To complicate an already complicated picture, most of our clients would be returning to communities that were struggling with drugs and crime, violence, unemployment, inadequate transportation and public services (housing, food, medical care), police harassment and surveillance, and poorer resident health, measured by increased illness and early mortality.<sup>130</sup>

Our clients, who had not seen their Baltimore City neighborhoods for decades, provided instant measures of the extent of urban decay. Their first reactions as they returned home *always* was *shock* at how *much worse* their neighborhoods were than when they were locked up.

In the face of these formidable challenges, there were only incomplete and overtaxed pre-release and post-release services and resources available to our clients. Although the OPD has an excellent social work unit, the pre-release needs of 237 geriatric prisoners far outstripped those resources, and there simply were no post-release reentry programs focused on geriatric prisoners in the State.<sup>131</sup> So, if there were to be such a reentry program for the Unger group, we would have to create it.<sup>132</sup>

Initially, the clients of the social work component were the same as the legal clients—the forty-eight and then eight referred by OPD. The clinic social workers and social work students provided the necessary pre-release services to these fifty-six. When the legal side negotiated the release of

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<sup>130</sup> One striking measure of the impact of urban problems on life is to compare life expectancies of people who live in neighborhoods in Baltimore City. Between 2005 and 2009, life expectancy varied by 29.6 years between census tracts in Baltimore. The highest value (86.3 years) was found in Greater Roland Park/Poplar, upper class white neighborhoods, and the lowest value (56.7 years) was found in Upton/Druid Heights, African-American communities that have all of the urban problems. These are the neighborhoods, or similar to, the ones to which our clients would be returning. These contrasts are even starker when looking at life expectancy for formerly incarcerated men of color (significantly worse). CTR. FOR HUMAN NEEDS VCU, NEIGHBORHOOD CHARACTERISTICS & HEALTH IN BALTIMORE, MARYLAND 20 (2012).

<sup>131</sup> The reentry services generally available to released prisoners were and are woefully inadequate. *See, e.g.*, Andrew S. Denney, Richard Tewksbury & Richard S. Jones, *Beyond Basic Needs: Social Support and Structure for Successful Offender Reentry*, 2 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 39 (2014); Jeffrey D. Morenoff & David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. SOC. 411 (2014).

<sup>132</sup> *See supra* note 2 (describing OSI-Baltimore funding of two Unger-focused positions in the Law and Social Work Services Program). With the OSI-Baltimore grant, we hired a second forensic social work fellow, Angela Aloï, *id.*, who became a liaison to the OPD and helped provide both pre-release planning and post-release services.

one of the fifty-six, or OPD obtained the release of one referred back to it, the social workers and social work students offered post-release, reentry services to that person.

As the Project evolved, the nature of our social work services changed. In a second expanded phase of the social work component the social workers and students began providing post-release services to OPD clients as well as the fifty-six initial clinic clients. Eventually, we transferred to OPD the pre-release social services functions, and some grant funds to help pay for them, so we could focus on providing comprehensive reentry services to the increasing numbers of those released.

We took on these major legal and social work responsibilities based on our shared commitments to service and social justice and our belief that this volume of work would help us achieve some unique educational goals, along with more common ones. For the social workers, social justice is an ethical mandate.<sup>133</sup> For lawyers in our clinical program, as in most others, it is an animating value.<sup>134</sup>

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<sup>133</sup> The social worker's ethical rules specifically state: "Social workers pursue social change, particularly with and on behalf of vulnerable and oppressed individuals and groups of people." CODE OF ETHICS (NAT'L ASS'N SOC. WORKERS, 1996, revised 2017).

<sup>134</sup> The 2007 Carnegie Foundation Report, *Educating Lawyers*, emphasized the importance of including discussions about justice in the law school curriculum. It criticized some aspects of the case method, saying: "In their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses." SULLIVAN ET AL., *supra* note 96, at 6. The ABA's 1992 MacCrate Report on legal education lists as one of the four basic values of the legal profession: "striving to promote justice, fairness and morality." ABA TASK FORCE ON LAW SCH. & THE PROFESSION, LEGAL EDUCATION & PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM 213 (1992). Many clinical law scholars also argue that law school clinics ought to have social justice goals. *See, e.g.*, Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 203 (2016) (stating that "founders and initial funders of modern clinical education possessed an underlying social and political vision alongside a skills agenda, which created openings for clinicians and students to engage in innovative and important social justice work at law schools across the country," and arguing that today's "challenge has been to defend the social justice imperative embedded in clinical legal education, as deans and faculties have expanded practical skills training in response to the 'professionalism crisis.'" (citation omitted)); Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 288 (2001); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461 (1998); Jane H. Aiken, *Striving to Teach "Justice, Fairness, And Morality,"* 4 CLINICAL L. REV. 1 (1997); Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL'Y 63, 71 (2003); Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 38 (Austin Sarat & Stuart Scheingold eds., 1998); Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic's Ability to Harmonize Teaching Practical*

With the acceptance of the major work responsibilities, we joined the Unger Project team, although the OPD retained the ultimate management and decision-making responsibilities for the Project. This broader role gave us important opportunities to teach our students about, and to engage them in, strategic decision-making in a major, high-profile project.

On the law side, our Project roles (as opposed to our individual client responsibilities), included helping the OPD to develop protocols to retrieve records, editing the template PC motion, helping to develop standard terms of settlement agreements, and helping to recruit private pro bono lawyers. When the Court of Appeals agreed to hear the challenges to *Unger*,<sup>135</sup> we also helped to draft, provide affidavits for, and edit two amicus briefs in which the clinic was the amicus party, and a third on behalf of a legal organization.<sup>136</sup> First-year law students, as well as upper level clinic students, worked on these briefs.<sup>137</sup>

Throughout, we worked with the OPD and Restorative Justice Initiative to try to provide accurate public information about the releases and to respond to critical media accounts.<sup>138</sup> In some

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*Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23 (2006); Minna J. Kotkin & Dean Hill Rivkin, *Clinical Legal Education at a Generational Crossroads: Reflections from Two Boomers*, 17 CLINICAL L. REV. 197, 197 (2010) (“lament[ing] the decline of an explicit systemic reform focus among newer clinicians—directed both at legal education and poverty law—and call[ing] for a renewed dialogue about the future directions of the clinical enterprise.”); Fran Quigley, *Seizing The Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995). The legal work should not only require students to learn and apply the craft, but also should “evoke from students an emotional and moral response to justice issues in both the law and in legal practice.” Aiken & Wizner, *supra*, at 71. *But see* Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 331, 337–38, 342 (2012); April Land, “*Lawyering Beyond*” *Without Leaving Individual Clients Behind*, 18 CLINICAL L. REV. 47, 54–59 (2011); Stephen F. Reed, *Clinical Legal Education at a Generational Crossroads: A Self-Focused Self-Study of Self*, 17 CLINICAL L. REV. 243, 249–52 (2010).

<sup>135</sup> See *supra* note 9.

<sup>136</sup> See *infra* Part IV.B.5.

<sup>137</sup> The first-year students participated in a LTP course that combined first-year Criminal Law and practice. See *supra* note 6.

<sup>138</sup> We did so with television and radio appearances and by co-authoring several Op-Ed pieces. See, e.g., Brian Saccenti, Becky Kling Feldman & Michael Millemann, Opinion, *Restoring Justice Through Early Release*, WASH. POST, Aug. 24, 2014, at C4; Michael Millemann, Opinion, *Court Ruling Corrects an Old Injustice*, BALT. SUN, July 16, 2013, at 15A; Michael Millemann, Commentary, *Getting the Racist Stain Out of the Wood*, AFRO (July 2, 2014), <http://www.afro.com/getting-the-racist-stain-out-of-the-wood/>.

of our most interesting classes, we discussed the ways in which lawyers can work with media during pending litigation.<sup>139</sup>

On the social work side, we took the lead in creating the Unger post-release, reentry program; acted as case managers to provide or obtain essential services for our clients; and worked with the OPD social workers and the Restorative Justice Initiative to support those released and their families.<sup>140</sup>

It is easy to envision different designs for the clinic than the one we chose, including some that would have better achieved other clinical educational goals with fewer, indeed far fewer, cases.<sup>141</sup>

For example, we could have assigned one case to a pair, or even a larger group, of students, and

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<sup>139</sup> See Peter A. Joy & Kevin C. McMunigal, *Criminal Justice: The Ethics of Talking to the Media*, ABA: GP SOLO (2014), [https://www.americanbar.org/publications/gp\\_solo/2014/july-august-2014/criminal\\_justice\\_ethics\\_talking\\_the\\_media.html](https://www.americanbar.org/publications/gp_solo/2014/july-august-2014/criminal_justice_ethics_talking_the_media.html); *Rules to Keep in Mind When Interacting with the Media*, YOURABA (2014), <https://www.americanbar.org/publications/youraba/2014/december-2014/rules-to-keep-in-mind-when-interacting-with-the-media.html>.

<sup>140</sup> See *infra* Parts IV.C. & V.A.

<sup>141</sup> Jon C. Dubin identifies the “numerous catalogs of clinical goals available to inform clinical design. They include the conventionally accepted nine goals of clinical education identified in the AALS Report of the In-House Clinic, Bradway’s seven goals, Schrag’s fifteen goals, to Barnhizer’s twenty goals, and Freamon’s four goals and thirteen subgoals of a clinical Center for Social Justice. All of these clinical goals may be viewed as components of or elaborations on one of two broader objectives: 1) client and community service; or 2) professional competency instruction in the skills and values of the profession.” Dubin, *supra* note 134, at 1478–79. We believe our clinic taught, in differing measures, the nine things that the AALS Committee on the Future of the In-House Clinic identified as clinical goals, in addition to interdisciplinary collaboration and cross-cultural competence. See *infra* Parts IV & V. Specifically, the AALS Committee on the Future of the In-House Clinic identified these nine goals of clinical education:

“1. Developing modes of planning and analysis for dealing with unstructured situations as opposed to the ‘pre-digested world of the appellate case;’ 2. Providing professional skills instruction in such necessary areas as interviewing, counselling, and fact investigation; 3. Teaching means of learning from experience; 4. Instructing students in professional responsibility by giving them first-hand exposure to the actual mores of the profession; 5. Exposing students to the demands and methods of acting in the role of attorney; 6. Providing opportunities for collaborative learning; 7. Imparting the obligation for service to clients, information about how to engage in such representation, and knowledge concerning the impact of the legal system on poor people; 8. Providing the opportunity for examining the impact of doctrine in real life and providing a laboratory in which students and faculty study particular areas of the law; and 9. Critiquing the capacities and limitations of lawyers and the legal system.”

William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 471–72 (1995) (quoting from The AALS Committee on the Future of the In-House Clinic).

taught much of what we eventually taught, and some of that better.<sup>142</sup> The additional clients, however, gave the students professional relationships with two or more people, and the multiple vantage points that come with this; a strong sense of personal responsibility by having “your own” client or clients;<sup>143</sup> a significant part in a major law implementation and reform project; a realistic introduction to actual practice; and a deep sense of self-fulfillment, which can be transformative. The latter came from first understanding and feeling, as they went through the semester, that they were competent to help someone who really needed it, and second that they really liked this helping role (with a common “this is why I came to law school” expression of this).

We acknowledge, of course, that the volume of work can overwhelm education. We do not believe, however, that this is inevitable in high volume clinics.<sup>144</sup> Instead, we believe clinics with substantial workloads can achieve many clinical educational goals and best teach some of the most important norms and aspirations of both law and social work professions.<sup>145</sup> There must, of course,

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<sup>142</sup> In one first year sequence of Torts (fall semester) and LTP/Criminal Law (second semester), Professors Richard Boldt (Torts) and Millemann (LTP/Criminal Law) taught an experiential component to twenty-four students with the parole applications of six life-sentenced prisoners, including two in the Unger group (the latter two before it became clear they would be released under *Unger*). The students worked in teams of four, each group helping to represent one prisoner, each case a window to criminal law and procedure, the purposes of punishment, and the administration of prisons. One could easily structure and teach an excellent upper-level clinic with the same number of, or even fewer cases.

<sup>143</sup> See *infra* notes 175 & 177 (describing the great extent, sometimes excessive, to which students felt such responsibility).

<sup>144</sup> With our substantial workloads, we still were able to do what Professor Steven Wizner argues distinguishes good clinical teaching from just good lawyering: “teach[ing] substantive law and practice” and “about systems and institutions;” “spend[ing] hours with students individually and in groups, in classes, supervisions and less formal conversations, helping them understand what they are seeing in the real world” and “helping them recognize, acknowledge and deal with their feelings about their clients and their clients’ legal problems;” “talking with them about . . . ethical issues, and how to deal with clients and adversaries effectively;” and “mooting students” for “client representational activities, and reading and editing their written work on behalf of clients.” Stephen Wizner, *Walking the Clinical Tightrope: Between Teaching and Doing*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 259, 261, 265 (2004) (Wizner asserts that “law school clinicians need to emphasize the primacy of the social justice objectives of clinical legal education by providing legal assistance to unprivileged and underserved clients in communities through supervised law student representation. Everything else we do should be seen as secondary and, to the extent possible, should support the primary objectives.”).

<sup>145</sup> For lawyers, this includes the profession’s expressed commitment to equal and effective access to justice. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 6.1, cmt. 1 (AM. BAR ASS’N 1983) (“Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a



be time and support for planning, good supervision of students, guided reflections about experiences, and variation in professional tasks. We believe we accomplished this in both parts of the clinic, although some days it was more challenging to do this than others.<sup>146</sup>

### **B. The Special Importance of the Social Work Component**

We made the clinic interdisciplinary to enhance both the legal representation and the clinical education and address the reentry needs of the clients. Looking back, we underestimated just how important the social work would be to the legal work and perhaps the preservation of *Unger* itself.

We knew that to negotiate releases, we would need to present solid post-release plans to prosecutors and judges. We also knew that if prisoners won new trials they would need release plans either to negotiate plea agreements or, if convicted, at the resentencing hearings. As it turned out, prosecutors and judges *required* these plans before they would consider negotiated releases.<sup>147</sup>

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lawyer.”) Social workers strive to uphold the ethical principles of *service* to those in need, elevating “service to others above self-interest...and draw on their knowledge, values and skills to help people in need and address social problems” and the pursuit of *social justice* “on behalf of vulnerable and oppressed individuals and groups of people”. Social workers respect the *dignity and worth of the person*, and “treat each person in a caring and respectful fashion . . . promote clients’ socially responsible self-determination . . . seek to enhance clients’ capacity and opportunity to change and address their own needs. Social workers are cognizant of their dual responsibility to clients and to the broader society. They seek to resolve conflicts between clients’ interests and the broader society’s interests in a socially responsible manner.” Social workers recognize the *value of human relationships* as “an important vehicle for change” and “engage people as partners in the helping process . . . and strengthen relationships among people in a purposeful effort to promote, restore, maintain, and enhance the well-being of individuals, families, social groups, organizations, and communities.” Social workers value integrity and behave in a trustworthy manner, and practice within their areas of *competence*. CODE OF ETHICS, *supra* note 133 (the primary ethical principles of social work are italicized).

