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RELEASING OLDER PRISONERS CONVICTED OF VIOLENT CRIMES: THE UNGER STORY

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INTRODUCTION

On May 24, 2012, Maryland’s highest court released a decision that shocked the Maryland legal world and gave older life-sentenced Maryland prisoners their first real hope of release in decades.¹ In *Unger v. State*, the Maryland Court of Appeals made retroactive a 1980 decision that had invalidated a historic instruction that Maryland judges had given juries in criminal cases for over 150 years.² In that instruction, judges told the *lay jurors* that *they*, not the judge, *were the ultimate judges of the law, and what the judge said was advisory only*.³ A fair reading of the *Unger* decision was that all prisoners convicted before 1981 were entitled to new trials. The court explicitly confirmed this through two subsequent decisions, the last in 2016, in which the State asked the court first to reverse *Unger*, and then to significantly limit it.⁴ The court rejected these arguments.

The result of these four years of litigation was that all of those prisoners convicted before 1981 were indeed entitled to new trials. There were 237 people in what we refer to as the “Unger group,” 236 men and one woman.⁵ In 2012, on average, they were sixty-four years

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¹ *Unger v. State*, 48 A.3d 242 (Md. 2012). For a full discussion of this opinion, see *infra* Part IV.

² *Stevenson v. State*, 423 A.2d 558 (Md. 1980).

³ *Unger*, 48 A.3d at 244. The provision making juries the “judges of law as well as of fact” was added to the Maryland Constitution in 1851. ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 340 (1915).

⁴ *State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016); *State v. Waine*, 122 A.3d 294, 296 (Md. 2015).

⁵ UNGER PROJECT DATA, 2012-2021 (2021) (on file with authors) (all data are up to date as of May 2021 and were compiled by Becky Feldman, former Deputy Public Defender of the Maryland Office of the Public Defender) [hereinafter UNGER PROJECT DATA].

old and had been incarcerated thirty-five years.⁶ Eighty-four percent were convicted of murder and thirteen percent were convicted for rape.⁷ There were also “an average of three [related] convictions per” person, “also for crimes of violence,” for which judges imposed separate concurrent or consecutive sentences.⁸

What followed the *Unger* decision was one of the most interesting and important unplanned criminal justice experiments in Maryland and national history. Over six years, 200 of these older prisoners were released on probation. The great majority were serving life with parole sentences.⁹ The vast majority of the released prisoners, 97%, have been successful, defined by not being re-incarcerated.¹⁰ These recidivist data are especially important for two reasons. First, the 200 who were released had not been approved individually by a parole authority as “safe” to release. Rather, they were 84% of *all state prisoners in Maryland convicted by juries of murder, rape, and other violent crimes before 1981*, some of whom the parole commission had recommended for parole, some it had not.¹¹ In addition, they had all been convicted of violent crimes. These facts, which may be the most important parts of the remarkable *Unger* story, have significant implications for criminal justice and corrections policy, as we argue in Part VI.¹²

⁶ *Id.* When *Unger* was decided in 2012, those in the *Unger* group were in their 50s, 60s, 70s, and 80s, and had been incarcerated on average over thirty-five years. Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, *Digging them Out Alive*, 25 CLINICAL L. REV. 365, 365-67 (2019). The oldest of the 237 was Charles Edret Ford. He was eighty-four when he was released in 2016. *See infra* notes 105-107 and accompanying text.

⁷ OPEN SOCIETY INSTITUTE OF BALTIMORE, BUILDING ON THE UNGER EXPERIENCE: A COST-BENEFIT ANALYSIS OF RELEASING AGING PRISONERS 4 (2019).

⁸ *Id.*

⁹ UNGER PROJECT DATA, *supra* note 5.

¹⁰ *Id.*

¹¹ As of May 14, 2021, the claims of the 237 members of the *Unger* group had the following resolutions: Of the 200 released from prison, 149 were released due to post-conviction settlements; 50 won new trials, pled guilty, and were released on parole and/or probation through plea bargains; and one was retried and acquitted. Of the 37 not released, 9 died before they were able to litigate or negotiate their claims; 9 were released to detainers for other convictions or sentences; 6 were retried, pled guilty, or were reconvicted, and received new life sentences with no part suspended; one was retried and sentenced to life with all but 100 years suspended; and 11 agreed to plead guilty and serve additional but fixed periods of incarceration (some are now released). UNGER PROJECT DATA, *supra* note 5. Merle Unger, whose lawsuit established the right to a new trial, was one of the individuals reconvicted and sentenced to life with no part suspended. *See Yvonne Wenger & Ian Duncan, Killer at Center of Prisoner Release Case Convicted Again*, BALTIMORE SUN (July 11, 2013), <http://www.baltimoresun.com/news/maryland/crime/bs-md-unger-cases-20130711-story.html>.

¹² *See infra* Part VI.

All three authors worked on the litigation that implemented the *Unger* decision, representing or helping to represent members of the Unger group. We did this through the University of Maryland Carey School of Law, Millemann as a lawyer and clinical teacher, and Feder and Chapman as law students.¹³ Our work through the law school's Unger clinic was part of a larger interdisciplinary, multi-partner collaboration to implement *Unger*, which we call the Unger Project.¹⁴

It has been over nine years since the *Unger* decision. This article is a retrospective analysis of the jury-determines-the-law instruction, the *Unger* decision, and the implementation of *Unger*, largely through the releases of older prisoners convicted of violent crimes. In this article, we identify what we believe is important about the Unger story, not just in Maryland but also nationally.

