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THE REFORM BLINDSPOT

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ABSTRACT

The last few years have seen a marked shift in the public's response to mass incarceration. Some state legislatures have responded by changing criminal statutes and sentencing schemes to reduce the number of people incarcerated in jails and prisons and lessen the collateral consequences faced by those previously convicted of crimes. Although these efforts are laudable, they may fail to consider the limitations imposed upon convicted persons seeking to avail themselves of these benefits without the assistance of counsel. This essay argues that, in addressing the question of how best to effectuate the progressive goals of criminal justice reform, it is critical to view the issue through Fourteenth Amendment theories supporting the right to counsel on appeal. This avenue promises a reasonable and feasible method of providing the type of legal support that is necessary to ensure reform statutes are accessible to those they were created to help.

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I. INTRODUCTION

MORE than seventeen years ago, then twenty-seven-year-old Khalil was convicted of possessing less than a quarter of an ounce of marijuana.[1] In the years since, this criminal conviction

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1. John Washington, *He Was Arrested for Marijuana 17 Years Ago. Now It's Legal. So Why Is He Still Guilty of a Crime?*, VOX: THE HIGHLIGHT (Dec. 10, 2020, 10:15 AM), https://www.vox.com/the-highlight/21749376/marijuana-expungements-biden-harris-convic-

has influenced Khalil's quality of life in markedly negative ways.[2] This is his reality, even though in the seventeen years since his conviction, his home state of Massachusetts has traveled a legislative road to legalizing the use of such small amounts of marijuana.[3] Some of the disruption remaining in Khalil's life from that single conviction is due to the Massachusetts legislature's failure to address the removal of criminal consequences for those convicted of marijuana possession decades before the drug's legalization.[4] Indeed, it was not until two years after marijuana was legalized in Massachusetts that community leaders successfully petitioned for an expungement statute to remove the taint of prior marijuana convictions.[5] For Khalil, despite being represented by counsel, the added availability of expungement has done little to improve his circumstances, as the process has proven slow and cumbersome with ill-defined standards.[6] Others are in an even worse position than Khalil, lacking legal representation to support them in pursuing the advantages of this progressive change to the state's criminal code.[7]

Unlike other reform efforts, expungements do not necessarily provoke adversarial engagement; they often appear instead as routine administrative procedures.[8] An expungement usually requires a judge to determine that clearing the record is in the interest of justice.[9] This can be shown with a clear recitation of the difficulties the conviction imposes on the person's life.[10] Yet even with the easier navigation of expungement law, ordinary citizens have found it difficult to expunge their convictions without the help of legal counsel.[11] In recognition of the obstacles to this otherwise routine effort to improve the criminal justice system, law schools have developed expungement clinics, and some better-resourced public defender offices have expungement days or divisions.[12] The limited avail-

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tion-drug-war [https://perma.cc/H6NJ-N8AD] (Khalil's legal name is excluded from publication to preserve anonymity).

2. One of the most damaging impacts of Khalil's conviction is that now, at forty-four years old, Khalil still cannot find a job due to the conviction on his record. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See id.*

8. *See, e.g.*, Kristian Hernández, *More States Consider Automatic Criminal Record Expungement*, PEW (May 25, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/25/more-states-consider-automatic-criminal-record-expungement [https://perma.cc/66RR-6QVB] (observing that a "growing number of states are trying to ease the burden of expungement and record clearing by making the process automatic . . . .").

9. *See* CAL. PENAL CODE § 1203.4 (West, Westlaw through Ch.19 of 2021 Reg. Sess.); Washington, *supra* note 1.

10. *See* Pauline Quirion, *Sealing and Expungement After Massachusetts Criminal Justice Reform*, 100 MASS. L. REV. 100, 108 (2019) (explaining different factors considered by judges, including "disadvantages [to petitioner] if the record is left open" and "stigma related to the offense").

11. *See* Washington, *supra* note 1.

12. *See, e.g.*, Cmty. L. Clinic, *Criminal Record Expungement*, STAN. L. SCH., https://law.stanford.edu/community-law-clinic/criminal-record-expungement [https://perma.cc/X37Q-SN9B].

ability of these enterprises, however, means many individuals do not have access to counsel to aid in expunging their convictions.[13] This fact should caution legislators who are pursuing criminal justice reform efforts. Expungements are an area where criminal justice can progress more easily, yet it has proven harder to access than one would imagine.

Changes to criminal statutes that apply retroactively initiate complicated analyses about the right to counsel and the role counsel should play in post-conviction proceedings. For example, sentencing reductions involve questions about how much time is appropriate for a person to serve given the change in the substantive criminal law.[14] These could include whether a person should be entirely released from custody.[15] Applications for such resentencing can prompt adversarial engagement from prosecutors, law enforcement, and crime victims invested in maintaining the initial sentence the court imposed.[16] If these changes to a criminal statute occur after a person's conviction has been affirmed on direct appeal, however, she may not be entitled to state-funded counsel to aid in taking advantage of these reforms.[17] Without the assistance of counsel, those eligible for resentencing would need to assert legal theories and present evidence to a court on their own without any formal legal training. This responsibility could make achieving success under these statutes aimed at reform more difficult or even unlikely, practically curbing the stated purpose of these changes.

This essay illustrates how the legal system should fulfill the progressive promises of criminal justice reform when an attorney might be a critical component of doing so because the required proceedings can be adversarial. The excessive nature of current public defender caseloads warns against trying to meet that need by adding to the already stretched-beyond-capacity Sixth Amendment right to effective assistance of counsel at the trial level.[18] Adding this obligation to an institution already overburdened and under-resourced by the criminal justice system is a potentially inefficient way of providing the type of effective representation necessary to pursue these new benefits. It would likely serve only to stretch these resources even thinner. Instead, the appellate system and fundamental Fourteenth Amendment theories behind the right to counsel on appeal provide a solution to the problem at hand.

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13. *See* Washington, *supra* note 1.

14. *See infra* notes 39–41 and accompanying text.

15. *See infra* notes 39–41 and accompanying text.

16. *See infra* notes 47–52 and accompanying text.

17. *See infra* notes 80–83 and accompanying text.

18. *See* Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1177–81, 1177 n.4 (2020) [hereinafter *Mass Prosecution*]; Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 4:55 AM), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [https://perma.cc/P29T-AV6A]; Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon,'* ATLANTIC (Mar. 13, 2013), https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433 [perma.cc/8JP6-JA3F].

This essay proceeds in three parts. Part II describes several criminal justice reform priorities in California, a state popularly considered a liberal bastion for advancement in the criminal law arena. This Part details how the absence of a right to counsel may contribute to results more conservative than expected. Part III discusses the applicability of the Sixth Amendment right to counsel. Part IV explores the ability of appellate counsel to participate more fully in achieving the goals of these progressive reforms. Although this essay focuses its study on California law, it serves as a tool for reconsidering how reform efforts should proceed in other states. Indeed, if institutions in California are unable to adequately meet this urgent call for reformation, then other states must take seriously the characterization of what is missing from California's criminal justice reform effort.