<sup>146</sup> In our view, there should be a continuum of practice experiences in a good law school, with heavy workloads appropriate in some upper level clinical courses, and relatively small portions of legal work in others, especially in first-year and upper level traditionally non-clinical courses. For the latter, see Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000). The authors identify three waves in clinical education. The second wave, which built on the scholarship of Jerome Frank (among others) and earlier externships (the first wave), combined social justice goals with more careful and self-conscious clinical methodology. One goal of the third wave, the authors contend, “should be to incorporate clinical teaching methodology into nonclinical courses to teach lessons that will be further developed and reinforced by in-house clinic and externship experiences,” thus bridging the gap between classroom and clinical curricula. *Id.* at 38. Reciprocally, another way to bridge the gap is to add substantial classroom components to clinical courses. In the Unger Clinic, we moved in this direction by adding traditional classroom seminar components, see *infra* Part VI, to clinical teaching.

<sup>147</sup> At least, every assistant state’s attorney who negotiated, or considered negotiating, releases with us required such a plan.

What, in time, we also came to appreciate was the direct way in which the work of the social workers and social work students built confidence in the *Unger* decision by helping to show prosecutors, trial judges, the public generally, and likely the Court of Appeals, that *Unger* could be implemented without danger to public safety. This was critically important. Over time, this growing confidence helped to thwart some prosecutors and the State's efforts over four years to reverse or significantly limit the *Unger* decision.<sup>148</sup>

We expected that implementation of *Unger* would generate media coverage and provoke deep public feelings. We were more right than we knew. Initially, the releases were front-page stories with banner headlines, including headlines about wholesale releases of “murderers.”<sup>149</sup> There would have been even bigger and lasting headlines if a released prisoner had committed a serious crime. Negative public opinion likely would have undermined the willingness of elected prosecutors to negotiate, and of elected judges to accept settlement agreements. It might have also given some judges on the Court of Appeals the motivation to consider reversing, or more likely limiting, *Unger*. We were concerned by pledges of some prosecutors to get *Unger* reversed or limited, although we saw no principled grounds to do either. Soon after the decision, the membership of the Court of Appeals changed, leaving on the Court two judges in the majority in *Unger* and two in the dissent, joined by two new judges.<sup>150</sup> The new judges would help to decide *Unger*'s future.

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<sup>148</sup> See *supra* note 104.

<sup>149</sup> See, e.g., Ian Duncan & Yvonne Wenger, *Thirteen Murderers Released After Court Ruling*, BALT. SUN (July 10, 2013), <http://www.baltimoresun.com/news/maryland/crime/bs-md-murder-releases-20130710-story.html> (stating on the front page: “Thirteen inmates convicted of murder have been released from prison”); Alison Knezevich, *Six More Convicted in Killings Released Under Court Decision*, BALT. SUN (July 25, 2013), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-prisoners-freed-20130725-story.html> (stating on the front page: “6 more convicts freed after ruling”).

<sup>150</sup> The seventh judge on the Court was the Chief Judge, who was an associate judge when *Unger* was decided but did not participate in that case.

The power of just one headline crime to dramatically affect criminal justice policy is a repeated fact in American political life. Think Willie Horton.<sup>151</sup> There was another closer-to-home example of the dramatic effects of a banner headline crime. In the mid-1990s, a Democratic Maryland governor seized upon the murder/suicide of a work-release prisoner to, de facto, virtually end parole in Maryland for lifers sentenced *with the possibility of parole*.<sup>152</sup> Such paroles require first the recommendation of the Parole Commission and then the governor's approval.<sup>153</sup> The Governor's real or staged reaction to this event condemned many in the Unger group to two additional decades of prison time. Once freed, they frequently talked at meetings about their responsibilities to those still inside to act properly, and reinforced this assumed duty with each other.

As the Unger prisoners were released, and as they were successful, we and the OPD presented information about the post-release successes to the Court of Appeals in three amicus briefs in the two post-*Unger* cases<sup>154</sup> and to the public generally (including the courts and prosecutors) through television and radio shows and Op-Ed pieces.<sup>155</sup> Within a year, the releases were no longer front-page news, and many in the public, as well as many trial judges and prosecutors, came to accept *Unger*. Towards the end, the media accounts were all very positive, both locally and nationally.<sup>156</sup>

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<sup>151</sup> See *infra* note 254.

<sup>152</sup> See *infra* Part VI.G.

<sup>153</sup> *Id.* A failure to disapprove is in some circumstances considered an approval. *Id.*

<sup>154</sup> See *supra* note 9.

<sup>155</sup> See *supra* note 138.

<sup>156</sup> Nationally, CBS News, NPR, and Huffington Post did positive pieces. See Ted Koppel, *The Ungers: Righting a Miscarriage of Justice*, CBS SUNDAY MORNING (Nov. 12, 2017, 9:08 AM), <https://www.cbsnews.com/news/the-ungers-righting-a-miscarriage-of-justice/>; Robert Siegel, *All Things Considered: More Than 130 Maryland Lifers Adjust to Freedom After Court Ruling* (NPR broadcast Feb. 17, 2016), <http://www.npr.org/2016/02/17/467118226/more-than-130-maryland-lifers-adjust-to-freedom-after-court-ruling>; Robert Siegel & Matt Ozug, *All Things Considered: From a Life Term to Life on the Outside: When Aging Felons Are Freed* (NPR broadcast Feb. 18, 2016), <http://www.npr.org/2016/02/18/467057603/from-a-life-term-to-life-on-the-outside-when-aging-felons-are-freed>; Jason Fagone, *Meet the Ungers*, HUFFINGTON POST HIGHLINE (May 2016), <http://highline.huffingtonpost.com/articles/en/meet-the-ungers/>.

The credit for the post-release successes, first and foremost, belongs to those released and their families.<sup>157</sup> We can never know for sure if the social work component actually helped to avoid that *Unger*-undermining headline crime. It was, however, *both* the post-release planning by the social workers and students *and* the post-release successes that built confidence in the *Unger* decision.

The final reason for making this an interdisciplinary clinic was educational. Others have described the benefits, as well as the challenges, of this interdisciplinary form of education.<sup>158</sup> As Jane Aiken and Stephen Wizner argue, this vantage point has a special value in teaching with and pursuing social justice. It helps clinical faculty to challenge “the generally accepted, narrowly legal and individualistic professional role of lawyers,”<sup>159</sup> and to learn from the “broad, flexible, and multi-faceted professional role” of social workers.<sup>160</sup> Aiken and Wizner say, and we agree: “Social work skills and values, and the social work commitment to social and economic justice, should be part of the lawyer's repertoire of skills, values, and commitments.”<sup>161</sup> Aiken and Wizner stress the importance of a “multi-faceted” approach, stating:

This role not only focuses on the individual client, but also on the client’s family and community, including the social, economic, racial, ethnic, and religious factors affecting the client’s life. In addition, social justice is an explicit ethical norm of the social work profession, not only in process, but also as a substantive outcome.<sup>162</sup>

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<sup>157</sup> See *infra* Part VI.A.

<sup>158</sup> See, e.g., Kathleen Coulborn Faller & Frank E. Vandervort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. MICH. J.L. REFORM 121 (2007) (discussing some of the difficulties of implementing an interdisciplinary clinic of social work and law students due to differing roles, ethical rules, and approaches to child welfare issues). For examples of law clinics effectively collaborating with social workers and social work students, see *Social Work*, HARV. L. SCH. CRIM. JUST. INST., <http://clinics.law.harvard.edu/cji/social-work/>; Johanna Gruber, *Two BU Law Clinics Partner with Graduate School of Social Work*, B.U. L. NEWS (Feb. 8, 2016), <http://www.bu.edu/law/2016/02/08/two-bu-law-clinics-partner-with-graduate-school-of-social-work/>; *Children’s Advocacy Clinic*, PENN STATE DICKINSON LAW, <https://dickinsonlaw.psu.edu/academics/experiential-learning/clinics/childrens-advocacy-clinic> (last visited July 14, 2018).

<sup>159</sup> Aiken & Wizner, *supra* note 134, at 65.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 73–74. Social worker skills include “empathic interviewing, listening, and counseling; cross-cultural awareness and sensitivity; identification of the causes of clients' problems; assisting clients to formulate goals and strategies for achieving them; crisis intervention; group work; and community organizing.” *Id.* at 66.

<sup>162</sup> *Id.* at 65.

The clinic provided the lawyers and law students with a wonderful opportunity to learn these valuable lessons directly from the social workers and social work students, and to incorporate what they learned in their legal work.

### **C. The Structure of the Clinic**

The clinic began the spring semester of 2013. This one-semester LTP Criminal Law Reform course became a model for subsequent semesters. We organized the work through interdisciplinary practice teams, with four law students and one social work student in each team. We assigned two cases to each law student. That student was primarily responsible for both cases, but team members helped each other with their cases.<sup>163</sup> The social work student had responsibility for preparing the release plans. Collaboration was essential, and the great majority of students understood, or came to understand the value of this.<sup>164</sup>

The clients were in ten prisons spread across the State. To avoid unnecessary travel time and to encourage collaboration, we made sure that the eight (or nine) clients of that team's members were in reasonably proximate prisons, usually two to three prisons. The team members worked together to understand each prison's rules on review and copying of records, visits and phone calls, and to schedule visits, travel to prisons, obtain records, and work on the cases.<sup>165</sup>

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<sup>163</sup> After we accepted the forty-eight referrals, we found out that we had twenty, not twenty-four, students. As it turned out, we had to return several cases to the OPD, per our agreement, because the prisoners had never filed post-conviction petitions. *See supra* note 113. Additionally, several students volunteered to take three cases.

<sup>164</sup> Two law students did not, and their work was the only subpar work of the semester.

<sup>165</sup> Each prison had its own rules for visits, phone calls, and access to records ranging from very arbitrary to reasonable. The students had to obtain access to this still-closed world prison by prison. The OPD leaders, Deise, *supra* note 7, and Millemann, met with the Secretary of the Department of Public Safety and his staff to discuss the Project generally and visitation and records-retrieval policies specifically. The Secretary and the Department were happy that some of the oldest and most expensive prisoners might be released, and provided top-down help with one particularly intransigent prison.

## 1. Law Component

By making this a legal theory and practice course,<sup>166</sup> we had the same number of weekly classroom hours (three) as most classroom courses and many seminars. This allowed us to discuss and analyze many of the topics we discuss in Part VI.

We also held weekly team meetings, met regularly with students individually, and had lots of drop-in meetings, phone calls, and electronic communications, through which the best work and learning often occurred.

In these different settings, we taught the basic skills and substantive law the students needed, and addressed ethical/professionalism, criminal justice, access to justice, and other issues. We taught the basic competencies mostly before, but also after, actual performances, through lectures, simulations, team meetings, and reflective post-mortems.

Some of the most interesting discussions occurred in case rounds in the weekly team meetings, which began with a focus on the practice issues in the students' cases and invariably led to discussion of larger issues.

Like most other clinical courses, these courses would have worked better as year-long courses, like the social work model we discuss immediately below. We obtained some of the advantages of year-long courses by allowing interested students to continue in a second semester in advanced clinic placements in which students helped as teaching assistants, continued to do legal work, and had tutorial relationships with faculty.

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<sup>166</sup> See *supra* note 6.

## 2. Social Work Component

Our social work students were in year-long field placements in the Clinical Law Program.<sup>167</sup> In conjunction with or before their placements, the students took “Foundation” courses.<sup>168</sup> Bowman-Rivas, the placement supervisor, taught additional classes, for example, about the criminal justice system (an overview); forensic issues (including working with lawyers); “prisonization;”<sup>169</sup> the special problems of geriatric prisoners;<sup>170</sup> State and federal benefit systems (an overview); and reentry barriers.

Each client was assigned to a student and one of the forensic social work fellows, both of whom Bowman-Rivas supervised. The degree of supervision depended on the complexity of the client’s needs and the student’s needs. Bowman-Rivas regularly met with fellows and students to review the work, update work plans, and provide opportunities for students to ask questions, reflect, and examine their reactions to their clients and their work.

We jointly co-taught one class (all law and social work students together), and co-taught one or other group of students (separately) several times.

## 3. Structural Professional Responsibility Issues

We anticipated two sets of potential ethical issues, or at least professional tensions, arising from the volume of the cases and interdisciplinary nature of the clinic, which we discuss in that order.

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<sup>167</sup> Social work students must complete two placements to graduate, and the Unger Clinic was the first option (six credits) for first-year students and the second option (twelve credits) for second-year students.

<sup>168</sup> The Foundation courses included: “Social Work Practice with Individuals” (covering “engaging, assessing, planning, intervening, and terminating with clients”); “Social Work Practice with Groups and Families” (including analysis of “social work practice with families”, with emphasis on family structure and dynamics as well as beginning techniques for intervention with families”); and “Human Behavior and the Social Environment” (which “includes theories of human behavior, including normal and pathological processes applicable to individuals [and] families”).

<sup>169</sup> HANEY, *supra* note 126; Elaine Crawley & Richard Sparks, *Is there Life After Imprisonment? How Elderly Men Talk About Imprisonment and Release*, 6 CRIMINOLOGY & CRIM. JUST. 63 (2006).

<sup>170</sup> See, e.g., Doreen Higgins & Margaret E. Severson, *Community Reentry and Older Adult Offenders: Redefining Social Work Roles*, 52 J. GERONTOLOGICAL SOC. WORK 784 (2009).

The first issue, common in many high volume practices, was how to avoid implicitly revealing our views about the *comparative merits* of our cases through the ways in which we handled them. This issue of perceived “favoritism” first arose in thinking about the order in which we would file and try to negotiate our cases in the jurisdictions, especially Baltimore City, in which we had multiple clients. We worried that this order would communicate to prosecutors our views about our “best” cases (the ones first in order), and thus implicitly, our views about our “worst” cases (the last ones).<sup>171</sup>

This concern was heightened when the Court of Appeals agreed to hear the two post-*Unger* cases in which the State asked the Court to reverse or significantly limit *Unger* and to restrict the procedural method to assert *Unger* claims.<sup>172</sup> During this two year period, negotiations continued in Baltimore City and in some, but not all, of the other jurisdictions. The pendency of the cases required us to consider the unthinkable: that the *order in which we filed and sought to negotiate* our clients’ cases might *determine the outcomes*, and thus determine who got out and who died in prison. If the Court of Appeals foreclosed any future relief (by reversing *Unger*), or imposed harsher rules for future cases (e.g., a harmless error rule), the clients whose cases had not been finalized would be badly harmed, some irreparably. (We emphasized the gross unfairness of changing the rules mid-game in our amicus briefs.)

Some further context is necessary. Over half of the cases were in Baltimore City.<sup>173</sup> During most of the Project in Baltimore City, we were negotiating with a single prosecutor.<sup>174</sup> He reviewed

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<sup>171</sup> On the other hand, it could be argued that leading with the “best cases,” defined as those clients with the least risk of recidivating, would benefit all of our clients through their post-release successes. We did not, however, accept this argument for many reasons, including that we were advocates and not a paroling authority, and this *would have* placed us in a conflict posture with the clients whom we would have judged as posing larger recidivism risks.

<sup>172</sup> See *supra* note 9.

<sup>173</sup> Feldman Data, *supra* note 13. Over 130 of the *Unger* group had been convicted in Baltimore City; the second largest number were convicted in Prince Georges County. *Id.*

<sup>174</sup> Antonio Gioia, Chief Counsel, Baltimore City State’s Attorney’s Office.



the transcript, post-conviction history and prison disciplinary records in each case, located (or tried to) victims' survivors and talked to them, and carefully considered each case individually. We assumed that prosecutors in other jurisdictions did at least some of these things, but did not have as much knowledge of that as we had in Baltimore City.

In making ultimate judgments, prosecutors either talked about or, it was apparent from their actions, they were considering a variety of criteria. Different prosecutors considered and gave weight to different criteria. In total the criteria included: the age of the prisoner (how old now, how young when arrested); the predictive danger the person posed if released, based largely on the person's prison disciplinary record; the strength of the State's case on possible retrial (almost never discussed); the nature of the crime (was it particularly brutal?) and the offender's role in it; whether the crime was "high profile;" who the victim was; whether there was a convicted co-defendant who had been released; the length of incarceration; the health of the person; the strength or weakness of the post-release plan; and the views of the victim's survivors if they could be located (sometimes discussed).

In Baltimore City, especially, there were negotiation queues and settlement hearings were scheduled in groups (of a few to as many as seven). Your place in the queue determined how quickly you got out. Our effort to obtain agreement on the criteria that would be used for settlement discussions was unsuccessful.

In this context, it took time for us to develop our approach. In the first semester, we submitted cases for negotiation in the order in which we had completed the legal pleadings and post-release plans in those cases. The speed and thoroughness with which social work and law students did their work affected this order, although the availability or unavailability of social services, especially housing, upon release was a larger factor. In this important sense, students had significant

client responsibilities and felt them, most students deeply.<sup>175</sup> In the second semester, a shorter summer clinic, the students finished the work of the first semester students roughly around the same time, and we filed more than thirty PC motions and settlement proposals around the same time.

The potential “showing favoritism” concern did not materialize both because of our timing, but more importantly because the prosecutors in those jurisdictions that had substantial numbers of *Unger* petitioners, especially Baltimore City, set the order of negotiations, and thus the releases, by sequentially identifying individual prisoners or small pools of prisoners for whom they would consider settlement proposals. In doing this, the prosecutors identified—sometimes expressly and sometimes implicitly—the criteria they were using to give order to the negotiations and releases. These were *their criteria* not ours.

There was much that we discussed in our various settings about these settlement criteria, especially those giving weight to whether a crime was “high-profile,” who the victim was, and the characteristics, views, and forcefulness of the victim’s survivors.<sup>176</sup>

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<sup>175</sup> Students each semester stressed this sense of responsibility and pointed to it to explain why they were working so hard. Occasionally, this caused debilitating anxiety, and our role then was to reassure students that we were backstopping them and ultimately were responsible for the clients, and to discuss how to manage anxiety in social work and law practice. See, e.g., Randee Fenner, *Stanford Law Professor Creates New Way to Help Students Deal with the Stress of it All*, STANFORD NEWS (Apr. 7, 2015), <https://news.stanford.edu/2015/04/07/bankman-law-anxiety-040715/>; Sarah Mourer, *Study, Support, and Save: Teaching Sensitivity in the Law School Death Penalty Clinic*, 67 U. MIAMI L. REV. 357 (2013).

<sup>176</sup> We do not have an empirical basis to assess the extent race, gender, or class—especially of the victim and survivors—played roles in the *Unger* re-prosecution decisions across the State. We do not believe they had an effect in Baltimore City. These are factors that influence decisions by prosecutors that scholars have criticized, especially in capital cases. See, e.g., Theodore R. Curry, *The Conditional Effects of Victim and Offender Ethnicity and Victim Gender on Sentences for Non-Capital Cases*, 12 PUNISHMENT & SOC’Y 438 (2010); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981). We also were concerned about the weight given to the quality of the post-release plan. This definitely placed at a disadvantage those prisoners without supportive families and those who had been convicted of sex offenses (and thus had very limited housing options).

Our clients' highest priority was getting out of prison. So when prosecutors agreed to release a client, an offer that usually already came with the best terms we could negotiate, we immediately communicated this to the client and he accepted. (Occasionally after acceptance, we were able to negotiate slightly improved terms, e.g., length of probation or a term of probation). It did not matter whether we thought another client had a better argument for release. This was for the obvious reason that our responsibilities were to individuals not to a group (this was not a class action), but also because the more people we could get out of prison the more it benefitted our clients inside; it made it less likely an appellate court would change the rules mid-game.

The second set of potential conflict/tensions related to differences between professional roles. Using an admittedly oversimplified description, the lawyers worried whether the social workers' relatively greater concerns about both the interests of third parties and "best interests of the client" would conflict with the lawyers' obligations of advocacy. For example, would the social workers be able to prepare release plans for clients if they thought the clients posed significant threats of harm to others? Or, could they support release of prisoners who posed little threat to others but for whom there were inadequate community services, for example, those for whom they could not find housing and whose "placement" would be in a shelter?

As to the latter, the prosecutors in our cases required that the release plans for our clients provide for all aspects of post-prison life, including housing, so we did not have the release-more-quickly-to-a-shelter dilemma.<sup>177</sup> We emphasize that the decision whether to wait in the negotiation

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<sup>177</sup> In the end, through what the lawyers and law students viewed as heroic measures, the social workers and students were able to find housing placements other than shelters for all of our clients without family housing. *See infra* Part IV.C. 3.

queue while social workers and students tried to find housing or to litigate was the client's decision to make.<sup>178</sup>

As to possible tensions growing out of ethical responsibilities to third parties, the social workers concluded that since the prosecutors would decide whether to retry or release the petitioners, and their consideration of public danger was at the top of the prosecutors' release criteria, their job was to prepare the best possible release plan under the circumstances. This also was consistent with bringing the social workers and social work students within the attorney-client relationship, which we did. Legally, we considered them agents of the lawyers when they were developing pre-release plans for use in litigation. We would have argued, if necessary, that this gave priority to the lawyers' ethical rules in cases of tensions among professional ethics.<sup>179</sup> We do not suggest, however, that this conception either is certainly right or that it wholly eliminated the tensions.<sup>180</sup> Moreover, as the social workers and social work students followed the clients into the community, and provided after-care social services that were less directly related to the legal services, there would have been good arguments that the ethical rules of social workers took priority.<sup>181</sup> We were never required to identify the dividing line in this gray area, but one logical line would have been after the termination of probation.

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<sup>178</sup> The reasons to settle, and wait patiently in the negotiation queue, were very strong. *See supra* Part IV.B.4.

<sup>179</sup> *See* Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Enriching Clinical Education: Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 699–700 (2007). The authors agree with our conclusion, although they could not find direct authority on point and find it a close question. On the other hand, they conclude that in an aftercare setting, like our reentry program, the social worker's ethics predominate. *Id.* at 712.

<sup>180</sup> For example, our social workers did not believe it obviated their reporting obligations imposed by statute. *See generally* Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2001); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123 (1999).

<sup>181</sup> *Id.*

In two instances there were role tensions that we had to resolve. The first had to do with the specificity and comprehensiveness of the release plans. The social workers sought to develop comprehensive and specific release plans, in part grounded in the best interests of the clients. These draft plans placed specific obligations on those released (e.g., to seek treatment or counseling at specified programs). The lawyers worried that these obligations would be converted into conditions of probation and trigger revocation proceedings if the released person failed to technically comply with them. The compromise, reached readily when the social workers understood the lawyers' concerns, was to list the services that would be available in more general terms, and to have separate traditional probation conditions.

The second source of tension arose around whether we should advise a released client to seek treatment that was not part of the release plan for what the social worker reasonably believed was a post-release drug problem. The lawyer's concern was that if the client agreed to seek treatment, in the application process the client would have to admit he had been using illegal drugs, a violation of probation. The social worker's concern was that the client needed treatment to stop using, or as it turned out, to go into a methadone program. The lawyer deferred to the social worker when the program guaranteed confidentiality and it was clear that the risk of probation violation would be greater from continued illegal drug use. The client took the advice and entered the program.

#### **IV. THE CLINIC'S WORK**

Both the law students and the social work students drafted introductory letters to the clients and visit-request letters, gathered records, scheduled interviews, interviewed their clients, and executed retainer agreements. The prison records were voluminous, covering three-to-five decades

of the clients' lives in prison and information about the clients' crimes and pre-prison backgrounds.<sup>182</sup> The students synthesized this information and incorporated it, as advocates, into the settlement proposals. In doing this, students faced many of the same issues that lawyers face in drafting fact statements in appellate briefs.<sup>183</sup>

### **A. The Client Interviews**

A high point of the semester was the client interviews. We prepared the students with reading assignments, lectures, and simulations (in both class and in teams). We discussed how to obtain sensitive or negative information, for example, about the crime or the client's disciplinary record, without appearing to pry or be judgmental.

We drilled the students about dress codes, dealing with prison staff, getting through security, and obtaining authorizations to review prison records. We also rehearsed what the students could and would say, with the client's permission, to the client's usually anxious family members. Each student submitted a self-assessment in a post-interview memorandum and we discussed this with them.

The first client interview in any clinic provides important teachable moments, including "disorienting moments."<sup>184</sup> This is especially true when the client has been convicted of murder or

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<sup>182</sup> The "base files" described the client's prison education, special training, infractions, jobs, program participation, and volunteer activities. Other files contained medical and psychological information about the client.

<sup>183</sup> The simply stated and wholly unhelpful aphorism is that the underlying duty is to be "an honest advocate." Examples in our clinic in which we felt and resolved advocacy and disclosure tensions included: what, if anything, to say about the circumstances of the client's life growing up and the client's earliest juvenile or criminal record if there was one; how to describe the facts of the crime, the client's role in it, and the client's defenses at trial (we had no co-defendant clients and would not have accepted any); what to say when the client asserted innocence, including in the face of overwhelming evidence of guilt; whether to describe early prison disciplinary infractions (many clients as young prisoners had some to many), or to just describe the last period of the prisoner's incarceration, often ten to twenty years, in which the client had few if any infractions; what to say, however, if the client had more recent and serious disciplinary infractions (some did); what, if anything, to say about a weak component of a release plan; and if, and when, to express our views about a client's mental health or addiction and what to say.

<sup>184</sup> Quigley, *supra* note 134, at 46 ("The learner's clinical experience of representing victims of injustice often includes a 'disorienting moment' for the learner, in which her prior conceptions of social reality and justice are unable to

rape, as ours had, and been locked up for several decades, at least, on a life sentence. Through client interviews, students often must confront their prejudices and stereotypes on one hand, and idealized views on the other. This was true for both sets of our students.

A number of the students reported that before the interviews, they focused on the crime and approached the interview with mixtures of anxiety (even fear), excitement, and curiosity. Some identified with the victims, especially if they or a loved one had been a victim of violent crime.

In the interviews, the students usually quickly got over their initial anxiety (often with the help of the client), and discovered that the client was a “regular person,” “human being,” or “a nice man.”<sup>185</sup> Some then became conscious of, and embarrassed about, their prejudices and stereotypes.

The students often found it difficult to reconcile the acts with the man. This often was because the crime was committed long ago, sometimes by a teenager, and the man before the student was now old with gray hair and aching knees, a very different person. He had spent many years paying for what he had done and often redeeming his life.

The overarching lesson to the students was to be conscious that you will bring stereotypes and prejudices to first client meetings, and identify and deal with them so they do not undermine the professional relationship and obscure fact-finding.<sup>186</sup> Over time, almost all students became heartfelt advocates for their clients and came to empathize with their struggles, appreciate them as people, and became invested in their successes.

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explain the clients’ situations, thus providing what adult learning theory holds is the beginning stage of real perspective transformation.”).

<sup>185</sup> Again, of the 237 *Unger*-eligible prisoners, only one was a woman, and all of our fifty-six clients were men. Thus we refer to them as “men” or “he.”

<sup>186</sup> See, e.g., Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271 (2016).

In later semesters, after some clients had been released, they came to class to talk about the interviews from their perspectives. They talked about how much they appreciated the visits and how important they were in their lives, reassuring the new groups of students.

For two reasons, the law and social work students largely conducted interviews separately, but shared the information they obtained. Maryland law and the social workers' Code of Ethics impose disclosure requirements on social workers that lawyers do not have.<sup>187</sup> We were concerned, in retrospect over-concerned, about these disclosure requirements. These were old clients who had been locked up for decades, and thus very unlikely to reveal anything that would trigger social work disclosure obligations.

The second reason for separate interviews was practical. The two sets of students were gathering different information for different purposes, and had limited time in the prison to conduct the interviews and to review and copy the prison records. During the thirteen-week semester there was not time for more than two or three visits to a client, so it was critical to make efficient use of time.

Having said this, we think in retrospect that both sets of students lost some educational opportunities by not being jointly present for at least the initial interview, which could have been structured to avoid potential disclosure obligations. This was so even though they later shared the information, with client consent, and therefore had a holistic view of the client on paper.

## **B. Legal Work**

In addition to the interviews, there were several forms of common legal work students undertook.

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<sup>187</sup> For example, the National Association of Social Workers' Code of Ethics requires social workers to disclose information obtained from a client "when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person." CODE OF ETHICS, *supra* note 133, § 1.07. The family law section of the Maryland Code states: "Notwithstanding any other provision of law, including any law on privileged communications," a health practitioner "who has reason to believe that a child has been subject to abuse or neglect" must report it. MD. CODE ANN., FAM. LAW § 5-704(a) (West 2013).



## 1. Finding Key Documents

The first task was to locate, or try to, the decades-old trial transcripts and post-conviction pleadings. When we started looking for these records, we were absolutely horrified to learn that court clerks in some of Maryland's twenty-four jurisdictions, at the directions of the administrative judges, had *destroyed the transcripts and post-conviction records* of the still-confined, life-sentenced prisoners. This was part of a statewide records destruction policy. Even the most compulsive clients could not always preserve their records, which sometimes were casually lost or just destroyed by prison officials when the prisoners were transferred from prison to prison. Our clients had been in many, usually at least six or seven, prisons. Imagine having been in prison for more than three decades, believing you were going to die in prison, and then learning that you had a good chance at freedom, but also discovering that the best evidence of your legal claim has been destroyed!

The good news was that an exceptional State Archivist had preserved the transcripts, post-conviction pleadings, and court orders of the great majority of our clients.<sup>188</sup> The search for the other missing records was like a scavenger hunt from a Stephen King novel. The students found essential records in the local circuit courts (including in cardboard boxes in basements), one of the two State appellate courts, the Attorney General's Office, the Public Defender's Office, on microfiche in one of the two State law school libraries, or with a family member (usually in a basement or garage).

The lesson for the students was that when requesting essential documents, be polite but do not take "no" for an answer. The corollary: there are no exceptions. In a number of our cases, virtually everyone in the chain of potential sources said "we don't have those records," only to find, after

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<sup>188</sup> Dr. Edward C. Papenfuse was Maryland State Archivist and Commissioner of Land Patents from 1975 to 2013.

repeated questioning or with differently framed questions or different identifying information, that they in fact did have them.

In the end, we were able to find the records for all but two clients. These clients would have been able to assert their claims by proving inferentially that the advisory-only instruction, which was required by the Maryland Declaration of Rights and Maryland Rules<sup>189</sup> and was uniformly given in all of the cases with transcripts, was given in their cases too.<sup>190</sup> One measure of the depth of some prosecutors' opposition to *Unger* was one prosecutor's unsuccessful objection to our use of an archived copy of a transcript because it was not the original document, which of course his jurisdiction's court had destroyed.