II. CALIFORNIA'S CRIMINAL JUSTICE REFORM PROMISES

California, possessing one of the highest rates of incarceration in the world, has attempted to lead the charge in criminal justice reform.[19] The state legislature has passed a plethora of reform bills in the hope of alleviating California's contributions to mass incarceration.[20] One of the most significant reforms to hit the state's criminal justice system was California Assembly Bill (AB) 109,[21] also known as Realignment.[22] Passed as a result of the U.S. Supreme Court's mandate to reduce California's severely overcrowded prisons,[23] AB 109 and its companion, AB 117,[24] transferred the responsibility for managing adults convicted of certain low-level felonies to the county level from the state level.[25] Realignment also saw the transfer of some individuals convicted of nonviolent and low-level of-

19. *California Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/CA.html [https://perma.cc/2W24-KLMX]; *see also* SARAH LAWRENCE, CALIFORNIA IN CONTEXT: HOW DOES CALIFORNIA'S CRIMINAL JUSTICE SYSTEM COMPARE TO OTHER STATES? 5 fig.4 (2012), https://www.law.berkeley.edu/files/bccj/CA_in_Context_Policy_Brief_Sept_2012_Final.pdf [https://perma.cc/SZP2-BD28]; Kevin Rector, Anita Chabria, James Queally & Benjamin Oreskes, *California Goes Big on Criminal Justice Reform, Setting a More Progressive Path*, L.A. TIMES (Nov. 5, 2020), https://www.latimes.com/california/story/2020-11-05/after-contentious-year-in-american-policing-voters-in-l-a-across-california-back-justice-reforms [https://perma.cc/2SYW-SPRJ].

20. *See* SCOTT GRAVES, CAL. BUDGET & POL'Y CTR., CRIMINAL JUSTICE REFORM IS WORKING IN CALIFORNIA 1 (2020), https://calbudgetcenter.org/wp-content/uploads/2020/08/CA_Budget_Center_5-Facts-criminal-justice_Aug2020.pdf [https://perma.cc/3QHY-QPAN]. *But see also* Tim Arango, *Reform Pruned California's Inmate Totals, but Critics Persist*, N.Y. TIMES (Jan. 21, 2019) at A10 (describing how California still has to engage in more meaningful reform).

21. 2011 Realignment Legislation addressing public safety, 2011 Cal. Legis. Serv. ch. 15 (West); *see also California Realignment*, STAN. CRIM. JUST. CTR., STAN. L. SCH., https://law.stanford.edu/stanford-criminal-justice-center-scjc/california-realignment [https://perma.cc/PVA6-4XKH].

22. LISA T. QUAN, SARA ABARBANEL & DEBBIE MUKAMAL, REALLOCATION OF RESPONSIBILITY: CHANGES TO THE CORRECTIONAL SYSTEM IN CALIFORNIA POST-REALIGNMENT 5 (2014), https://law.stanford.edu/index.php?webauth-document=child-page/183091/doc/slspublic/CC%20Bulletin%20Jan%2014.pdf [https://perma.cc/8JAS-9DMB].

23. *See* Brown v. Plata, 563 U.S. 493, 545 (2011); QUAN ET AL., *supra* note 22, at 5.

24. Act of June 30, 2011, 2011 Cal. Legis. Serv. ch. 39 (West).

25. QUAN ET AL., *supra* note 22, at 5.

fenses to supervision in lieu of incarceration.[26]

Realignment was only the beginning of California's modern push for criminal justice reform. In 2012, Proposition 36 was passed, which revised California's notorious three-strikes law.[27] In 2014, California voters passed Proposition 47, also known as the Safe Neighborhoods and Schools Act.[28] This proposition reduced the penalties for certain low-level drug and property offenses, reclassifying them from felonies to misdemeanors.[29] The intent and effect of these two propositions was to lower the number of people entering, and remaining in, California prisons.[30]

More recently, California enacted legislation to address issues salient in criminal justice reform conversations today. These include laws that address racial disparities in trials and sentencing, as well as police use of deadly force.[31] For example, the California Racial Justice Act of 2020 created a pathway to relief in the form of a new trial for defendants whose cases were infected by racial bias.[32] These statutes are important steps in

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26. Joan Petersilia, *California Prison Downsizing and its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 332, 337 n.54 (2014).

27. Cal. Prop. 36, Three Strikes Law. Repeat Felony Offenders. Penalties. (2012), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2314&context=CA_ballot_props [https://perma.cc/CLM2-BMYK]; *see also* MIA BIRD, MAGNUS LOFSTROM, BRANDON MARTIN, STEVEN RAPHAEL & VIET NGUYEN, PUB. POL'Y INST. CAL., THE IMPACT OF PROPOSITION 47 ON CRIME AND RECIDIVISM 4 (2018), https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf [https://perma.cc/4VUS-BVCP]; Ewing v. California, 538 U.S. 11, 28 (2003); Lockyer v. Andrade, 538 U.S. 63, 70 (2003). This was "the first voter initiative since the Civil War to reduce the sentences of inmates currently behind bars." *Three Strikes Basics*, THREE STRIKES PROJECT, STAN L. SCH., https://law.stanford.edu/stanford-justice-advocacy-project/three-strikes-basics [https://perma.cc/Q9RP-69UY].

28. Cal. Prop. 47, Criminal Sentences. Misdemeanor Penalties. (2014), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2325&context=CA_ballot_props [https://perma.cc/G2W6-42KX]; *see also* BIRD ET AL., *supra* note 27, at 4; *Proposition 47: The Safe Neighborhoods and Schools Act*, CAL. CTS., https://www.courts.ca.gov/prop47.htm [https://perma.cc/F9YZ-KLWR].

29. BIRD ET AL., *supra* note 27, at 4.

30. *See id.* at 4–5.

31. *See* Jamilah King & Samantha Michaels, *California Just Passed New Limits on Police Use of Force. Not Everyone Is Happy With the Compromise.*, MOTHER JONES (Aug. 19, 2019), https://www.motherjones.com/crime-justice/2019/08/california-newsom-police-use-of-force-bill-stephon-clark-black-lives-matter-opposition [https://perma.cc/H3XD-6JWL]. Further, the CRISES Act, which Governor Newsom vetoed, would have provided grants to community organizations to fund and develop non-law enforcement responses for crises related to mental health, substance use, intimate partner and community violence, and natural disasters. *See* Anthony Pignataro, *Could This Bill Be a First Step Toward Taking the Police Out of Policing?*, L.A. MAG. (Jun. 5, 2020), https://www.lamag.com/citythinkblog/crises-act-ab-2054-police [https://perma.cc/7PVY-3QNS]; *B–2054 Emergency Services*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB2054 [https://perma.cc/J2RR-E5X7].