## **2. Analyzing the Transcripts and Post-Conviction Histories**

We asked the students to summarize the facts in the trial transcript, excerpt all references to the jury's right to determine the law in the opening and closing arguments and instructions, indicate whether defense counsel objected to the instruction (never in our cases), and to state whether the lawyers and judge erroneously thought the judge was obligated to impose a life sentence (they did in all cases before 1976, when the Court of Appeals held judges had sentencing discretion, and despite this clear ruling, in many cases after 1976).<sup>191</sup> The supervisors also read the transcripts. This was the first time most of the second- and third-year law students had read a transcript, and there was much to teach about with this, which we did largely in the team meetings.<sup>192</sup>

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<sup>189</sup> See MD. R. 756b. A subsequent rule, MD. R. 757b, contained virtually identical text. A 1984 revision restructured the rule as Rule 4-325 and omitted the advisory-only jury instruction. MD. R. 4-325.

<sup>190</sup> The OPD, who had several clients who also had no records, was developing a common legal argument about why they should be able to proceed without records. We returned our two record-less clients to them. In the end, these prisoners were able to proceed without transcripts and post-conviction records, but the dispositions in their cases, including negotiated releases, were delayed, for some substantially.

<sup>191</sup> *State v. Wooten*, 352 A.2d 114 (Md. 1976). See Part I.A. (describing Bobby's case, where the judge and counsel did not know about *Wooten* a year after *Wooten*).

<sup>192</sup> We discussed how to identify issues raised by motions; determine what the contested and uncontested facts were; understand what a "theory of the case" is and identify the prosecution and defense theories in the client's case; identify

Our clients' post-conviction histories provided even more teaching opportunities and challenges. In order to help students disentangle the usually complex and extensive post-conviction histories we had to ensure they understood the post-conviction process, waiver doctrine, basic criminal law (especially the elements of murder and rape), and retroactivity.<sup>193</sup> That these most often were pro se pleadings significantly complicated the task.

### 3. Drafting the PC Motions and Proposed Settlement Agreements

After obtaining and understanding the transcripts and case records, and understanding Maryland post-conviction law, the students drafted the PC motions and prepared the comprehensive appendices.<sup>194</sup> To do so, the students had to understand the common legal claim based on *Unger*

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legal issues that counsel protected with proper objections or waived; evaluate the judge's instructions; and assess the arguments of counsel.

<sup>193</sup> Maryland's Post Conviction Act authorizes a prisoner to challenge a conviction "imposed in violation of the Constitution of the United States or the Constitution or laws of this State." MD. CODE ANN., CRIM. PROC. § 7-102(a)(1) (LexisNexis 2001). Maryland courts reject the vast majority of claims on procedural grounds, either because they have been "waived" or "finally litigated." *Id.* §§ 7-102(b)(2), 7-106(a)(1), (2). Normally, if defense counsel does not object to an instruction, the issue is waived, and none of the trial lawyers in our cases objected to the advisory-only instruction because it was so well-established and because the applicable rule *required* judges to give it. *See* MD. R. 756b; MD. R. 757b. In Maryland, there is "a two-tier waiver rule that is part statutory and part common law." *Baker v. Corcoran*, 220 F.3d 276, 289–90 (4th Cir. 2000). A defendant waives a non-fundamental right claim when their lawyer fails to preserve the issue, by objection or motion. MD. CODE ANN., CRIM. PROC. § 7-106(b)(1)(i) (LexisNexis 2001). The advisory-law instruction, remarkably as it may seem, was in the "non-fundamental rights" category, so the failures of lawyers to object to that instruction in the 237 cases waived the defendant's right to later attack it until *Unger*. There is a limited category of "fundamental rights," for which "the United States Supreme Court has required an express, knowing, and intelligent waiver" by the client. *Curtis v. State*, 395 A.2d 464, 470 (Md. 1978); *Baker*, 220 F.3d at 290. There is no waiver or final litigation bar, however, if the U.S. Supreme Court or a Maryland appellate court "holds that . . . the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized," and "the standard is intended to be applied retrospectively." MD. CODE ANN., CRIM. PROC. §§ 7-106(c)(2)(i), (ii) (LexisNexis 2001). What the Court of Appeals did in *Unger* was to find that the invalidation of the advisory-law instruction was a new standard that should have been applied retroactively. The Maryland Post-Conviction Procedure Act also authorizes Maryland circuit courts to reopen a post-conviction proceeding that was previously concluded if the court determines that doing so "is in the interests of justice." *Id.* §§ 7-102(a), 7-104. We argued in our motions that the retroactive "new standard" rule is a legislatively prescribed, mandatory reopening provision; in effect, a legislative finding that in this context, reopening is automatically "in the interests of justice." In 2016, the Court of Appeals rejected the State's argument that trial courts "in the interests of justice" had discretion to deny motions to reopen asserting *Unger* claims. *State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016).

<sup>194</sup> Appendices contained excerpts from the transcript, the petitioner's appellate and post-conviction pleadings and orders and opinions, and copies of unreported circuit court opinions in other post-*Unger* cases.

and the decisions that preceded it,<sup>195</sup> and to draft the case-specific fact allegations, and modify, as necessary, the provisions in the template.

In the customized parts, the students: 1) identified the theories of the prosecution and defense at trial; 2) stated the key facts; 3) summarized the procedural history; 4) compared the advisory-law instruction in their cases to that given in *Unger* (always, the client’s instructions were at least as bad, or more often worse, i.e., better for the legal argument, than in *Unger*);<sup>196</sup> 5) tried to preempt anticipated counterarguments (especially “harmless error” arguments); and 6) drafted the facts and arguments persuasively with as much of an equitable appeal as possible. This was a classic exercise in pleading and advocacy writing.

One of the hardest issues for the law faculty was whether to raise claims unrelated to *Unger* and if so, what claims. We talked about this extensively in case meetings and in class. We usually take a “leave no stone unturned” approach to our legal work, but that would have been literally fatal here. In three-to-five decades of post-conviction litigation, almost all of our clients, acting pro se, had raised many issues, although often in confusing and incomplete ways. Some had a better legal claim, or claims, that they had never raised. Repeatedly, we observed the failure of pro se litigants to effectively use the complex post-conviction process. After the extensive pro se litigation, however, virtually all non-*Unger* issues would have been found to have been “finally litigated”<sup>197</sup> or waived.<sup>198</sup>

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<sup>195</sup> See *supra* Introduction & Part I.B.

<sup>196</sup> By which we mean good for our arguments.

<sup>197</sup> See MD. CODE ANN., CRIM. PROC. § 7-102(b)(2), 7-106(a)(1) & (2) (LexisNexis 2001).

<sup>198</sup> See *Baker v. Corcoran*, 220 F.3d 276, 289–90 (4th Cir. 2000); MD. CODE ANN., CRIM. PROC. § 7-106(b)(1)(i) (LexisNexis 2001).

We asked the students to gather all of the appellate opinions and post-conviction pleadings, but to focus on the *Unger* issue, the sentencing error that entitled clients to new sentencing hearings,<sup>199</sup> and the post-trial failure of trial counsel to file one or more motions, a third possible error.<sup>200</sup> The law faculty read the transcripts and backstopped the students on these and other issues.

If these had been *initial* post-conviction pleadings, we would have taken a more comprehensive approach.<sup>201</sup> Our clients, however, were elderly and many were in poor health. The prosecutors were asserting laches, waiver, and “finally litigated” defenses *to the Unger claim*. Mining our cases for decades-old errors would have played right into their hands. We took these cases understanding that we had to prepare and file them as soon as possible. Our over-arching goal was to make sure none of our clients died in prison before they could assert their *Unger* claim, as nine in the *Unger* group did.

In the end, we discussed any other issues that the clients wanted to raise with them, helped them assess those issues, almost always advised the clients not to assert them (explaining why), explained they would be waiving the arguments, and left the ultimate decision to the client. Our clients took our advice. This was a teachable moment on how the ultimate decision must be for the clients to make, but informed by the lawyer’s, sometimes forceful, advice.

The law students, with the release plan provided by the social work students, also prepared the draft settlement agreements and supporting appendices.

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<sup>199</sup> The sentencing error was the wrongful belief, often held by counsel and the court, that the court did not have discretion to suspend all or part of a life sentence. *See supra* note 191 and accompanying text; *Williamson v. State*, 395 A.2d 496 (Md. 1979).

<sup>200</sup> The failure of trial counsel to file certain post-trial motions when requested by the client constituted actionable ineffective assistance of counsel. *See generally* *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>201</sup> As we said, when a client had not filed a post-conviction petition before (we had three such clients), we referred their cases back to the OPD. *See supra* note 113.

#### 4. Giving Legal Advice

To accurately advise clients, students had to understand the rights the client had under *Unger* to a new trial, the terms of the likely settlement offer,<sup>202</sup> the comparative litigation and settlement options, and the predictable timelines for each option.<sup>203</sup>

We were not worried about how the law students would handle the majority of interview tasks, such as, how they would introduce themselves, explain *Unger* and the retainer agreement, and gather information about the crime and client's post-conviction history.

In the beginning, we were concerned about two possible polar client reactions to *Unger*. The first that *Unger* would be another broken promise. This pessimism was rooted in the past broken promises about parole,<sup>204</sup> and past over-promises by some private post-conviction lawyers. We needed to try to reasonably reassure these clients that the *Unger* claim might well be different. The great majority of our clients came to trust us, but many did not believe they would be released until they walked out of the courthouse lockup. On the other hand, some clients believed that *Unger* guaranteed them immediate release. We pointed out that the only remedy in *Unger* was a new trial, and that most prosecutors were opposing even that.

Our advice changed over the life of the clinic. As more clients were released, the advice became more certain and optimistic. Additionally, our advice obviously changed after the Court of Appeals rejected the two post-*Unger* challenges.

We developed scripts for the advice, not that the students read verbatim but rather that guided what they said. We mooted this several times. Most students did fine, but there were a few times

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<sup>202</sup> See *supra* note 17 and accompanying text.

<sup>203</sup> Feldman Data, *supra* note 13.

<sup>204</sup> See *infra* Part VI.G.

during the client interviews that the students inadvertently reinforced unrealistic client expectations and the faculty had to correct the advice.

Giving good legal advice was complicated by the slow pace of the negotiations and the hardball approach of prosecutors to litigation. The problem with litigating was that until 2016, prosecutors usually sought appellate review of orders setting aside convictions and granting new trials. This added eighteen months or more of appellate time to the timeline.<sup>205</sup> With two cases challenging *Unger* pending in the Court of Appeals, the Court of Special Appeals was not resolving, let alone accelerating, decisions on the applications for leave to appeal, and we did not believe it was either possible, or, if possible, in the prisoners' interests, to try to persuade that court to decide the open issues. If they had, without question, the Court of Appeals would have granted certiorari to review those decisions, adding yet more delay to the timeline.

Furthermore, if a prisoner decided to litigate and then won at both the trial and appellate levels, what he would win was the right to a new trial. This would add another six months, or so, of time to the timeline, almost certainly while remaining in jail because no trial court was likely to grant a bail motion under all of these circumstances.<sup>206</sup> Then there was the risk of reconviction (eventually, seven of eight were reconvicted),<sup>207</sup> although prior to retrial, some prosecutors were negotiating "immediate release" plea agreements similar to those in the other settled cases.<sup>208</sup> And, upon conviction on retrial, there would be no sentencing agreement.

The point was clear: litigate at your peril, even if you win all the way until trial.

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<sup>205</sup> Feldman Data, *supra* note 13.

<sup>206</sup> *Id.* Trial judges uniformly denied motions for bail when new trials were ordered.

<sup>207</sup> *See supra* note 19. In six of the new convictions, the judges imposed life sentences, no parts suspended; in the seventh, the judge imposed a life sentence, "all" but 100 years suspended. *Id.*

<sup>208</sup> Feldman Data, *supra* note 13.

The terms of the settlement agreements were the most difficult part of the Unger practice for our clients, us, and our students.<sup>209</sup> Throughout this article, we have referred to “negotiations,” and “settlement agreements,” but with some variations, the core terms were not “negotiated,” but instead were offered on a take-it-or-leave-it basis.<sup>210</sup> The substantial majority of clients readily accepted the settlement agreements so they would be released. However, a few clients who asserted their innocence, were understandably upset by the requirements that they accept the validity of their convictions, be resentenced to life (all but time served suspended), and be placed on probation, even though they would be immediately released.

Our advice to accept the offers generally was strong given the timetable, and the strongest in those cases in which there was clear evidence of guilt and no reasonable (or weak) legal arguments, the prosecution might well retry the client, and the client had a bad or mixed prison record (and therefore would be in a weak position at resentencing, in the likely event he was convicted). In these cases, it was virtually certain the client would die in prison if he did not accept the offered agreement. Again, however, we made it clear, the ultimate choice was the client’s and that, if they opted to seek a new trial, we and later the OPD would zealously represent them in seeking to overturn their convictions and win at trial.

All of this provided compelling teaching material, including about the need to give advice in clear, understandable terms and to make clear and sometimes forceful recommendations; about the hardball approaches of some prosecutors, their extraordinary discretion generally, and the differing

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<sup>209</sup> See *supra* note 17 (describing the standard terms of the settlement agreements).

<sup>210</sup> What usually could be negotiated were the provisions of post-release plans. What sometimes could be negotiated were the lengths of the probationary periods and the released person’s ability to file “review of sentence” motions. These motions allowed the released person later—two years after release, for example—to argue that based on good behavior the court should reduce the period of probation or convert it from supervised to unsupervised probation.



factors they considered in exercising it; and the relevance and weight in the negotiations of the awful losses of the victims (life and bodily integrity) and their survivors.

### **5. Working on Three Amicus Briefs**

During 2014 and 2015, the work of both sets of students was very important in three amicus briefs in the two post-*Unger* Court of Appeals' cases.<sup>211</sup> The Clinical Law Program was the amicus in two of the three briefs. We focused on providing the Court with information about the post-release services the social workers and students were providing and how well those released were doing. We also presented the Court with our reviews of the transcripts in our clients' cases. All of this information was directly relevant to the issues before the Court.<sup>212</sup>

### **6. Continuing and Ending the Legal Work**

After the end of the spring semester in 2013, the Baltimore City Circuit Court held settlement hearings in seven cases (four of which were clinic clients), and approved the releases in all those cases.

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<sup>211</sup> *State v. Waine*, 122 A.3d 294 (Md. 2015); *State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016).

<sup>212</sup> In *Waine*, DLA Piper, acting pro bono, represented the law school's Clinical Law Program and Law and Social Work Services Program, and the Maryland Restorative Justice Initiative, as amici. Michael Bakhama, a DLA Piper associate, helped to write the brief and was co-counsel for amici. He was an outstanding graduate of the first (spring 2013) Unger Clinic. Amici counsel opposed reversal or limitation of *Unger*, supporting their arguments with: 1) the comprehensive post-release planning of the social workers and students, 2) the complete absence of probation revocations or convictions (other than of traffic/driving misdemeanors) of the then released eighty-seven Unger group members (thus a 100% success rate in these respects), and 3) findings based on the reviews by the law students and clinical law faculty of our Unger clients' transcripts. In this respect, one issue was the extent to which trial judges and lawyers had understood prior to *Stevenson* that the jury's right to determine the law was limited in the ways the Majority in *Stevenson* held that it was, i.e., just to the "law of the crime" and the "legal effect of the evidence." See *supra* note 74. The reviews of the clients' transcripts revealed that in *none* of the fifty-plus trials, which were randomly selected by the OPD, did a defense lawyer or prosecutor seek such a limited instruction, and in *none* did a trial judge offer to give or give such a limited instruction. Thus, the core reasoning of *Stevenson*'s non-retroactivity holding collapsed. *Id.* Brief of University of Maryland Carey School of Law Clinical Law Program and Law and Social Work Services Program and Maryland Restorative Justice Initiative, Inc. as Amici Curiae in Support of Appellee, *State v. Waine*, 122 A.3d 294 (Md. 2015) (No. 90).