32. California Racial Justice Act of 2020, 2020 Cal. Legis. Serv. ch. 317, § 3 (West) (codified at CAL. PENAL CODE §§ 745, 1473); *see also* Ashley Chamber & Roseryn Bhudsabourg, *Racial Justice Act Passes California Senate Public Safety Committee*, ELLA BAKER CTR. FOR HUM. RTS. (Aug. 7, 2020), https://ellabakercenter.org/press/racial-justice-act-passes-california-senate-public-safety-committee [https://perma.cc/PG26-CDPP]. The California legislature is now considering legislation that would ensure the Racial Justice Act can be applied retroactively for all Californians. *California Racial Justice Act for All Passes First Legislative Committee*, CA STATE ASSEMBLY DEMOCRATIC CAUCUS (Mar. 23, 2021), https://asmdc.org/press-releases/california-racial-justice-act-all-passes-first-legislative-committee [https://perma.cc/QN42-MR5F].

the path to criminal justice reform, but the success of any reform statute is best evaluated by how many people are able to benefit and in what ways they are able to do so.[33]

The path of Adnan Khan provides a notable example of California's progress in criminal justice reform. When he was twenty-eight years old, Khan was sentenced to a term of twenty-five years to life in prison under California's felony-murder rule.[34] While incarcerated he became deeply involved in efforts to reform the state's felony-murder rule.[35] His and others' efforts were ultimately successful: Senate Bill (SB) 1437 was signed into law in 2018, altering the definition of felony murder.[36] Prior to the bill's passage, a person who, for example, took part in a burglary that resulted in a person's death could be convicted of murder, even if the person did not do the killing and did not intend for anyone to be killed.[37] SB 1437 changed that.[38] Notably, like many important criminal justice reform efforts, the law affects not only cases in the future but also convictions long since final, like Khan's.[39] It does so by setting out a multistage petition process in California Penal Code section 1170.95.[40] Thus, this statute has the remarkable potential to vacate murder convictions and drastically reduce the sentences of people who have been incarcerated for years under a theory of murder now considered excessive and unfair.[41]

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33. *See* Adam Gelb, *You Get What You Measure: New Performance Indicators Needed to Gauge Progress of Criminal Justice Reform*, HARVARD KENNEDY SCH. (May 2018), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/you_get_what_you_measure.pdf [https://perma.cc/KQ94-SBXP] (reflecting on the need for "new performance measures that shed light on progress" toward criminal justice reform, with the "raw number of people in prison" a factor).

34. *About Adnan Khan*, RE:STORE JUST., https://restorecal.org/author/adnan [https://perma.cc/R3V7-3FHF].

35. *Id.*

36. *See* Act of Sept. 30, 2018, 2018 Cal. Legis. Serv. Ch. 1015 (West) (codified at CAL. PENAL CODE §§ 188, 189(e), 1170.95).

37. *See* Claire Trageser, *California's Felony Murder Law Change Means Freedom for San Diego Man*, KPBS (Feb. 26, 2020), https://www.kpbs.org/news/2020/feb/26/after-16-years-prison-californias-felony-murder-la [https://perma.cc/86J5-GN53] (describing the case of Shawn Khalifa, who was convicted of felony murder at fifteen after acting as a lookout in a home invasion that resulted in the homeowner's death); Press Release, Nancy Skinner, Senator, California State Senate, They Didn't Kill, Why Is It Murder? Senators Skinner, Anderson and Advocates Rally for SB 1437: Fixing Felony Murder (Aug. 21, 2018), https://sd09.senate.ca.gov/news/20180821-they-didn%E2%80%99t-kill-why-it-murder-senators-skinner-anderson-and-advocates-rally-sb-1437 [https://perma.cc/TDA7-9SW3] (quoting Sen. Skinner: "The felony murder law irrationally treats those who did not commit murder the same as those who did.").

38. *See* Trageser, *supra* note 37.

39. *See* PENAL § 1170.95(a) (West, Westlaw through Ch.10 of 2021 Reg. Sess.) ("A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts . . . .").

40. *Id.* § 1170.95(b)(1).

41. *See id.* § 1170.95; Lara Bazelon, *Anissa Jordan Took Part in a Robbery. She Went to Prison for Murder.*, ATLANTIC (Feb. 16, 2021), https://www.theatlantic.com/politics/archive/2021/02/what-makes-a-murderer/617819 [https://perma.cc/R8F2-VKD4] (observing that the California Supreme Court has described felony murder as "barbaric" and "Procrustean"). A similar bill being considered by the legislature would reform sentencing for felony murder special circumstances and have retroactive application. *See* Eric Gelber,

But there's a hitch. The law has a statutory right-to-counsel provision,[42] but California appellate courts initially interpreted its scope narrowly.[43] Courts held, for example, that the provision does not confer a right to counsel to pursue a petition until other requirements have been met.[44] And under long-standing California precedent, individuals would not have a right to counsel to file a petition based on federal or state constitutional standards.[45] These two strands of case law mean that incarcerated individuals must learn about and understand these new changes in the law and bring petitions for resentencing pro se, a formidable task.[46]

It is important to note just how much more adversarial engagement a petition brought under section 1170.95 invites than an application to expunge. A section 1170.95 petition challenges the finality of a murder conviction and seeks resentencing.[47] Recall that Adnan Khan was sentenced to a potential life term in prison for the death of a young man during an attempted felony before he was resentenced.[48] Predictably, resentencing petitions involving crimes as sobering as homicide can meet with great resistance from prosecutors, courts, victims, and other system stakehold-

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California Capitol Watch: Bill Would Reform Sentencing for Felony Murder Special Circumstances, DAVIS VANGUARD (Apr. 8, 2021), https://www.davisvanguard.org/2021/04/california-capitol-watch-bill-would-reform-sentencing-for-felony-murder-special-circumstances [https://perma.cc/2QN6-67MA] ("SB 300 also provides an avenue for currently incarcerated people sentenced to death or [life without parole] under the felony murder special circumstance law to petition the court for resentencing, offering recourse to Californians who have been unjustly sentenced.").

42. PENAL § 1170.95(c) ("The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner.").

43. *See, e.g.*, People v. Lewis, 257 Cal. Rptr. 3d 265, 272–73 (Cal. Ct. App. 2020), *rev'd and remanded*, No. S260598, 2021 WL 3137434 (Cal. July 26, 2021). Khan himself had a lawyer represent him as part of Re:Store Justice, the criminal justice reform organization Khan co-founded while in prison. *See* Hope McKenney, *'My Intentions Were Not to Kill': Adnan Khan Is First To Be Released From Prison Under New Law*, KQED (Jan. 25, 2019), https://www.kqed.org/news/11720792/my-intentions-were-not-to-kill-adnan-khan-is-first-to-be-released-from-prison-under-new-law [https://perma.cc/ZC27-NUV9].

44. *Lewis*, 257 Cal. Rptr. 3d at 273.

45. *See* People v. Rouse, 199 Cal. Rptr. 3d 360, 367 (Cal. Ct. App. 2016) (discussing Sixth and Fourteenth Amendment right to counsel concerns, holding that a petitioner has a right to counsel at the resentencing phase but expressing no opinion as to whether the right attaches at the eligibility stage).

46. Courts and scholars alike have observed the challenges that incarcerated individuals face in bringing self-represented petitions and appeals. *See* Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1252–53 (2012); Halbert v. Michigan, 545 U.S. 605, 620–21 (2005) (observing that incarcerated persons are "particularly handicapped as self-representatives" due to high rates of illiteracy, learning disabilities, and mental impairments); Martinez v. Ct. of App. of Cal., 528 U.S. 152, 161 (2000) ("No one, . . . attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient."). Under the California Supreme Court's recent resolution of *People v. Lewis*, however, these difficulties are less acute, as petitioners who do bring facially sufficient petitions now must be appointed counsel. People v. Lewis, No. S260598, 2021 WL 3137434, at *1 (Cal. July 26, 2021).

47. PENAL § 1170.95.

48. *About Adnan Khan*, *supra* note 34; McKenney, *supra* note 43.

ers.[49] This means defendants would greatly benefit from, and in some cases could not prevail without, the assistance of legal counsel. As noted in a recent amici curiae brief, courts had instead failed to appoint counsel and summarily denied resentencing petitions.[50] The brief, submitted by the author of the legislation and one of its principal drafters, noted that individuals had been solicited by lawyers to file resentencing petitions for $12,000, an exorbitant amount for indigent people who are incarcerated at the time they are seeking resentencing.[51] For those who filed petitions without counsel, summary denials (and appellate litigation) frequently followed.[52]

Such summary denials are uniquely problematic with new laws redefining criminal behavior and establishing new sentencing schemes. This is because there are inevitably many opaque applications of a new law that have to be litigated. Yet courts may miss these issues if they summarily deny petitions without the benefit of briefing and counsel alerting them to the nonobvious issues that may be lurking—and it is the petitioners who cannot afford to hire counsel who are harmed.[53]

Unfortunately, the problem of courts summarily denying the resentencing petitions of incarcerated individuals is not unusual. California Penal Code section 1170.91,[54] for example, is a new law providing for the resentencing of veterans, surely a much less controversial effort than section 1170.95.[55] As with section 1170.95, individuals often must file petitions under section 1170.91 without counsel.[56] This has led to similar issues as those described above. For example, even though the statute explicitly requires courts to hold a hearing once they receive a resentencing petition,[57] some courts have summarily denied these petitions without hear-

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49. *See* Bazelon, *supra* note 41 ("California's effort to dramatically change its felony-murder rule shows just how steep and winding the path to positive change can be."); Jessica Pishko, *Hundreds Stuck in California Prisons as Prosecutors Seek to Block New Law*, APPEAL (Mar. 25, 2019), https://theappeal.org/hundreds-stuck-in-prison-in-california-as-prosecutors-seek-to-block-new-law [https://perma.cc/5TBQ-ABCQ].

50. Julian Verdon & Linhchi Nguyen, *Brief Filed on SB 1437 Alleges Courts Failing to Appoint Counsel and Summarily Denying Resentencing Petitions*, DAVIS VANGUARD (Nov. 17, 2020), https://www.davisvanguard.org/2020/11/brief-filed-on-sb-1437-alleges-courts-failing-to-appoint-counsel-and-summarily-denying-resentencing-petitions [https://perma.cc/6DAK-G68N].

51. Brief Amici Curiae of the Honorable Nancy Skinner and the Justice Collaborative Institute in Support of Appellant at 12–15, People v. Lewis, No. S260598 (Cal. July 26, 2021) [hereinafter Brief Amici Curiae, Lewis].

52. *See id.* at 29, 37.

53. *See* Verdon & Nguyen, *supra* note 50.

54. CAL. PENAL CODE § 1170.91 (West, Westlaw through Ch.10 of 2021 Reg. Sess.).

55. *See, e.g.*, Tori DeAngelis, *Courts for Veterans See Exponential Growth*, 47 AM. PSYCH. ASS'N 20 (2016), https://www.apa.org/monitor/2016/12/courts-veterans (describing the growth of veterans treatment courts, which began in 2008 as a single pilot program in Buffalo and have swelled to 435 programs around the country).

56. Duncan MacVicar, *Incarcerated Veterans in Need of Representation When Filing Petitions for Resentencing*, CAL. LAWS. ASS'N, https://calawyers.org/criminal-law/incarcerated-veterans-in-need-of-representation-when-filing-petitions-for-resentencing [https://perma.cc/A7WE-YGRQ].

57. PENAL § 1170.91(b)(3) ("Upon receiving a petition under this subdivision, the court shall determine, at a public hearing . . . .").

ings.[58] In one petition for resentencing, U.S. Marine Corps veteran Jonathan Bonilla-Bray explained to the court that his military service had led to "serious mental health issues and substance abuse addiction."[59] Bonilla-Bray attached records to demonstrate as much.[60] Though Bonilla-Bray's petition met all of the statutory requirements, the court summarily denied it without holding a hearing.[61] Had the court held a hearing as required, Bonilla-Bray likely would have been able to show his eligibility for resentencing, given that he met all the criteria.[62] We should ask why, what interaction of factors, led to Bonilla-Bray's petition being denied without even a hearing.

A final example suggests the presence of a lawyer is at least a factor in how courts treat resentencing petitions. California Penal Code section 1473.7(a)(1) provides a process for individuals to vacate their convictions because of their prior inability to understand the immigration consequences of their guilty plea.[63] Courts have dismissed these motions at in-person hearings where the movant was not represented or even present because, for example, they were in Immigration and Customs Enforcement (ICE) detention.[64] Yet it is inconceivable that judges would have dismissed these motions at hearings if they had been filed by counsel who was absent with good cause rather than by detained individuals. Thus, a two-tiered system of justice emerges—one for the represented and one for the unrepresented, one for the wealthy and one for the poor[65]—despite efforts to reform the system.

The problem outlined in the previous part of this essay is not unique to California. Florida, for example, passed a statute entitling individuals "to obtain DNA testing and, if the results are exculpatory, a reversal of [their] conviction."[66] For eight years after the statute was passed, James Bain sought to obtain DNA testing, filing no less than "five separate handwritten requests from his prison cell," all of which were denied.[67] It was only when attorneys from the Florida Innocence Project began to represent him that a judge was persuaded to order DNA testing.[68] The

58. *See, e.g.*, People v. Bonilla-Bray, 262 Cal. Rptr. 3d 754, 756 (Cal. Ct. App. 2020).
59. *Id.* at 755–56.
60. *Id.* at 755.
61. *Id.* at 756.
62. *See id.* at 757 ("[A]s the People acknowledge, defendant's petition alleges that he met the statutory requirements under section 1170.91, subdivision (b).").
63. PENAL § 1473.7(a)(1).
64. *See, e.g.*, People v. Rodriguez, 251 Cal. Rptr. 3d 538, 545 (Cal. Ct. App. 2019) (trial court dismissed motion to vacate at a hearing where movant was in ICE custody so not present and was not represented by counsel); People v. Fryhaat, 248 Cal. Rptr. 3d 39, 42–43 (Cal. Ct. App. 2019) (same).
65. *Cf.* People v. Shipman, 397 P.2d 993, 996 (Cal. 1965) (observing that while "absolute equality is not required," it "is now settled that whenever a state affords a direct or collateral remedy to attack a criminal conviction, it cannot invidiously discriminate between rich and poor").
66. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 215 (2011).
67. *Id.*
68. *Id.*

testing proved his innocence.[69] In all, Bain spent thirty-five years wrongfully incarcerated.[70]

This access-to-counsel issue also exists in the federal system. For example, the U.S. Sentencing Commission occasionally lowers the sentencing range for various offenses, and people who are serving their sentences may file a motion for a reduced sentence based on such a change.[71] Yet federal courts have held that these incarcerated individuals do not have a right to counsel to pursue a reduction in their sentence.[72] Despite the complexity of the federal sentencing guidelines and the often adversarial nature of a proceeding to reduce one's sentence, incarcerated people must fend for themselves against highly qualified government attorneys.[73] The next section explores how the system has reached a point that leaves so much to be desired in fulfilling the promises of criminal justice reform.