In *Adams-Bey*, Venable LLP, pro bono, represented the same amici. The brief relied heavily on the then data that showed 141 Unger group members had been released and again none had been convicted of a crime other than a traffic/driving misdemeanor and in no cases had a probation been revoked (again, a 100% success rate in these respects). Brief of Amici Curiae the Clinical Law Program and the Law and Social Work Services Program of the University of Maryland Francis King Carey School of Law, and the Maryland Restorative Justice Initiative, Inc., *State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016) (No. 105).

We continued our representation of the forty-eight clients in the 2013 summer clinic. Nine summer students finished and filed the pleadings that we had not finished or filed in the preceding semester. The Baltimore City Circuit Court held additional settlement hearings and approved settlements in several clinic cases over the summer.

In fall 2013, we accepted eight new OPD referrals of *Unger*-eligible clients and Deise, with some help from Millemann, taught another Criminal Law Reform/Legal Theory and Practice course. Thereafter, under Millemann's supervision, law students continued to represent Unger clients in a second summer clinic, a number of advanced clinic placements, and a first-year Criminal Law/Legal Theory and Practice course.

On October 5, 2016, we handled the last settlement hearing for a client, resulting in the clinic's twentieth release.

### **C. Social Work**

In addition to the client interviews, the social workers and social work students provided several different types of services.

#### **1. In-prison Services**

First, was the prison-based preparation for reentry. To develop the release plans, the students interviewed the clients and gathered records, and then talked to institutional staff (including social work and medical staff); family members (sometimes helping to reunite estranged siblings); community medical, mental health, housing, and other service providers; and administrators of reentry programs. Social workers and social work students initially developed these plans in consort with the law faculty and law students, and later, also with OPD and private lawyers.

The end of the pre-release process was to try to make sure that the prison “release packet” contained the client’s medications (supply for a month) and proper identification cards. In a significant number of releases, one or both were missing, requiring us to make a next-day trip to the prison to obtain what was missing.

Although we were continually impressed by the work and commitment of overburdened social workers in prisons, prison staff should have done some of the reentry work that we had to do. Prisons, however, do little to prepare prisoners for reentry, particularly those who are released without much lead time as our clients were.

The failures of the prisons to provide the men with State identification and Social Security cards prior to release was especially damaging. It created a legal no-man’s land.<sup>213</sup> In this legal limbo, those without identification did not legally exist and could not apply for essential benefits or for most employment, nor obtain health insurance.<sup>214</sup> When we had to assist clients in obtaining identification, there often were extensive waiting periods for cash, food stamps, and Medical Assistance benefits.

## **2. Pre-Court Briefings**

Prior to release, we and OPD participated in pre-court briefings on the day of the settlement hearings to help the clients’ families and friends prepare for the hearings and releases. We alerted them that victims’ survivors might make moving statements in court and afterwards reporters might seek to interview the released prisoners and their relatives, and we discussed how to handle this. We warned them to save their celebrations of joy for the outside-courthouse releases, sparing

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<sup>213</sup> To obtain a Social Security card requires execution of a memorandum of understanding between the Social Security Administration and the State Department of Vital records.

<sup>214</sup> The birth certificates and Social Security cards should be available prior to release. This would substantially reduce needless reentry problems.

victims' survivors in court further pain. We also discussed what to expect during the initial transitional period. Often, Walter Lomax, the Executive Director of the Maryland Restorative Justice Initiative, described the post-release help the Initiative provided.<sup>215</sup>

### **3. Post-Release Services**

All of our clients were returning to new worlds. None had been eligible for minimum security, so they were coming out “cold turkey,” without the step-down advantages of minimum security prisons, residential community centers, or work-release.<sup>216</sup> The families and friends of some had died or “moved on,” although we were surprised by the number who had family support throughout incarceration and upon release.<sup>217</sup> Many, especially those who had been confined as juveniles, lacked basic life skills in a free world. None understood the advances in and pervasive uses of technology. Few had a realistic sense of today's cost of living, and those who were employable knew little about today's job markets.<sup>218</sup>

Most were challenged, some overwhelmed, by the pace of free world life, by the sheer number of choices for everything, or by, for example, the experience of riding in a car or using mass transit.

They had been forced in prison to suppress basic human emotions. Many spoke of the difficulty of shedding the “prison mask” and relinquishing the hyper-vigilance developed through decades of life in a dangerous environment, or of their delayed, overwhelming grief at the first visit to a parent's gravesite, even though the death was decades ago.

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<sup>215</sup> For a description of Mr. Lomax, *see supra* notes 84 & 85 and accompanying text. We also provided family members with post-release packages we had prepared, which included a binder with extensive information about how to contact the clients' lawyers and social workers, reentry services, other post-release resources, information about how to apply for benefits, a MTA CharmCard to help clients begin to navigate the City's public transportation system, basic hygiene products, a bottle of water, and a snack. These items eased the tension and often exhausting events of the hearing-day and enabled the family to enjoy that day.

<sup>216</sup> *See supra* note 23; *infra* note 270 and accompanying text.

<sup>217</sup> *See infra* Parts IV.C.3 & V.A.

<sup>218</sup> Jobs in reentry are geared for people who tend to be able to do very physical work; our geriatric clients often had advanced education and management skills but were not physically able to do the construction and deconstruction jobs that are typical reentry jobs.

All had to adjust and readjust their expectations as they faced inevitable glitches and frustrations; struggled with obtaining identification documents, benefits, and medical care; and dealt with the collateral consequences of incarceration, such as the barriers to housing and employment.

Virtually all of our clients who were in their sixties and seventies had some, and usually significant to severe, medical problems. Additionally, many of our clients in their fifties had advanced medical conditions brought on by the effects of long-term incarceration.<sup>219</sup>

**a. A Transition Model**

To help prepare families for the future and to set reasonable expectations, we used a very rough predictive, ninety-day transition model, divided into thirty-day periods that would apply to most, but not all, of those to be released. By this rough timeline, we alerted the family and client to anticipated sequential steps in a successful reentry process.

In the first thirty-day period, there is initial joy and celebrations. Those released meet family members, including grandchildren, they had not met before, and celebrate freedom and family. With this, comes delayed grief about the deaths of parents or siblings. During this period, we helped clients obtain identification documents, apply for benefits, make and keep medical appointments, and begin to establish the rhythms of their new lives.

In the second period, the clients become more conscious of expectations—from themselves, the others released earlier, us, and their families. They deal with the frustrations that arise from severe poverty, barriers to employment, and denial of anticipated benefits. In short, they are introduced to the inadequate reentry “non-system” of services and benefits.

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<sup>219</sup> Our clients’ typical medical conditions include hypertension, heart disease, diabetes, arthritis, stroke, and cancer. More than three-quarters have Hepatitis-C. Less typically, we have clients with COPD, cirrhosis, and dementia. Most have an addictions history and some have forms of emotional and mental problems either pre-dating their incarceration or developed during incarceration.

In the third period, they begin to seek, or think about seeking, more autonomy in their lives and living arrangements. They face the problem of achieving this without adequate benefits or employment. This challenges their resiliency and determination to build new independent lives, while still including their families in these lives.

#### **b. Finding and Providing Services**

To help our clients and their families to obtain the services they needed to move through these three periods, we did several things as case managers. We established relationships with both prison social workers (to identify the clients' anticipated needs) and community-based providers (who might help meet those needs). We spent substantial time making and following referrals. Often, we created service options that did not exist before to meet the special needs of a client.

We also provided direct services. To differing degrees, we helped clients obtain State identification cards, Social Security cards, and even birth certificates. We helped them apply for basic benefits like Supplemental Security Income (SSI), Temporary Disability Assistance, Supplemental Nutrition Assistance (i.e. Food Stamps), Medical Assistance or Medicare, and MTA Mobility Assistance and other transportation assistance (bus passes and cab fares). We also helped clients to obtain necessary medical care and prescriptions, and worked hard to help them obtain housing, including limited Section Eight vouchers, and employment. With the more involved clients, we helped on a daily or weekly basis with the everyday issues of living.<sup>220</sup>

Although this list of benefits may appear to comprise a comprehensive "safety net," they absolutely do not. Many of those without family support have been required to subsist at best on

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<sup>220</sup> More basically, upon release, many of the men needed clothing, personal hygiene items, and a way to get from the prisons to their new residences. The social work team also gave them a "reentry resource binder," which included contact information for the social workers and their lawyers and information about reentry services, Social Security, and other sources of assistance. As a nice touch, there was a snack and bottle of water included.

approximately \$370 a month,<sup>221</sup> and often on just \$189,<sup>222</sup> both a virtually impossible task. For some lucky ones this abject poverty lasted for the period, one-to-six months, until they were found eligible for SSI, which provides \$733 a month. For others, the minimal financial support has been permanent. Their incomes have had to cover not just food, but also prescription co-pays, transportation, and the big item—housing. The latter is because these men are ineligible, because of their criminal records, for most senior housing and all public housing options. Of course they have no credit or rental histories, so fair market rentals are beyond their reach.

Our support also included life-skills training; advice about technology (computer basics and cell phone functions); and help in creating personal schedules/calendars and in drafting correspondence. We accompanied some to their initial medical and mental health appointments, and rode with some on mass transit to demonstrate how to get to appointments on time. For those who were indigent and had no family support, we tried to find in our limited budget funds for one-time payments for housing, bus passes, medical co-pays, over-the-counter medications and hygiene items, and in extreme circumstances, for groceries, while their benefits applications were pending.

### **c. Using Tiered Service Models**

Our ultimate goal was to help those released to live independently and offer assistance when they needed and wanted help. Some left prison more ready to live independently than others.

We were pleasantly surprised by the relatively large numbers who had family members—often sisters and sometimes more distant relatives—who agreed to take their prisoner relatives in. We

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<sup>221</sup> The total of Temporary Disability Assistance and Supplemental Nutrition Assistance payments. *See generally Temporary Disability Assistance Program (TDAP)*, PEOPLE'S L. LIB. MD., (last updated Mar. 5, 2018) <https://www.peoples-law.org/temporary-disability-assistance-program-tdap>.

<sup>222</sup> The monthly amount of Supplemental Nutrition Assistance payments. *See generally Supplemental Nutrition Assistance Program*, PEOPLE'S L. LIB. MD., (last updated Nov. 15, 2016), <https://www.peoples-law.org/supplemental-nutrition-assistance-program>.

estimate that approximately 70% of the 190 were released to relatives. Others were placed in nursing homes, assisted living arrangements, senior buildings, and forms of transitional housing. The remainder are living with roommates or in rentals (often without leases).

Over time, we developed a tiered model of service based on the clients' needs and the services we predicted we would have to provide to them. Initially the model consisted of four tiers but over time evolved into a seven tier model of service. These tiers reflect the complexity and variety of assistance our clients needed, and in some cases, continue to need, and their available resources.

Tier One consisted of complex, high needs clients. These were indigent clients with little-to-no community support. These clients also faced multiple challenges, including, depending on the client, mental health, serious medical, and substance abuse issues. Some of the high needs clients required supported housing, nursing home, or hospice care. For some, they had been incarcerated as juveniles and were "raised" in prison; upon release these clients often needed more assistance adjusting to life on the outside.

Tier Two included clients with one or two major challenges. Challenges clients in Tier Two faced included indigence and limited community support. In some cases, they were difficult-to-place clients, such as those convicted as sex offenders.

In Tier Three were clients that needed some support at release, but required a lower level of material support initially, due to family support. The needs of these clients increased at the six to eight month mark after release as the clients sought to become independent, or as they struggled with issues, such as limited family resources or conflicts in housing situations.

Tier Four clients had very limited needs upon release due to stable family support. These clients also were in no rush to move to independent housing. Most issues clients in this tier faced



involved needs of extended family, including care for aging parents and/or the client's own emerging health issues.

Tier Five included clients who needed limited initial support. These clients were primarily referred out for employment services and support. Follow up was provided through periodic contacts with clients and other providers. Additionally, Tier Five clients receive monthly check-in calls and invitations to monthly events.<sup>223</sup>

Tier Six clients “graduated” from ongoing case management and were and are managing well independently. The social work team is available for crisis-based intervention. These clients receive monthly check-in calls and invitations to monthly events.

Tier Seven clients were released to outlying counties and received referrals. They receive monthly check-in calls. Tier Seven also included clients who declined services.

When we ended the social services component in May 2018, we referred some clients who had not “graduated” to community resources with follow up to make sure the matches worked, and retained the more needy ones, thirteen of 135, in the Clinical Law Program's permanent Law and Social Work Services Program. These thirteen are some of the older men (late 70s and 80s), a few who are nursing home-bound or extremely medically fragile, and a handful of mostly independent clients who have a few targeted needs, or have been highly reluctant to disengage (a handful who mostly just want a call every month and face-to-face meetings once per semester). We remain available to all of our past Unger clients for crisis support, although we are happy to say fewer and fewer need this.

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<sup>223</sup> See *supra* Part IV.C.4 (describing the monthly events bringing together clients, their families, and the social work team).

#### **4. Monthly Events**

We sponsored monthly events for those who were released, their families, and their social work teams. Initially these events were held at the Law School. Now the Maryland Restorative Justice Initiative holds them at a community center. For those recently released, these informal events have a “welcome home” dimension. They have been the highlights of our work.

At these events, there is dinner, a time for fellowship (which social workers or students facilitate), and a different speaker each month who talks about an important post-release topic, for example, available services and jobs, use of Internet and online privacy, personal relationships, or budgeting. There may be a group activity like a writing workshop. Sometimes, there is a break-out session for family members and friends. The Executive Director of the Maryland Restorative Justice Initiative usually speaks at these events.

We believe these events have been important to the successes of those released. They help to create a strong sense of community, reinforce the friendships many formed in prison, and provide a meeting place at which those released can offer assistance when needed to each other. Additionally, these events build a sense of responsibility among those released.

#### **V. THE STUDENTS’ PERSPECTIVE<sup>224</sup>**

The students who have come through the clinic are consistent in their belief that it gave them new perspectives about themselves and the people they represented. It affected their personal and professional worldviews.

All of us were nervous. These men were in prison for committing the most serious of crimes. A fellow clinic mate remembered, “I have seen those shows about lawyers or women being leered

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<sup>224</sup> This segment was written entirely by two law students, Michael Bakhama and David McAloon, who participated in the Unger Clinic in 2013.

at in prisons. This is what I thought the whole time going through the metal detector and the heavy doors.” We fretted about how the prisoners would respond to having a twenty-something law student, young enough to be their grandchild, as a supposed champion. What we found were people who were gracious with their time, grateful for the visits, and many that were cautiously optimistic for the future. What was perhaps most surprising for all of us was how surprising we found it. Why should we have expected them to be anything but regular people just like us? People who, despite their situations, still shared many of the same hopes and dreams that we did.