III. UNDERSTANDING THE RIGHT TO COUNSEL

A bedrock constitutional right guaranteed at trial is the Sixth Amendment's right to counsel.[74] In 1963, the Supreme Court recognized this right as applicable to the states.[75] Specifically, the Court in *Gideon v. Wainwright* held: "Not only [our] precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[76] That is to say, no matter how equitable and procedurally correct the trial otherwise is, the mere fact that the accused wanted to retain counsel but was too poor

69. *Id.*; Michael Shaffer, *James Bain*, NAT'L REGISTRY EXONERATIONS (Dec. 27, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3008 [https://perma.cc/4BTB-48L9].

70. GARRETT, *supra* note 66, at 215; Shaffer, *supra* note 69 (stating that Bain spent more time in prison "than any other person exonerated through DNA testing in the United States" for a crime he did not commit and that "Bain was only 19 years old when convicted; he was 54 when he was finally set free.").

71. *See* 18 U.S.C. § 3582(c)(2).

72. *See, e.g.*, United States v. Webb, 565 F.3d 789, 794 (11th Cir. 2009) ("The notion of a statutory or constitutional right to counsel for § 3582(c)(2) motions has been rejected by all of our sister circuits that have addressed the issue, and we agree with this consensus.").

73. *See* Jona Goldschmidt, *Has He "Made His Bed, and Now Must Lie in It"? Toward Recognition of the Pro Se Defendant's Sixth Amendment Right to Post-Trial Readmonishment of the Right to Counsel*, 8 DEPAUL J. SOC. JUST. 287, 332 (2015) ("Since the creation of the U.S. Sentencing Commission and the adoption of its Sentencing Guidelines, the complexity of federal sentencing has surpassed that of the trial itself, such that defense counsel is a necessity." (citations omitted)); *see also* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315 (2005) (describing the guidelines as "inordinately complex").

74. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.").

75. Gideon v. Wainwright, 372 U.S. 335, 342 (1963) ("We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights [made obligatory upon the States by the Fourteenth Amendment].").

76. *Id.* at 344.

to do so renders the proceeding fundamentally unfair.[77] The right to effective assistance of counsel is such an elemental part of a fair trial that a conviction will be reversed long after it has been obtained if an individual can demonstrate that her lawyer was inadequate and the lawyer's performance had a prejudicial effect.[78] This right also extends to the punishment stage, with sentencing having been deemed a critical part of criminal proceedings.[79]

However, the Sixth Amendment's right to counsel applies only to "criminal prosecutions,"[80] and as such, it has limited application in the post-conviction context.[81] The Court determined that "a 'criminal prosecution' continues and the defendant remains an 'accused' . . . until a final sentence is imposed."[82] Thus, for example, the Court held in *Ross v. Moffitt* that the Constitution does not guarantee a right to counsel to file a discretionary appeal to a state supreme court.[83] The Court distinguished this kind of appeal from a trial, holding: "The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."[84] As a result, while the Sixth Amendment guarantees a right to counsel when it is needed as a "shield" against the government, its application is much diminished when it is sought to be used as a "sword."[85] This understanding of the Sixth Amendment right to counsel as a shield, coupled with the historic structural emphasis on finality,[86] means the path to post-convic-

77. *See id.* The denial of counsel at a critical stage of a state criminal proceeding requires automatic reversal. *See* Johnson v. United States, 520 U.S. 461, 468–69 (1997) (explaining that the Supreme Court has found "structural errors only in a very limited class of cases," including where there is a "total deprivation of the right to counsel").

78. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

79. *See* Mempa v. Rhay, 389 U.S. 128, 134–37 (1967) (holding that the absence of counsel at sentencing is a violation of the Sixth Amendment).

80. U.S. CONST. amend. VI.

81. *See* Martinez v. Ct. of App. of Cal., 528 U.S. 152, 159–60 (2000) ("The Sixth Amendment identifies the basic rights that the accused shall enjoy in 'all criminal prosecutions.' They are presented strictly as rights that are available in preparation for trial and at the trial itself."); Murray v. Giarratano, 492 U.S. 1, 3–4, 10 (1989); Pennsylvania v. Finley, 481 U.S. 551, 554–55 (1987); Gagnon v. Scarpelli, 411 U.S. 778, 781–82 (1973).

82. United States v. Haymond, 139 S. Ct. 2369, 2379 (2019).

83. Ross v. Moffitt, 417 U.S. 600, 618–19 (1974); *Appeal*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/appeal [https://perma.cc/JX54-2AMS] ("An appeal of right is one that the higher court must hear, if the losing party demands it, while a discretionary appeal is one that the higher court may, but does not have to, consider.").

84. *Ross*, 417 U.S. at 610–11.

85. *Compare* Gideon v. Wainwright, 372 U.S. 335, 344 (1963), *with Ross*, 417 U.S. at 610–11.

86. *See, e.g.*, McClesky v. Zant, 499 U.S. 467, 491 (1991) ("One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.'" (quoting Teague v. Lane, 489 U.S. 288, 309 (1989)); Stephen B. Bright, The Intersection of Race and Poverty in Criminal Justice, University of Tennessee College of Law Summers-Wyatt Lecture (Sept. 27, 2010), *in* 8 TENN. J.L. & POL'Y 166, 197 ("The courts have lost sight of justice in a tangle of procedural rules, pretenses and administrative concerns so that finality—not justice—has become the ultimate goal of the criminal courts.").

tion relief for the unjustly incarcerated is littered with roadblocks.[87]

IV. A FIX TO CONSIDER FOR REFORM EFFORTS

A. The Reach of the Fourteenth Amendment's Right to Counsel

In 1963's *Douglas v. California*, the Court held that there is a right to counsel to pursue a first appeal as of right in criminal cases.[88] The Court in *Ross* explained that "[t]he precise rationale for [*Douglas*] has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."[89] While the Due Process Clause emphasizes the state's fair treatment of the individual, the Equal Protection Clause emphasizes equality in the state's treatment of different classes of individuals.[90] These two lines of analysis come together in the holding of *Douglas*: "[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[91] Decades later, the Court relied on *Douglas* to hold that counsel must also be appointed for defendants "who seek access to first-tier [appellate] review," even when that review is not as of right.[92]

Professor Brandon L. Garrett has characterized this intersection of concerns about equality and due process as "equal process."[93] In such cases, "the combined concern with wealth inequality and unfair process

87. *See generally* Daniel S. Medwed, Prosecution Complex: America's Race to Convict and Its Impact on the Innocent 126 (2012) ("All told, the post-conviction road to freedom is strewn with procedural potholes."); Uhrig, *supra* note 46 (discussing how the limited right to counsel to seek post-conviction relief affects state prisoners who file federal habeas corpus petitions).

88. Douglas v. California, 372 U.S. 353, 357 (1963). In other words, on an appeal the appellate court "must hear, if the losing party demands it." *Appeal*, *supra* note 83.

89. *Ross*, 417 U.S. at 608–09; *see also* Halbert v. Michigan, 545 U.S. 605, 610 (2005) ("Our decisions in point reflect 'both equal protection and due process concerns.'" (quoting M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996))); Bearden v. Georgia, 461 U.S. 660, 665 (1983) ("Due process and equal protection principles converge in the Court's analysis in these cases."); Anders v. California, 386 U.S. 738, 744 (1967) ("The constitutional requirement of substantial equality and fair process can only be attained where [appellate] counsel acts in the role of an active advocate in behalf of his client . . . ."); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 Wm. & Mary L. Rev. 397, 420–21 (2019). *Cf.* Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring) (indicating that a State may not "bolt the door to equal justice" to indigent defendants).

90. *Ross*, 417 U.S. at 609; *see also M.L.B.*, 519 U.S. at 120 ("The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. . . . The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action."); Garrett, *supra* note 89, at 420–21.

91. *Douglas*, 372 U.S. at 357.

92. *Halbert*, 545 U.S at 609–10 (holding that this result is required by the Due Process and Equal Protection Clauses).

93. Garrett, *supra* note 89, at 397–98 ("Equal process theory has the potential to reinvigorate the Fourteenth Amendment as a guardian against unfair process and discrimination that increases inequality in society.").

results in a constitutional violation."[94] For him, one strong "reason to focus on the intersection between procedural due process and equality is that it gets at the heart of an urgent, practical problem: indigent people often suffer from both (1) arbitrary decision-making and inadequate access to courts, as well as, (2) the unequal outcomes that result."[95]

As described in the previous Part, some state legislatures are increasingly making efforts to undo the effects of decades-long mass incarceration policies.[96] These efforts include passing laws that reduce the culpability or prison terms of incarcerated individuals who are serving their sentences.[97] Yet it may be difficult for such individuals to obtain the benefit of these new laws without counsel—that is, to access the courts and obtain equal outcomes.[98]

One possible fix is to recognize the broader reach of *Douglas*'s "equal process" reasoning. To this end, it is useful to compare the rights at stake in a generic first-tier criminal appeal with the rights at stake in a petition for resentencing under section 1170.95 of the California Penal Code. A petitioner under this section seeks to have her murder conviction vacated and to be resentenced due to the change in California's definition of felony murder.[99] This comparison illustrates the continuing vitality of the reasoning of *Douglas*, especially in an era of increasing economic inequality and intolerably high rates of incarceration.[100]

Most clearly, an individual's first-tier appeal represents that person's first opportunity to raise an error that occurred in the trial court.[101] If the evidence at trial was insufficient to support a murder conviction, for example, and the court and jury found it sufficient anyway, a first-tier appeal is the first time the error can be challenged.[102] The same is true for a section 1170.95 petition. A person convicted of felony murder under a newly invalid theory would have had no reason to mount such a challenge earlier: the 1170.95 petition is their first chance.

In extending the *Douglas* right to counsel to those "who seek access to first-tier [appellate] review," even when that review is not as of right, the Court in *Halbert v. Michigan* looked to two primary factors.[103] "First,

94. *Id.* at 402.
95. *Id.* at 405.
96. *See supra* Part III.
97. *See supra* notes 27–40 and accompanying text.
98. *See supra* Part III.
99. CAL. PENAL CODE § 1170.95(a) (West, Westlaw through Ch.10 of 2021 Reg. Sess.).
100. *See* Garrett, *supra* note 89, at 451 ("In an era of rising income inequality, equal process claims may have an important role to play."); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/PJJ3-CU95] ("The U.S. locks up more people per capita than any other nation, at the staggering rate of 698 per 100,000 residents."); Bill Chappell, *U.S. Income Inequality Worsens, Widening to a New Gap*, NPR (Sept. 26, 2019), https://www.npr.org/2019/09/26/764654623/u-s-income-inequality-worsens-widening-to-a-new-gap [https://perma.cc/KY8T-69YV].
101. *See* GARRETT, *supra* note 66, at 194.
102. *See id.*
103. Halbert v. Michigan, 545 U.S. 605, 611 (2005).

such an appeal entails an adjudication on the 'merits.' Second, first-tier review differs from subsequent appellate stages 'at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court.'"[104] Both are true for section 1170.95 petitions as well. In determining whether to grant or deny the petition, the court examines the merits of the petition, not the general importance of the question presented.[105] And one who files such a petition generally does not have the benefit of previous appellate briefing on the issue.[106]

Further, in a direct appeal, there is a limited range of errors that can be raised, given that the errors must appear in the trial record.[107] The wide range of errors that can be raised in a habeas corpus petition may be one reason why the right to counsel on habeas is so restricted, as courts are concerned about cost and efficiency.[108] A section 1170.95 petition, however, is more akin to a direct appeal and is indeed even more limited because only one type of error can be raised.[109] Further, both the appellate process and the section 1170.95 petition process are formal, technical processes where the assistance of skilled counsel could have the ultimate benefit of overturning a conviction.[110] And of course, in both instances, while the wealthy can hire counsel to pursue these advantages, the poor cannot.[111] The combination of these factors encourages a closer examination of whether an unconstitutional line is once again being drawn between the rich and poor with regard to such criminal justice reform

104. *Id.* (alteration in original) (citation omitted) (quoting Douglas v. California, 372 U.S. 353, 356–57 (1963)).

105. CAL. PENAL CODE § 1170.95(c) (West, Westlaw through Ch.10 of 2021 Reg. Sess.); *see Halbert*, 545 U.S. at 617–19.

106. *See Halbert*, 545 U.S. at 619 ("A first-tier review applicant, forced to act *pro se*, will face a record unreviewed by appellate counsel, and will be equipped with no attorney's brief prepared for, or reasoned opinion by, a court of review."); *see also* Pennsylvania v. Finley, 481 U.S. 551, 557 (1987); Ross v. Moffitt, 417 U.S. 600, 614–15 (1974).

107. *See* GARRETT, *supra* note 66, at 194–95; *see also, e.g.*, *In re* Robbins, 959 P.2d 311, 316 (Cal. 1998) ("California law also recognizes that in some circumstances there may be matters that undermine the validity of a judgment or the legality of a defendant's confinement or sentence, but which are not apparent from the record on appeal, and that such circumstances may provide a basis for a collateral challenge to the judgment through a writ of habeas corpus.").

108. *Cf.* Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 736–43 (2007) (describing the broad scope of a habeas attorney's work and the delays associated with these proceedings).

109. *See* PENAL § 1170.95(a).

110. *See id.* § 1170.95; *Halbert*, 545 U.S. at 622 ("Michigan's very procedures for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled."); Martinez v. Ct. of App. of Cal., 528 U.S. 152, 161 (2000) ("No one, . . . attempts to argue that as a rule *pro se* representation [in criminal appeals] is wise, desirable, or efficient. . . . Our experience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'"); *Ross*, 417 U.S. at 616; APP. DEFS., INC., ADI APPELLATE PRACTICE MANUAL § 4.2 (2d ed., rev. Apr. 2020), http://www.adi-sandiego.com/panel/manual/Chapter_4_Issue_spotting.pdf#202007 [https://perma.cc/836K-KSYJ] ("If something in the record, either a factual matter or a point of law, seems puzzling, unfair, or otherwise not quite right, counsel should pursue it until satisfied. Not knowing an answer is an easily solved problem. Not even *asking* the right question can lead to disaster.").