After meeting our clients, we were faced with very new fears. We were no longer afraid of who these people were and how they would treat us. We were now afraid of how we would treat them. We were afraid of failing them. This was intimidating, more because of the stakes involved, than the workload. Many of us had thrown ourselves into clinics or internships before while taking heavy course loads in law school, so we were used to sleep and leisure time being in short supply. What was new here was that real human beings, who had had hope stolen from them decades ago, would either be getting a miraculous second chance or dying in prison. If there was ever a time to bring our A game, this was it.

Meeting our clients face to face made us want to work even harder. We redefined our definition of hard work. Many of us thought that the trials and tribulations of the first year of law school had been challenging, but the clinic brought a whole new universe of pressure. Before, if we were tired of working on a project and felt a B was “good enough,” we had the luxury of turning in subpar work. Now, average was no longer good enough; people’s lives and liberties were at stake. People who needed help because the system had locked them up for forty years and then thrown away the key. People who were counting on us to get the job done, because this was their last chance at

freedom. Putting in a half-hearted effort would mean being cavalier about someone's life. Realizing this, all of us resolved to work harder on our clients' cases than we had ever worked on anything before. Many of us were driven by the fear that, for the first time in our lives, failure would have deep and irreversible consequences.

Tied to that fear was an effort to temper expectations. As you begin to learn in law school, but only truly realize when you have real clients, you have to under-promise and over-deliver. For many of the prisoners, this was not a problem. They had heard it all. Hucksters had come in every couple of years with the promise of some new court decision that just came out that was sure to affect their case and, "oh, for the nominal fee of \$500, I'll file that appeal for you." Many of us saw bemused smirks as we explained *Unger* and its import. These men already knew about *Unger*. They knew who had filed *Unger* petitions, who had succeeded, and who was still waiting. Still, some of them could not help but allow some hope to creep back into their lives. One of us told a client, J, how he played guitar, and J responded that he had picked up the drums in prison, and how when he got out maybe they could jam sometime.

We were reminded time and again how difficult this would be, all the more so as we navigated the vagaries of a Byzantine post-conviction system in Maryland. We quickly learned the truth of the quote, "The state furnishes no machinery for arriving at justice."<sup>225</sup> Nearly all of these men had tried, and failed, to achieve justice on their own, by filing pro se petitions. One man had petitioned for post-conviction relief decades earlier, on grounds separate from *Unger*, and had in our view done so effectively. The post-conviction judge summarily dismissed the petition, refusing to even hear its merits, however, because the man had failed to style his pleading properly.

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<sup>225</sup> CLARENCE DARROW, RESIST NOT EVIL 153 (1902).

This man lost decades of his life to what can only be described as an arcane point of procedure. We could not begin to imagine the confusion and frustration he must have felt. As law students, we had been taught the theory that “procedure should be the handmaid of justice, rather than its mistress.”<sup>226</sup> We now saw the reality: to people like our clients, who could not afford lawyers, procedure was a harsh mistress indeed. This experience was not uncommon, and it brought to each of us on a visceral level the problems attendant to the criminal justice system.

These problems extended beyond the courtroom. Believing that some judges might look for any procedural misstep to justify denying our petitions, we made every effort to track down each clients’ procedural history to present a clear and accurate narrative to the court. This became the most time-intensive part of the process. There were countless trips to courthouses and State archives, interviews with clients’ family members, and calls to the company that provides court reporters. Our cases would rise and fall based on the judge’s jury instruction as recorded on the trial transcript, yet many of us could not even locate the transcripts for these cases. In at least one instance, a transcript was never even made! Even when we could find the trial transcript, we would often find that the rest of the client’s file had been destroyed. It mystified us how, in this country, the State had sentenced these individuals to life in prison and then simply destroyed their files. It was more like a Kafka novel than the United States.

Fortunately, amidst all our frustration, we were nonetheless inspired by the men we represented. We learned how remarkable these men were. They had been jazz musicians, high school athletic champions, army soldiers. Most worked at improving themselves while in prison, earning high school diplomas, trade certifications, and other advanced degrees. Some had spotless disci-

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<sup>226</sup> See Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938).

iplinary records, without a single infraction in a world where improper towel hanging is an infraction. All this, while constantly having the rug pulled out from under them. The Pell Grants providing funding for prisoner education are long gone. The work-release program that many of these men participated in while on the path to parole taken away—along with any hope for parole—in 1993. Nonetheless, they persevered. And so would we.

Each of us took so much away from the clinic. We gained confidence in our ability to work in the legal profession. Some gained a new career path in criminal defense—a new line of work never intended upon entering law school but one certain to be challenging and rewarding. For others, it only reinforced that this was the line of work they wanted to do. Working together in teams was a key element of the experience. In contrast to the typical, competitive law school class dynamic, we gained insights from each other, complemented one another's skill sets, and supported each other as a team.

As a learning tool, one of the unique benefits of the clinic was that it was focused on helping the clients. Although there were classes tying our practice to larger principles, the focus was on making *Unger* count for a group of men who would not get another chance. Our clients were not a pedagogical exercise, a teaching tool, or a means to an end; they were the whole point. That meant that we, as students, were given challenges and responsibilities that, while initially sometimes overwhelming, taught us a lot more about how to deal with the pressure and responsibility of being a lawyer than a less intense, more narrowly focused class might have done.

So yes, we gained lessons and perspectives that will guide us through our personal and professional lives. But this clinic was and remains about the people that we tried to help. And in that respect, we experienced some joys, some frustrations, and some sadness; just like “real” lawyers would. Some got to see the light in their clients' faces when they told them the State had agreed to

release them, and later witness the tearful family reunions. Others were left to curse the injustice as they heard the State had reneged on an agreed-upon release two days before the hearing at which the client would have gone home. But the cruelest fate fell to one man who, after returning to his family and attending a welcome home party, kissed his wife goodnight, told her “I love you,” then went to bed and died of a heart attack.<sup>227</sup> Maybe his heart burst from experiencing too much joy at seeing his loved ones again. Maybe the universe could have given him more than one day with his family. Then again, maybe he would have had that heart attack in prison, and so it was only fortune that let him hug his wife one last time before leaving.

The opportunity to interact with these gentlemen, even if only for a little time, was without a doubt the most profound and rewarding experiences of our law school careers.<sup>228</sup>

## **VI. WHAT WE LEARNED AND TAUGHT WITHIN THE CLINIC**

The Unger Project has been a pedagogical onion. As we peeled it, every layer generated a new and important topic for discussion. What follows are some things that we learned about and taught with. Our clients presented many stories, all relevant to our work that can be grouped in the following ways: families and community; effects of race in the criminal justice system; professional responsibility; unreliability of old convictions; changes in the purposes of incarceration; over-incarceration of older prisoners; the cynical politics of parole; and unavailability or inadequacies of reentry programs for geriatric prisoners. We address these topics in that order.

### **A. Our Clients, Their Families and Their Community**

Most of the Unger group did awful things, often when young, most often without much if any pre-thought. Listening to the tearful testimony of victims’ survivors at settlement hearings was

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<sup>227</sup> See *supra* note 108.

<sup>228</sup> See *supra* note 6.

exceedingly difficult. It left no doubt that homicide causes incomparable loss and irreparable intergenerational damage as well.

It does not diminish or disrespect these losses to conclude that our clients' redemptions provided the most important teaching moments in the clinic. The substantial majority, over time, grew into peaceful and law-abiding people. They demonstrated in prison capacities for, and interests in, education, work, and spiritual development. They displayed the human potential for love and compassion and to live moral, ethical, and productive lives. Most often, their families did not abandon them.

Upon release, the students saw the important and supportive community their clients are building. It is what a good community should be. Its members care for and support one another and have high expectations for each other; for some, this is the first time anyone has had high expectations for them. This largely is a self-motivated and self-created peaceful community, comprised of individuals who many believed were irredeemable.

Some knew each other before prison. Others built friendships with one another in prison or after being released. The leaders of this community usually lead with their wives and partners. Some of those wives and partners became grassroots organizers and criminal justice reformers while their loved-ones were in prison, often in response to what they learned about prisons from those they loved. They were building a community before the Unger group was released.

In this community, like many, there are group dinners, bowling trips, and barbeques in local parks, support for friends at funerals, visits to those who are hospitalized, and support for those still inside. They answer late night phone calls of frustration and doubt, they share hardships and triumphs, and they hold each other accountable to their new freedom. Some speak, write, and rally



in support of proposed criminal justice reforms, and a number were present in court at settlement hearings to support those coming home.

This community has a motto, “Failure is not an option.” We have heard many repeat this motto like a mantra. The members work hard to make sure everyone lives up to that motto. So far, almost all have.

The family members, especially mothers, sisters, wives, and girlfriends, who maintained the family through prison bars, laid the foundation for this community. Men who returned to families that provided them intergenerational support during their incarcerations were least likely to struggle with transitional problems. The stability of an established home, even if the home was, or is, financially strained, was a key in the most successful reentries.

This, most often, matriarchal structure of faith, stability, and connection within the African-American community made a tangible difference as men struggled to find their way in a society that was utterly foreign to them. We had client after client who were welcomed home by mothers in their late eighties or their nineties, as well as their children, grandchildren and great-grandchildren. This preserved the concept and fact of home and belonging, and helped to buffer trauma and grief.

Thus, the best teachers in this Project have been our clients, their families, and the community they have created. They have taught us the power of hope and how to sustain it, the importance of family in doing that, and the fallacies and unfairness of accepted stereotypes.

## B. The Pervasive and Lasting Effects of Race

The experiences of the Unger group wholly validate the claims made by many scholars about racism in the criminal justice system.<sup>229</sup> The advisory-only jury instruction added an especially ugly dimension to the racism.

As we said earlier, in the Unger group, 84% of those for whom race is known were African-Americans.<sup>230</sup> These numbers are grossly disproportionate to the relative percentages of African-Americans and whites charged with homicides in the 1960s and 1970s.<sup>231</sup>

All parts of Maryland in this period had racial strife.<sup>232</sup> All of the 237 Unger cases were tried before the Supreme Court held in *Batson v. Kentucky* that prosecutors could not use peremptory challenges to strike minorities from juries.<sup>233</sup> In the 1960s in Baltimore City, African-Americans were not generally summonsed for jury duty,<sup>234</sup> and when they were in the 1970s, the prosecutors routinely struck them with peremptory challenges.<sup>235</sup> This was true statewide as well. Thus, the juries in the trials of the Unger clients did not come from fair cross-sections of their communities.

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<sup>229</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>230</sup> See Feldman Data, *supra* note 13.

<sup>231</sup> See *supra* note 26.

<sup>232</sup> See SUZANNE E. GREENE ET AL., *MARYLAND: A HISTORY OF ITS PEOPLE* 262 (1986) (discussing racial violence occurring in Maryland in the 1960s).

<sup>233</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>234</sup> There was a “key man” system in effect in Baltimore City until 1969. Pursuant to this system, each judge of the seventeen judges on the circuit court (then called the Supreme Bench), all of whom were white until 1967, see *Archives of Maryland Historical List, Supreme Bench of Baltimore City and Baltimore City Circuit Court, 1867 -*, MD. ST. ARCHIVES, , <https://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/supbench.html>, asked “key men,” friends of the judges, to nominate jurors for criminal trials. After this practice ended in 1969, African-American representation in Baltimore City juries increased significantly. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 114–15 n.562 (1990) (“In 1969, Baltimore revised its jury selection procedures, and selected registered voters to serve as jurors instead of personally selecting ‘key-men.’ The difference increased black jury representation from 30% to 46.7% in the years 1969 to 1974.” (citing JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 33–34 (1977))).

<sup>235</sup> In Maryland in the 1960s and 1970s, legal challenges to the exclusion of minorities from juries met with little success. See, e.g., *Brooks v. State*, 240 A.2d 114 (Md. Ct. Spec. App. 1968) (stating that of 400 prospective jurors, only fourteen were African-American, and that—as well as other evidence of exclusion of African-Americans from the jury—was not enough to establish a prima facie case of purposeful discrimination).

In the 1960s and early 1970s, when the Unger group was convicted, Baltimore was a majority-white city. It had a substantial white working class population and a growing African-American population.<sup>236</sup> A measure of the views of the people throughout the State was provided by the presidential primary in 1964. When George Wallace, famous for his “segregation now, segregation tomorrow, segregation forever” pledge as Alabama governor, ran, he won *43% of the vote* in Maryland, and won the majority-white precincts.<sup>237</sup> If you exclude African-Americans, then over 20% of Maryland’s population, who almost certainly did not vote for him, *it means a majority of white people in Maryland voted for Wallace.*<sup>238</sup> This majority often formed the majorities of juries with the racist exclusion of blacks from juries.

During the 1960s and 1970s, race relations in Maryland, as throughout the country, also were inflamed by the backlash against the Civil Rights Movement, the assassination of Dr. Martin Luther King Jr., the violent disturbances in reaction to that event, and the angry counter-responses.<sup>239</sup>

It was in this context that judges in the trials of the Unger group were instructing juries that they were free to decide what the law was.

### **C. Professional Responsibility Issues: Models of Lawyering**

The work of many lawyers was before the students, depending when they took the clinic. These were the lawyers who prosecuted the original cases decades ago, and the contemporaneous prosecutors and assistant attorneys general who represented the State in the *Unger* proceedings; the defense counsel in the original trials and original appellate and post-conviction counsel; and the

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<sup>236</sup> See KENNETH D. DURR, BEHIND THE BACKLASH: WHITE WORKING-CLASS POLITICS IN BALTIMORE, 1940–1980 126 (2003); HAROLD A. MCDUGALL, BLACK BALTIMORE: A NEW THEORY OF COMMUNITY 98 (1993).

<sup>237</sup> See DURR, *supra* note 236, at 124.

<sup>238</sup> See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 36 (101st ed. 1980).

<sup>239</sup> *Id.* at 141–42. See *supra* note 116.

lawyers, including assistant public defenders, pro bono lawyers, and law faculty, who represented the Unger petitioners. There were plenty of models of lawyering to talk about.

There were many examples of good and bad lawyering in the cases we handled, and much teaching “material” about competency and good advocacy, and the absence of both. Some of the original trials happened before the creation of a Public Defender Program,<sup>240</sup> and the performances of many of the defense lawyers were plainly deficient.<sup>241</sup>

Our students witnessed firsthand the long-lasting and life-changing effects of bad lawyering, as well as the ability of lawyers to help rectify wrongs through good lawyering and commitments to justice.

#### **D. The Unreliability of the Old Convictions, Especially With the Advisory-only Instructions, and Sentencing Hearings**

Most of our clients’ convictions were imposed in trials that lasted one-to-three days. Many of our clients had strong arguments that they were not guilty of the crimes for which they were convicted;<sup>242</sup> some that the prosecution had plainly failed to establish that they were guilty beyond a reasonable doubt; and among them, some that were factually innocent.

The majority of the sentencing proceedings were legally flawed. In the substantial majority of proceedings there were no, or only very brief hearings, in which the defense called no witnesses.

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<sup>240</sup> Maryland’s Office of the Public Defender was created by statute in 1971. *See* Act of Apr. 29, 1971, ch. 209, 1971 Md. Laws 485 (adding a new Article 27A to the Annotated Code of Maryland to provide for the creation of a Public Defender System for the State of Maryland) (codified as MD. CODE ANN., CRIM. PROC. § 16-202 (LEXISNEXIS 2008)). *Office of the Public Defender: Origin and Functions*, MARYLAND.GOV, <http://msa.maryland.gov/msa/mdmanual/25ind/html/61pubdf.html>.

<sup>241</sup> For a powerful example of the deficient lawyering occurring in some of our cases, see *supra* Section I.A (describing Bobby’s case).

<sup>242</sup> *See supra* Section I.A (describing Bobby’s case).

This likely was so because many of the lawyers and judges erroneously believed that it was mandatory that the judge impose a full life sentence (no part suspended) for murder.<sup>243</sup> This misconception continued after the Court of Appeals expressly rejected it.<sup>244</sup>

Moreover, the Supreme Court did not hold that errors by lawyers at sentencing hearings could be constitutionally ineffective, entitling the defendants to new hearings, until 2003.<sup>245</sup> By any measure, many of the sentencing hearings of the Unger group were deficient with little or no mitigation.

After the trials, the U.S. Supreme Court and the Maryland Court of Appeals recognized new legal rules that would bar some of the evidence routinely allowed then<sup>246</sup> and provide compelling defenses today,<sup>247</sup> and held unconstitutional several of the other key instructions that appeared in our clients' cases.<sup>248</sup> These instructions included that the burden was on the defendant to establish mitigation<sup>249</sup> or an alibi defense.<sup>250</sup> These were either not retroactive decisions or retroactive decisions that the clients simply could not enforce pro se in the post-conviction process.

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<sup>243</sup> See *State v. Wooten*, 352 A.2d 829 (Md. 1976) (finding the court had “the power to suspend completely or partially any and all sentences over which they have jurisdiction.”); *Williamson v. State*, 395 A.2d 496 (Md. 1979) (finding the trial judge did not properly exercise his discretion in refusing to consider suspending part of the defendant’s life sentence).

<sup>244</sup> See *supra* notes 55 & 191 and accompanying text.

<sup>245</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003).

<sup>246</sup> See, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965) (finding the Confrontation Clause in the Sixth Amendment is a fundamental right, applicable to the states through the Fourteenth Amendment); *Bruton v. United States*, 391 U.S. 123 (1968) (finding the introduction of a nontestifying codefendant’s confession, implicating the defendant, violated the defendant’s right to confront a witness, even when the judge instructed the jury to only consider the confession against the codefendant).

<sup>247</sup> See *Miller v. Alabama*, 567 U.S. 460 (2012) (finding the Eight Amendment of the U.S. Constitution forbids the mandatory sentence of life in prison without parole for juveniles who commit homicide); *State v. Smullen*, 844 A.2d 429 (Md. 2004) (finding the Battered Spouse Syndrome section of the Maryland Code applies to battered children (citing MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (LexisNexis 1996))).

<sup>248</sup> The evolution of criminal law and evidentiary standards were why some Unger cases could not be retried.

<sup>249</sup> See *State v. Evans*, 362 A.2d 629 (Md. 1976) (applying *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).

<sup>250</sup> See *State v. Grady*, 345 A.2d 436 (Md. 1975); *Robinson v. State*, 316 A.2d 268 (Md. Ct. Spec. App. 1974).

We are not arguing that we should measure the legality of old convictions by today's non-retroactive rules, but rather that in making release decisions today, we should not have undue confidence in the reliability of the old convictions, nor in the actual ability of our post-conviction structure to remedy prejudicial errors.<sup>251</sup>

### **E. Changes in the Purposes of Incarceration**

Using our clients' lives, we analyzed the progression in the accepted purposes of incarceration from the 1960s and 1970s, when there was a mixture of rehabilitation, deterrence, and retribution, to the 1980s and 1990s, when there was a sharp turn to retribution.<sup>252</sup> The imposition of mandatory sentences in the "War on Drugs," the rigid enforcement of three-time loser laws, the general increase in the lengths of prison sentences, and the abolition of, or significant restrictions on, parole, and other factors, multiplied by almost ten times by 2014 the number of people whom this country had locked up in 1974.<sup>253</sup>

Our clients' lives were living evidence of the critical importance of rehabilitation and that rehabilitative programs can work, and of the power of people who commit the worst crimes to redeem their lives. Their lives underscore the avoidable human losses that came with the more purely punitive purposes of prisons. Much of this change was produced by politically cultivated public anger, not empirical facts.<sup>254</sup>

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<sup>251</sup> In a number of the 237 Unger cases, prosecutors did not retry the prisoners because, although they could have used the original transcripts, they knew that they could not get convictions on the facts and under today's legal rules.

<sup>252</sup> See AM. SOCIOLOGICAL ASS'N, *supra* note 26 (discussing the shift "from rehabilitative to incapacitative sentencing policies"); Christina Pazzanese, *Punitive Damages: Q&A on the Economic and Social Costs of Rising U.S. Incarcerations, Despite Dipping Crime Rates*, HARV. GAZETTE (May 13, 2014), <http://news.harvard.edu/gazette/story/2014/05/punitive-damages/> ("Back in the [19]70s and before, rehabilitation was an articulated goal of the criminal justice system [but] [t]he Supreme Court has said clearly now rehabilitation is no longer a penological goal."); Meghan J. Ryan, *Science and the New Rehabilitation* 16 (SMU Dedman Sch. of Law Legal Studs. Res. Paper No. 97, 2013) (describing "the general abandonment of rehabilitation [as a penological policy] in the mid-1970s").

<sup>253</sup> See THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS (updated June 2017), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

<sup>254</sup> For information on how President Richard Nixon formulated the "War on Drugs" by portraying drug users as criminals requiring punishment, not rehabilitation, see Ed Vulliamy, *Nixon's 'War on Drugs' Began 40 Years Ago*,

## F. Over-Incarceration, Especially of Older, Long-incarcerated Prisoners

There is a developing consensus that the United States incarcerates far too many people.<sup>255</sup> The Unger Project experiences support this consensus, demonstrating that thousands of older long-incarcerated prisoners could be safely released, especially with post-release support. These experiences are highly relevant in the current debates about our nation's penal policy generally and about over-incarceration specifically.<sup>256</sup> The Project experiences confirm recidivist studies<sup>257</sup> and support arguments, including cost-effective arguments, against over-incarceration.<sup>258</sup> Our Unger clients put human faces on these policy arguments.

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*and the Battle is Still Raging*, THE GUARDIAN (July 23, 2011, 8:07 PM), <https://www.theguardian.com/society/2011/jul/24/war-on-drugs-40-years>; Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, THE ATLANTIC (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/>. For information on President George H.W. Bush's 1988 presidential campaign ad using the Willie Horton case to portray Michael Dukakis as soft on crime, see Editorial, *George Bush and Willie Horton*, N.Y. TIMES, Nov. 4, 1988, at 34; Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

<sup>255</sup> See PEW CTR. ON THE STS., TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS (2012); ACLU, *supra* note 21; Caitlin J. Taylor, *Ending the Punishment Cycle by Reducing Sentence Length and Reconsidering Evidence-Based Reentry Practices*, 89 TEMP. L. REV. 747 (2017); Lynn Adelman & Jon Deitrich, "Booker," *Judges, and Mass Incarceration*, 29 FED. SENT'G REP. 224 (2017). See also ALEXANDER, *supra* note 229; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); STEVEN RAPHAEL & MICHAEL A. STOLL, DO PRISONS MAKE US SAFER? 3 (2009) ("Over the past three decades, the U.S. prison incarceration rate has increased to unprecedented levels. Prior to the mid-1970s, the incarceration rate was stable . . . thereafter, however, the incarceration rate increases precipitously. Between 1975 and 2004, the prison incarceration rate more than quadrupled.").

<sup>256</sup> See, e.g., Roger Fairfax, *From Overcriminalization to Smart on Crime: American Criminal Justice Reform-Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597 (2011); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581 (2012); Carol S. Steiker, *Symposium: Mass Incarceration: Causes, Consequences, and Exit Strategies: Introduction*, 9 OHIO ST. J. CRIM. L. 1 (2011).

<sup>257</sup> See *supra* note 21.

<sup>258</sup> CTR. FOR JUST. COLUM. U., AGING IN PRISON: REDUCING ELDER INCARCERATION AND PROMOTING PUBLIC SAFETY IX (2015); Matt Stroud, *U.S. Taxpayers Shell Out \$16 Billion Every Year to Care for Elderly Prisoners*, FORBES (July 1, 2013), <https://www.forbes.com/sites/mattstroud/2013/07/01/caring-for-elderly-prisoners/#51fa085722f2>. Currently, the Open Society Institute-Baltimore is conducting an economic study that will measure the savings from the releases of the Unger group. The annual cost of an elderly inmate is roughly double that of a younger inmate, in large part because of the enhanced medical expenses, with estimates in the \$60,000 to \$70,000 a year range. *Id.* The Unger group members, on average, were incarcerated thirty-nine years. Using a more conservative cost figure, \$50,000 a year, and considering only the last fourteen years of their incarcerations, everything over twenty-five years cost the State over 160 million dollars (237 x 14 x \$50,000) in prison costs. Obviously, there are some offsetting costs of reentry.

We emphasize that those in the Unger group were not selected because they had the best prison records (although most had good-to-excellent records). The Maryland Parole Commission recommended many for parole, but almost certainly not the majority.<sup>259</sup> The 237 are representative of long-term lifers generally, and there is no reason to distinguish the 190 in Maryland from tens of thousands of long-term, old lifers across the country.

Geriatric prisoners are a special national problem. Nationally, almost one-quarter of a million prisoners are age fifty or older.<sup>260</sup> With longer mandatory sentences and less meaningful opportunities for parole, the prison population continues to age in place. From 1995 to 2010, the numbers of prisoners age fifty-five or older nearly quadrupled, from 32,600 to 124,400.<sup>261</sup> By 2020 older inmates will represent 21% to 33% of the prison population.<sup>262</sup>

The cost of keeping aging prisoners behind bars is an estimated \$16 billion per year, including \$3 billion in medical care.<sup>263</sup> By 2030, it is estimated that up to one-third of the entire prison population in the United States, upwards of 400,000 prisoners, will be classified as elderly.<sup>264</sup>

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<sup>259</sup> See *infra* Section V.G.

<sup>260</sup> OSBORNE ASS'N, *supra* note 21, at 2. Part VI

<sup>261</sup> HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 24 (2012).

<sup>262</sup> R. V. Rikard & Ed Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System*, 13 J. CORRECTIONAL HEALTH CARE 150, 151 (2007).

<sup>263</sup> CTR. FOR JUST. COLUM. U., *supra* note 258, at IX; Stroud, *supra* note 258.

<sup>264</sup> CTR. FOR JUST. COLUM. U., *supra* note 258, at 3; Stroud, *supra* note 258. The ACLU, in a report on the aging prison population stated: "There is an overwhelming consensus among correctional experts, criminologists, and the National Institute of Corrections that 50 years of age is the appropriate point marking when a prisoner becomes 'aging' or 'elderly.'" ACLU, *supra* note 21, at v. See also *supra* note 4.



While it costs approximately \$34,100 per year on average to incarcerate a prisoner, it costs approximately twice as much, \$68,270 per year, to incarcerate an elderly prisoner.<sup>265</sup> That is a major reason Maryland's corrections spending grew by 674% over the last twenty-five years.<sup>266</sup>

In sum, the Unger experiences strongly support policy arguments in favor of many criminal justice reforms, including those limiting prison populations, against life-without-parole sentences, and in favor of a substantially expanded use of parole, not parole-abolition, for lifers.

### **G. Revealing the Cynical Politics of Parole**

All of the 237 Unger prisoners were sentenced to life with parole. This was before the Maryland Legislature provided a life without parole option.<sup>267</sup> In Maryland, the Parole Commission must recommend, and the governor must either approve, or fail to disapprove, parole before a life-sentenced prisoner can be released.<sup>268</sup> In 1993, the average period served on a life with parole sentence was between twenty and twenty-one years.<sup>269</sup> Prosecutors and defense lawyers negotiated pleas, and judges sentenced convicted defendants with this benchmark in mind. *This was the expectation of all of the critical actors when the 237 were sentenced.*

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<sup>265</sup> ACLU, *supra* note 21, at 28 (2012); PEW CHARITABLE TRUSTS & MACARTHUR FOUNDATION, STATE PRISON HEALTH CARE SPENDING 1 (2014) (stating that health care spending peaked at \$ 8.2 billion in 2009 and since declined, due in part to a decrease in state prison populations).

<sup>266</sup> MD. DEP'T OF PUBLIC SAFETY & CORRECTIONAL SERVS., QUARTERLY INMATE CHARACTERISTICS REPORT (July 2013), [http://www.dpscs.state.md.us/publicinfo/pdfs/stats/data-reports/I\\_and\\_I-Statistics/Inmate\\_Characteristics/Quarterly\\_Inmate\\_Characteristics/FY2014/2013\\_July\\_Inmate\\_Char.pdf](http://www.dpscs.state.md.us/publicinfo/pdfs/stats/data-reports/I_and_I-Statistics/Inmate_Characteristics/Quarterly_Inmate_Characteristics/FY2014/2013_July_Inmate_Char.pdf).

<sup>267</sup> The Maryland General Assembly enacted the life without parole punishment for murder in 1987. MD. CODE ANN., CRIM. LAW § 2-203, § 2-304 (West 2013). See Byron L. Warnken, *Life Should Not Mean Life Without Parole (Part III)*, PROFESSOR BYRON L. WARNKEN'S BLOG (Mar. 29, 2011), <http://professorwarnken.com/2011/03/29/life-without-parol/>.

<sup>268</sup> Governors must approve parole of lifers who have served less than twenty-five years of their sentences and disapprove parole for lifers who have served twenty-five years or more. MD. CODE ANN., CORR. SERVS. §7-301(d)(4) (LexisNexis 2013); MD. CODE ANN., CORR. SERVS. §7-301(d)(5)(ii) (LexisNexis 2013).

<sup>269</sup> See Darren M. Allen, *Killer Asks for Lighter Sentence: Parole Seeker Cites "Oz" for Hope*, BALT. SUN, June 16, 1993, at 1B (quoting then Chairman of the Maryland Parole Commission, Paul Davis, as stating "[t]he lifers now on parole served an average of 20.6 years before being released.").

The pathway to parole for lifers in Maryland in the 1960s, 70s, and 80s, was to move from maximum to medium to minimum security prisons. The last leg out was a successful period in work release, where prisoners slept in a community center at night, took buses to outside jobs during the day, and spent weekends living with their families. They were thus able to demonstrate over several years usually that they were ready for release, and they had major conditional reentry experiences before they were released.

That all ended in 1993 when a lifer on work release killed a woman and himself.<sup>270</sup> All prisoners on work release, including many of the 237 Unger prisoners, were immediately loaded on buses and shipped back to maximum security prisons. This was so, regardless of how well they were doing. Thereafter, they were made ineligible for minimum security and most prison programs.

In 1995, Governor Paris Glendening announced to great fanfare that “life means life,” failing to point out that life with the possibility of parole always meant there was a real possibility of parole. He rejected all of the recommendations by his Parole Commission that a lifer be paroled.<sup>271</sup> Governor Martin O’Malley continued this policy during his two terms.<sup>272</sup> This virtual end-of-parole-for-lifers policy was the major reason there were so many in the Unger group.

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<sup>270</sup> See Michael James, *134 Lifers Taken from Prerelease System: Midnight Move to Higher Security Follows Murder, Escapes*, BALTIMORE SUN (June 4, 1993), [http://articles.baltimoresun.com/1993-06-04/news/1993155079\\_1\\_lifers-prerelease-preparing-inmates](http://articles.baltimoresun.com/1993-06-04/news/1993155079_1_lifers-prerelease-preparing-inmates); Warnken, *supra* note 267; THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 14 (2013).