111. *See* Douglas v. California, 372 U.S. 353, 357–58 (1963).

efforts.[112]

Despite these similarities, some courts will hesitate to recognize the broader reach of *Douglas v. California*. The Supreme Court has not recognized a right to counsel to file a petition for a writ of habeas corpus, even if the petition raises an issue that could not have been raised before.[113] In *Pennsylvania v. Finley*, the Court stated, "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."[114] This was based, in part, on the fact that state habeas relief is far removed from the criminal trial, and the proceeding is considered civil in nature.[115] The Court in *Murray v. Giarratano* affirmed *Finley* and held that there is also no right to counsel for capital defendants to file habeas corpus petitions.[116] Then, in *Coleman v. Thompson*, the Court seemingly left open the possibility of an exception to *Finley* and *Giarratano* for claims that can *only* be raised in habeas proceedings.[117] Yet courts must be wary of importing the due process standards applicable to habeas corpus petitions wholesale. The writ of habeas corpus occupies a unique legal space, implicating finality and efficiency concerns that courts have attempted to work through over decades.[118] By contrast, criminal law reforms that the legislature makes retroactive are not similarly historically fraught.

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112. *See id.* at 357.

113. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.2(a) (7th ed. 2020) ("A more accurate summary of the Court's treatment of the issue . . . is Justice Blackmun's conclusion in his last opinion before retiring—that the Court 'thus far has declined to hold that indigent capital defendants have a right to counsel.'").

114. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (citation omitted). The Court phrased its holding as regarding collateral review, which may encompass various statutory petition processes. *See* Wall v. Kholi, 562 U.S. 545, 560 (2011). However, it appears that state habeas relief was at issue in both *Finley* and *Giarratano*, not a statute retroactively reducing culpability or a sentencing prescription, which would raise different concerns and be more intertwined with the underlying criminal proceeding. *See* Finley, 481 U.S. at 553; Murray v. Giarratano, 492 U.S. 1, 3–4 (1989); Pennsylvania v. Finley, 383 A.2d 898, 898 (Pa. 1978).

115. *Finley*, 481 U.S. at 556–57.

116. *Giarratano*, 492 U.S. at 10.

117. Coleman v. Thompson, 501 U.S. 722, 755–56 (1991). In California, courts have identified a constitutional right to habeas counsel once the petitioner has made out a prima facie case for relief. People v. Frazier, 269 Cal. Rptr. 3d 806, 812 (Cal. App. 2020) ("In a habeas corpus proceeding the right to counsel and a hearing is triggered only after the petitioner has made a prima facie factual showing that, if unrebutted, demonstrates entitlement to relief." (first citing People v. Duvall, 886 P.2d 1252 (Cal. 1995); and then citing *In re* Clark, 855 P.2d 729 (Cal. 1993))).

118. *See, e.g.*, Dillon v. United States, 307 F.2d 445, 446 & n.3 (9th Cir. 1962) (stating that there is no right to counsel to file a post-conviction petition under 28 U.S.C. § 2255 because such petitions are "frequently frivolous," "may be resubmitted," and "are not a part of the basic processes for determining guilt"); Stidham v. United States, 170 F.2d 294, 297 (8th Cir. 1948) ("The claim is that after the court had pronounced sentence he was denied the assistance of counsel to aid him in preparing a petition for a writ of habeas corpus. . . . In this connection it should be borne in mind that an application for writ of habeas corpus is not a criminal proceeding but a civil one, and the court was not required by the Constitution or by statute to furnish the defendant counsel to prepare a petition for the writ.").

B. Practical and Legislative Changes

From a practical perspective, appellate defenders are well-situated to protect individuals' rights under these statutes. For one, the types of criminal justice reform statutes that this essay has addressed often generate an astonishing amount of appellate litigation.[119] If courts were to appoint appellate defenders at an early stage, those attorneys could generate an appropriate record for appeal in the trial court and later pursue an appeal, if merited. Representation not only aids petitioners but also courts, because attorneys can advise their clients if a petition or appeal is even worth filing.[120] Further, appellate defenders will not have a never-ending task under new statutes because at a certain point the vast majority of those who are eligible for relief under a retroactively applicable statute receive relief, and few people remain. The statutes themselves could also provide a date by which all petitions must be filed.[121]

Scholars, including Eve Brensike Primus, have long argued that states should consider expanding or altering the role of appellate counsel.[122] As Professor Primus explains, appellate attorneys are often prevented from raising meritorious issues, either because those issues are forfeited, or most saliently because the issue is trial counsel's ineffectiveness itself.[123] Various procedural rules limit the matters appellate defenders may raise on direct appeal only to those issues that appear on the face of the trial record.[124] Trial counsel's ineffectiveness is often a structural problem resulting from excessive caseloads and lack of funding.[125] To prove that ineffectiveness undermines a conviction, counsel typically must investigate, develop, and introduce new evidence—a task beyond appellate defenders' usual scope of appointment.[126] Because the role of appellate defenders is as circumscribed as it is, Professor Primus finds that "the system

119. *See, e.g.*, *CCAP Prop. 47 Case Summaries*, Cent. Cal. App. Program, https://www.capcentral.org/criminal/sentencing/prop47/prop47_cases.asp [https://perma.cc/9NMM-QXU5] (providing an extensive compilation of cases decided by California appellate courts on Proposition 47).

120. *Cf.* Brief Amici Curiae, Lewis, *supra* note 51, at 14 ("Because the various legal theories of homicide are complex and not at all intuitive, the Legislature knew that some people would incorrectly believe they were eligible for relief under SB 1437. The Legislature anticipated there would be meritless petitions, not necessarily as a result of any knowing falsehood on the part of the petitioner, but as a result of a misapprehension of the law or facts as it applied to a particular person's case.").

121. *See, e.g.*, *Information Re: California's Two and Three Strikes Law*, Prison L. Off. (Oct. 2017), http://prisonlaw.com/wp-content/uploads/2017/10/ThreeStrikesOct-2017.pdf [https://perma.cc/ZJL4-SQP7] ("The deadline for filing a Proposition 36 petition ran out on November 6, 2014; at this late date, a court can consider a petition filed only if the prisoner shows good cause for not filing a petition earlier.").

122. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 682, 685 (2007); *see also* A. C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 Am. Crim. L. Rev. 1161, 1162–63, 1169 (1997).

123. Primus, *supra* note 122, at 681–82, 688–89.

124. *Id.*

125. *Id.* at 686–88.

126. *See id.* at 689; *In re* Clark, 855 P.2d 729, 783 n.20 (Cal. 1993) (noting that noncapital appellate counsel have "no obligation to conduct an investigation to discover if facts

underutilizes criminal appellate attorneys" and so does not take full advantage of a "valuable resource."[127]

The prescription proposed by this essay seeks to address that concern to an extent. Appellate defenders—skilled at reviewing trial records, examining the legislative history of statutes, interpreting ambiguous statutory language, and persuasively arguing on behalf of incarcerated clients—are well-positioned to advance individuals' rights under new criminal laws.[128] There is an added benefit to appellate defenders themselves, in that the change has the potential to improve appellate defenders' morale and conception of their work, as well as foster better working relationships with trial defenders.[129] However, while this proposal does not impose any additional burdens on trial public defenders,[130] their appellate counterparts may require additional funding to adequately carry out this new role.[131]

With respect to funding, there is a structural benefit to assigning this role to appellate defenders. In many states, appellate-defense services are organized at the state level.[132] California, for example, leaves the management and funding of trial-level representation to its counties, but provides statewide funding for appellate representation.[133] This statewide

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outside the record on appeal would support a petition for habeas corpus or other challenge to the judgment").