<sup>271</sup> Kate Shatzkin, *Glendening Acts to End Parole for Inmates with Life Sentences: Those on Work Release Summoned Back to Prison*, BALTIMORE SUN, Sept. 29, 1995, at 2B. Governor Glendening has since changed his stance on not granting parole to lifers. Speaking at a press conference with the Maryland Alliance for Justice Reform in March 2018, Glendening stated he was “completely wrong” and supported legislation to end the requirement for the Governor to approve or disapprove parole for lifers, calling it “a no-win power.” Rachel Chason & Ovetta Wiggins, *Glendening, Former Md. Governor, Says He Was Wrong to Deny ‘Lifers’ Early Release*, WASH. POST (Mar. 7, 2018), [https://www.washingtonpost.com/local/md-politics/glendening-former-md-governor-says-he-was-wrong-to-deny-lifers-early-release/2018/03/07/a9e681bc-2211-11e8-94da-ebf9d112159c\\_story.html?utm\\_term=.4e8ab34be8f7](https://www.washingtonpost.com/local/md-politics/glendening-former-md-governor-says-he-was-wrong-to-deny-lifers-early-release/2018/03/07/a9e681bc-2211-11e8-94da-ebf9d112159c_story.html?utm_term=.4e8ab34be8f7); Michael Dresser, *Former Maryland Governors Glendening, Ehrlich Join to Support ‘Smart’ Approaches to Crime*, BALTIMORE SUN (Mar. 6, 2018, 4:50 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-glendening-ehrllich-20180306-story.html>. The legislation, HB846/SB249, that would have removed Maryland Governors from parole decisions for lifers did not pass during the 2018 Maryland General Assembly Session.

<sup>272</sup> It appears that from 1989 to the present, Maryland governors have approved, or failed to disapprove, the parole (excluding medical parole) of only three lifers, with two recently by current Governor Larry Hogan. See Editorial, *Get*

The success of the Unger group reveals that there is no public safety justification for this policy.<sup>273</sup> The Unger Project experiences call into question arguments that some people will always pose dangers to others—they will not or cannot change, and we can accurately predict who those people are early in their lives. These false arguments are offered in support of life without parole sentences, the abolition of parole, and lengthy sentences generally.

#### **H. The Unavailability or Gross Inadequacies of Reentry Programs for Geriatric Prisoners**

Our clients' reentry needs identified the holes—many gaping—in the reentry programs, especially for older people coming out of prison. Without repeating what we discussed in Part IV.C., we summarize as follows:

1) Our prisons did not adequately prepare our clients for release, most seriously, often by not providing them with necessary identification, thereby putting them in a dangerous legal limbo.<sup>274</sup>

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*Governors Out of Parole Decisions*, BALTIMORE SUN (Feb. 20, 2017), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-parole-20170220-story.html>; Declaration of David Blumberg, Chairman of the Maryland Parole Commission, Md. Restorative Just. Initiative v. Hogan, Civ. Action No. ELH-16-1021 (D. Md. 2016). Governors have granted sentence commutations to some other lifers, reducing life sentences to terms of years. *Id.* With approximately 2500 Maryland prisoners serving life sentences, obtaining a parole or even a commutation is a little like hitting the lottery. Alison Knezevich, *Number of U.S. Prisoners Serving Life Sentences Has Quadrupled*, BALTIMORE SUN (Jan. 31, 2017), <http://www.baltimoresun.com/news/maryland/crime/bs-md-sentencing-report-20170131-story.html>.

<sup>273</sup> Some of this change in policy undoubtedly dates back to the Willie Horton affair. Then-candidate, President George H.W. Bush used the violent acts of an escaped work-release prisoner in Massachusetts to paint Michael Dukakis as soft on crime. *See supra* note 254. For a video of the 1988 ad, see llehman84, *Willie Horton 1988 Attack Ad*, YOUTUBE (Nov. 3, 2008), <https://youtu.be/Io9KMSSEZ0Y>.

<sup>274</sup> *See supra* notes 213 & 214 and accompanying text. The Real Identification Act, passed in the aftermath of September 11th, makes the problems worse. To issue a photo ID, Maryland requires a birth certificate, Social Security card, photo ID, and two proofs of address. *See Identification Cards in Maryland*, DMV.ORG, <https://www.dmv.org/md-maryland/id-cards.php> (last visited Aug. 8, 2018). This essentially is a “Catch-22”; the law requires ID to get ID. Even birth certificates and Social Security cards are difficult to acquire without some proof of identity. *See Learn What Documents You Will Need to Get a Social Security Card*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssnumber/ss5doc.htm> (last visited Aug. 8, 2018) (describing the documents necessary to obtain a Social Security card and emphasizing the documents cannot be expired and must be originals or copies certified by an issuing agency); *Request Birth Certificates*, MD. DEP'T HEALTH, <https://health.maryland.gov/vsa/Pages/birth.aspx> (last visited Aug. 8, 2018).

2) The sources of income for destitute people leaving prisons are wholly inadequate.<sup>275</sup>

3) The disqualifications of many of our clients for most senior and all public housing were particularly difficult challenges, and drive many returning citizens into shelters or lives on the street, often supported by crime.<sup>276</sup>

4) Most reentry programs focus primarily on job readiness and employment, appropriately so, because stable employment is one of the most significant factors in reducing recidivism. These programs are often a poor match for older returning citizens because they generally involve physically strenuous activity, which older people, like our clients who are living with chronic health problems, cannot do.<sup>277</sup>

5) Many reentry problems have legal dimensions and require advocacy and sometimes legal services. We were able to provide the necessary advocacy for our clients through trained social workers and, on an ad hoc basis, the help of lawyers.<sup>278</sup>

We learned more about the holes in the reentry programs for geriatric persons leaving prison, but these are the major points.

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<sup>275</sup> See *supra* note 218, 221 & 222 and accompanying text.

<sup>276</sup> See *supra* Part IV.C.3.b. Our clients were banned from public housing until they completed probation, or permanently if they were convicted of sexual offenses. Most senior citizen housing will not accept individuals with criminal records. (Exceptions are usually at the discretion of management companies.) Most assisted living programs and nursing homes will not accept individuals with violent histories, not matter how remote. See Patricia McKernan, *Homelessness and Prisoner Reentry: Examining Barriers to Housing Stability and Evidence-Based Strategies That Promote Improved Outcomes*, 27 J. COMMUNITY CORRECTIONS 7 (2017); Robert M. Gibson & Rebecca Ferrini, *Identifying and Managing Long-Term Care Residents with Criminal or Correctional Histories*, 22 ANNALS LONG-TERM CARE 30 (2014).

<sup>277</sup> See, e.g., MARYLAND CORRECTIONAL ENTERPRISES FY 2017 ANNUAL REPORT (Sept. 1, 2017). Maryland Correctional Enterprises (MCE) “provide[s] structured employment and training activities” to Maryland inmates. Although MCE offers some less strenuous employment opportunities, such as graphic design, the majority of employment and training opportunities require physical labor, such as furniture building, metal fabrication, and meat cutting. *Id.*

<sup>278</sup> See NANCY LA VIGNE, ELIZABETH DAVIES, TOBI PALMER & ROBIN HALBERSTADY, URBAN INST., *RELEASE PLANNING FOR SUCCESSFUL REENTRY* (2008) (discussing “specific elements that together embody thoughtful and effective prisoner release procedures”); Darrell P. Wheeler & George Patterson, *Prisoner Reentry*, 33 HEALTH & SOC. WORK 145 (2008) (discussing reentry issues and service needs); Todd A. Berger & Joseph A. DaGrossa, *Overcoming Legal Barriers to Reentry*, 77 FED. PROB. 3 (2013) (describing the need to “address the legal services gap in the reentry landscape” and one program, Rutgers Federal Prisoner Reentry Project, created to help meet that need).

## CONCLUSION

The Unger Clinic was an interdisciplinary, multi-year clinic created as part of a larger criminal justice project led by a major legal services provider. The partnership also included pro bono lawyers and a citizen-led reform organization. That organization, and two essential members of the clinic, were funded by a charitable organization.<sup>279</sup> The legal work was limited in scope; the social work more complete. Together they were very important parts of the Project, generated an array of important and interesting educational opportunities, and produced data that inform important national issues.

We do not claim that this clinical model is unique. Other law clinics have worked with legal services providers on major projects, along with social workers and social work students, to provide legal services to clients and to enrich clinical education. Some have done so to implement sweeping court decisions, like *Miller v. Alabama*.<sup>280</sup> In *Miller*, the Supreme Court held that the Eighth Amendment prohibits mandatory life sentences without the possibility of parole for juvenile offenders.<sup>281</sup>

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<sup>279</sup> In our case the Open Society Institute of Baltimore. *See supra* note 2.

<sup>280</sup> 567 U.S. 460 (2012). In 2016, the Supreme Court held *Miller* to be retroactive in *Montgomery v. Louisiana*, 136 S. Ct. 718.

<sup>281</sup> A number of law school clinics around the country helped to implement *Miller*, and later *Montgomery*, with components like those in our Unger Clinic, e.g., the Washington University School of Law's Juvenile Law and Justice Clinic (this work was continued through the Roderick & Solange MacArthur Justice Center in St. Louis, Missouri) and the Northwestern University's Pritzker School of Law's Children and Family Justice Center, collaborating with the Illinois Coalition for the Fair Sentencing of Children. These clinics helped to implement *Miller* and promote fair sentencing of juvenile offenders generally. *See Children and Family Justice Center: What We Do*, NW. PRITZKER SCH. L., <http://www.law.northwestern.edu/legalclinic/cfjc/projects/> (last visited July 16, 2018); *Clinic Leads Charge to Reform Juvenile Sentencing Laws*, WASH. U. L. NEWS, <http://law.wustl.edu/news/pages.aspx?id=9693>; Mae C. Quinn, *The Other Missouri Model: Systemic Juvenile Injustice in the Show-Me State*, 79 MO. L. REV. 1193 (2013); *Court Moves Forward Class Action Challenging Unjust Parole Process for Missouri Juveniles Previously Sentenced to Death Behind Bars*, RODERICK & SOLANGE MACARTHUR JUST. CTR. (Nov. 6, 2017), <http://stl.macarthurjustice.org/news/11812>

Others use this model, or parts of it, to represent clients and to challenge illegal rules and practices in immigration cases.<sup>282</sup> We are sure there are many other examples of this and apologize to those whom we have left out.

Our basic point is that a model like the one used in the Unger Project might be useful and replicable in discrete state and national law reform and implementation projects and civil rights projects, among many others. The major partner might be a state legal aid or public defender program, or a national advocacy organization. The focus of the project might be on immigration, voting rights, criminal justice, or one of many other endangered rights and rights-holders, or more generally to protect the Rule of Law.

We turn in a moment to the why, why to make a multi-year commitment, but first some observations on the how, how in retrospect we could have done a better job. First, although the social work students worked in year-long placements, with some opportunities to continue work after that, law students spent only one semester in the clinic. We were able to maintain a continual Unger law practice by offering the LTP courses sequentially, offering summer clinics, and allowing some students to continue to work in advanced clinical placements, but much of this had a make-it-up-as-you-go-along quality. Once we decided to make a multi-year clinic commitment, we should have thought this through more carefully. For example, we might have considered requiring some practice simulation course prerequisites, thus reducing some of the skills teaching we did and giving students more time for actual practice. Or we might have formalized the advanced second semester experiences, more carefully considering what the classroom and practice

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<sup>282</sup> The Immigration Clinic at the University of Maryland Carey School of Law, directed by Maureen Sweeney, also uses an interdisciplinary, collaborative model to represent immigrants and their families, as do other immigration clinics. *See, e.g., Immigration Clinic*, U.S.C. GOULD SCH. OF L., <https://gould.usc.edu/academics/experiential/clinics/immigration/> (last visited Aug. 9, 2018); *Asylum & Human Rights Clinic*, UCONN SCHOOL OF LAW, <https://www.law.uconn.edu/academics/clinics-experiential-learning/asylum-human-rights-clinic#> (last visited Aug. 9, 2018).

components would be, and whether there should be a teacher assistant role added. Or we might have considered teaching overlapping one-semester and two-semester law clinics and mixing students in co-counseling roles. There are undoubtedly other and better ideas.

We identify this as a challenge for anyone considering the multi-year model we used, acknowledging that we should have thought about it more carefully.

Second, in retrospect, at some point in the Project, we should have created a more thorough data-collection system so that we could have taken more complete advantage of the laboratory potential of this clinic. Thankfully, the OPD has kept lots of data, but we, as an academic institution, missed an opportunity to simultaneously supplement the OPD's data-collection in ways that would better support future scholarship.

Third, although the two professions—lawyers and law students and social workers and social work students—*worked* well together, we missed opportunities to teach better about and with the two professions. For example, we should have had more joint classes, and the two sets of students should have done some joint interviewing.<sup>283</sup>

The “why”? Why do it? This clinic provided extraordinary highlights in our practice and teaching careers, and in our lives, and in those of our students. The Unger Project, and the clinic within it, became an important part of the law school, well beyond the services we provided. The school celebrated the successes of those returning home and their families, first through the periodic welcome-home events. Then, the law school hosted the Fourth Year Unger Celebration, and the Dean gave welcoming remarks to those who had been released and their families, saying “[w]e believe

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<sup>283</sup> See *supra* Part IV.A.

in the quest of the Unger clients for...justice,” and “[w]e are honored to help.”<sup>284</sup> We also made several, always warmly received, presentations to the faculty.

At the center of these remarkable experiences for us and our students are the lives of our clients. It is wonderful to hear them talk about appreciating the simple things in life, such as using utensils not made of plastic, or sitting on the porch, quietly watching, as the squirrels run around and the snow comes down. These are the kinds of things we take for granted every day, and working with our clients reminds us how important they are.

We watch happily as our clients reconnect with long-lost family members, get married, help to raise children and grandchildren, become ordained clergy in churches and mosques, obtain their drivers’ licenses, avidly learn new technology, and volunteer to provide support to others in their neighborhoods.

We are proud as they participate in speaking engagements, volunteer with several organizations, including Mothers of Murdered Sons and the Maryland Restorative Justice Initiative, and create their own organization called CRY (Creating Responsible Youth), a collaborative effort of more than ten of our clients, most of whom were incarcerated before age nineteen.<sup>285</sup>

We applaud as they speak to incarcerated youth at a variety of facilities throughout Maryland and at events discussing the incarceration of juveniles, the issues of juvenile lifers, and how to avoid these unhappy fates.

We cheer as they become employed, a number of them full-time; care for elderly siblings and parents; and return to school to finish degrees begun in prison.

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<sup>284</sup> *Maryland Carey Law Celebrates the Fourth Anniversary of the Unger Decision*, UNIV. OF MD. FRANCIS KING CAREY SCHOOL OF LAW, [http://www.law.umaryland.edu/about/features/feature\\_details.html?feature=512](http://www.law.umaryland.edu/about/features/feature_details.html?feature=512) (last visited June 29, 2018).

<sup>285</sup> CRY is working with the Mayor’s Office and a variety of community and recreation centers to bring mentoring and community connections to “at risk” youth throughout Baltimore City.



We celebrate that we and our students have had the opportunity to be part of this extraordinary Project.