127. Primus, *supra* note 122, at 706. However, there are wide variations in the roles and responsibilities of appellate defenders, including client-centered approaches. *See* Jonah A. Siegel, Jeanette M. Hussemann & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579, 583 (2017) (contrasting the traditional "four corners" approach to appellate defense with client-centered approaches).

128. *See* Primus, *supra* note 122, at 722–23; Deena Jo Schneider, *The Complete Appellate Advocate: Beyond Brief Writing*, ABA (Sept. 6, 2019), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2019/summer/the-complete-appellate-advocate-beyond-brief-writing [https://perma.cc/EXF3-TS7D].

129. *See Primus*, *supra* note 122, at 704 ("Appellate attorneys can almost always find some issue to brief if they search hard enough, but it is demoralizing to spend so much time and energy locating and briefing meritless issues."); Carol Foster, *The Trial and Appellate Counsel Relationship: The "A.C.E." Approach*, CENT. CAL. APP. PROGRAM, https://www.capcentral.org/procedures/case_manag/docs/ACE_approach.pdf (discussing the importance of communication and mutual understanding between trial and appellate counsel).

130. *See* Joe, *Mass Prosecution*, *supra* note 18, at 1177–81, 1177 n.4 (describing the well-documented caseload crisis that trial-level public defenders often face). By directly assigning appellate defenders to these cases, states will avoid the duplication of work that results from representation by a trial defender, then an appellate defender.

131. *See* Siegel et al., *supra* note 127, at 601 ("[A]ppellate public defender offices are typically massively underfunded, such that lawyers are forced to provide representation under tight timelines with little access to the experts and evidence that could drastically improve their cases.").

132. Colorado, Illinois, and Maryland are just three examples. *See Appellate Division*, OFF. COLO. ST. PUB. DEF., https://www.coloradodefenders.us/offices/appellate-division [https://perma.cc/UCX2-F35K]; *About Us*, ILL. ST. APP. DEF., https://www2.illinois.gov/osad/AboutUs/Pages/default.aspx [https://perma.cc/9MR5-DJT3]; *Appellate Division*, MD. OFF. PUB. DEF., https://www.opd.state.md.us/appellate [https://perma.cc/Q3QN-GR8F].

133. Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 130 n.84 (2020); *see also id.* at 126 n.65, 141 n.152; *Appellate Projects in California*, APP. DEFS., INC., http://www.adi-sandiego.com/panel/ca_legal_projects.asp [https://perma.cc/

funding scheme can aid in ensuring stable, uniform representation throughout the state.[134] It may also lead appellate defenders to formulate statewide litigation strategies so that their clients can best profit from new laws.[135] By expanding the scope of appellate defenders' appointments in this way, states can better utilize their skills and knowledge, while also advancing criminal justice reform goals.

Crucially, to ensure that appellate defenders are appointed and have a well-defined scope of appointment, state legislatures enacting criminal justice reform efforts should include detailed and specific right-to-counsel provisions. Such provisions will reduce the need for litigation over if and when the Fourteenth Amendment's right to counsel attaches to each reform statute. This, in fact, was what the drafters of California Penal Code section 1170.95 made an effort to do.[136] Though California courts first interpreted the statute in a narrow way, the California Supreme Court ultimately held that there is a statutory right to counsel once a petitioner files a facially sufficient petition.[137] The California experience will hopefully encourage future legislators to continue to strive for clarity and specificity. Further, increased recognition that this right to counsel is not only statutory but also rooted in fundamental equal protection and due process principles is invaluable.[138] This recognition should foster respect for, and protection of, the right to counsel in a new legal landscape.

V. CONCLUSION

The meaningful reform efforts that have captured the nation's attention should not be limited only to those who can afford counsel. It is also not enough for rules of criminal liability and procedure to change for the better only for those to come.[139] The harm that, for example, overly puni-

SWJ4-5TH5] (providing a list of the regionally based non-profit appellate projects in California).

134. *See* Joe, *supra* note 133, at 143–48, 162–63 ("[S]cholars have found that state budget appropriations provide more equitable funding and are better able to ensure uniform practices across a state.").

135. The appellate projects in California, for example, publish numerous practice articles for defenders to consult on changing criminal laws and practices. *See Practice Articles*, APP. DEFS., INC., http://www.adi-sandiego.com/practice/pract_articles.asp [https://perma.cc/ZW7Z-79DW]; *Criminal Articles*, CENT. CAL. APP. PROGRAM, https://www.capcentral.org/criminal/articles/index.asp [https://perma.cc/3P4J-GGXF]; *Articles & Outlines*, FIRST DIST. APP. PROJECT, https://www.fdap.org/resource/articles [https://perma.cc/4NN6-2A7S]; *cf.* Daniel Epps & William Ortman, *One Change That Could Make American Criminal Justice Fairer*, ATLANTIC (Mar. 16, 2020), https://www.theatlantic.com/ideas/archive/2020/03/america-needs-defender-general/608002 [https://perma.cc/F9EK-6NNT] (describing the desirability of a public "Office of the Defender General," which "would be responsible for advocating for the *collective* interests of criminal defendants" in cases that reach the U.S. Supreme Court).

136. *See* Brief Amici Curiae, Lewis, *supra* note 51, at 16–20.

137. *See* People v. Lewis, S260598, 2021 WL 3137434, at *1 (Cal. July 26, 2021).

138. *See supra* Section IV.A.

139. *See, e.g.*, *Assemblymember Kalra Announces New California Racial Justice Act for All*, CWP (Jan. 15, 2021), https://womenprisoners.org/2021/01/for-immediate-release-assemblymember-kalra-announces-new-california-racial-justice-act-for-all [https://perma.cc/299W-AWWJ] ("It is incumbent upon us to make sure that all Californians are afforded an

tive sentencing rules have caused should be addressed in a thoughtful way that looks backward too and enables prior defendants of all resourcing positions to benefit.[140] Achieving such change takes foresight on the part of legislators in choosing among a range of possible procedural options. If the process is to be largely non-adversarial, many of the burdens of providing relief to individuals can be allocated to state actors such as prosecutors and even courts.[141] But if the process is to be hotly contested, it is crucial that would-be petitioners are appointed counsel early and in an efficient way. Appellate defenders, already tasked with fulfilling the Fourteenth Amendment right to counsel and asserting the rights of incarcerated individuals under new statutes, are well-positioned to take on this additional role.[142] Some criminal law reform statutes may themselves implicate a right to counsel that is grounded in the interplay of equal protection and due process principles.[143] Appointing counsel to would-be petitioners as early as possible would not only protect such individuals' rights, it would be a sure way to deliver on the promises driving new criminal justice reforms.

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opportunity to pursue justice by making the [Racial Justice Act] retroactive—ensuring that these new protections are rightfully extended to those who have already been harmed by unfair convictions and sentences.").

140. *See* Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020), https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19 [https://perma.cc/95UZ-LCL5] ("Why are there so many older adults behind bars? Some scholars point to harsh sentencing laws imposed in the 1980s and 1990s as a factor.").

141. *See, e.g.*, Margaret Colgate Love, *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside [https://perma.cc/QN9Z-D39X] (showing that some states offer automatic expungement or sealing of some convictions).

142. *See supra* Part IV.B; Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

143. *See supra* Part IV.A.