In Part I, we describe the jury-determines-the-law instruction, which we call the "advisory-only instruction," and use an actual case study to show how it worked in practice and to demonstrate how it nullified the Rule of Law.¹⁵

In Part II, we use another case study, the famous colonial trial in New York of John Peter Zenger for seditious libel, to demonstrate why in the early history of this country the jury right to determine the law was a fundamental protection of liberty, especially free speech.¹⁶

In Part III, we argue that by the time of the Unger group's trials, primarily in the 1960s and 1970s,¹⁷ the jury's right to determine the law had become a serious threat to a fair trial, not a protection of defendants' rights.¹⁸ We focus on the large role that we believe race played in the convictions and continued incarcerations of the members of the Unger

¹³ In 2013, Feder was a law student in the original Unger clinic in 2013. In 2015, Chapman was a student in a first-year Criminal Law/Legal Theory and Practice course in which students worked on the Unger cases. In total, on the law side, there were two upper-level Unger clinics, two summer clinics, and eight advanced clinical placements in which the students acted as teaching assistants and "senior counsel" in cases. On the social work side there were six year-long field placements and related courses. We simplify this by calling these courses and placements "the Unger clinic." Three clinical law professors, 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. 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.

¹⁴ See a description of this Project *infra* Part V.

¹⁵ See *infra* Part I.

¹⁶ See *infra* Part II.

¹⁷ At least one in the Unger group was convicted in the 1950s, see *infra* notes 105-107 and accompanying text, and some were convicted in 1980 before the Maryland Court of Appeals prohibited the advisory-only instruction in future trials on December 17, 1980. *Stevenson v. State*, 423 A.2d 558, 565 (Md. 1980).

¹⁸ See *infra* Part III.

group. We argue that in these decades of politically cultivated race divisiveness, the advisory-only instruction gave jurors a legitimate way to rationalize, at least to themselves, arbitrary decisions to convict defendants, including decisions influenced by racism. This combination, we argue, not only denied the Unger group members fair trials but also likely produced a number of wrongful convictions.

In Part IV, we describe the over three decades of litigation that led up to the *Unger* decision,¹⁹ and offer our views about the factors that made Maryland one of the last two states to finally reject or severely limit the advisory-only instruction.²⁰

In Part V, we describe the evolution of the responses to the Unger releases.²¹ Initially, the responses of many prosecutors and some in the media were negative, even angry, with pledges by a number of prosecutors to oppose any releases and by others to ask the Maryland Court of Appeals to reverse the *Unger* decision, which the State did in 2014.²² With the successes of those released over time, however, the public, the media, and many prosecutors came to accept *Unger*.²³ We argue that, like many older, long-incarcerated prisoners, most in the Unger group had worked hard in prison to improve themselves and to prepare themselves to live peacefully and productively in society.²⁴ They also developed a strong community where they and their families supported one another and in which the mantra was, and is, “failure is not an option.” There was a major social work component of the Unger Project as well that provided critically important support services to those in the Unger group, from prison through release. That is, the Unger Project created a model reentry program.

¹⁹ See *infra* Part IV.

²⁰ The other is Indiana, in which an advisory-only instruction is still in effect in limited form. See *infra* notes 87 & 176.

²¹ See *infra* Part V.

²² See, e.g., Duncan & 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”).

²³ See, e.g., Jason Fagone, *Meet the Ungers*, HUFFINGTON POST (May 2016), <https://highline.huffingtonpost.com/articles/en/meet-the-ungers/>.

²⁴ Elderly people who are released from prison have low rates of recidivism, a dynamic known as “aging out” of crime. Molly Connor, *From First Steps to Second Chances: Addressing Mass Incarceration in State Prisons*, 95 NOTRE DAME L. REV. 1699, 1710 (2020); Mirko Bagaric, Marissa Florio & Brienna Bagaric, *A Principled Approach to Separating the Fusion Between Nursing Homes and Prisons*, 44 PEPP. L. REV. 957, 998-1003 (2017).

In Part VI, we examine the post-*Unger* assessments by others, such as researchers, commentators, and social justice organizations, of the significance of the Unger group's success and add our own assessments.²⁵ We argue that the success of the Unger group provides both a strong argument against, and a roadmap to challenge, over-incarceration, especially of geriatric prisoners. It provides a strong basis to reject the widely held assumption that prison release programs and strategies should not include prisoners who were convicted of violent crimes. It offers a model of a good reentry program, which includes peer counseling by released prisoners. It also generally undermines public safety arguments for life-without-parole and no-parole laws, among other contemporary criminal justice practices and policies. We point out another way in which we believe the Unger Project has had a beneficial effect. Very recently, Maryland has become a national leader in developing "second look" initiatives, which allow older, long-incarcerated prisoners to seek resentencing hearings, and there are similar initiatives in many states. We believe the successes of the Unger group have given policymakers confidence in these second look initiatives and reasons to adopt them, and that the Unger Project provides those who seek to help prisoners under these initiatives a helpful model of interdisciplinary advocacy.

In Part VII, as teachers and former students, we look at the legal education dimension of the Unger Project and ask: "What did the law students learn?"²⁶ We did not try to answer this question ourselves, but rather asked students in the first *Unger* clinical courses in 2013 how they would answer this question. They share their retrospective assessments of this collaborative and interdisciplinary experience and what they learned from it.

The place we choose to start is with an actual case.

PART I: THE ADVISORY-ONLY INSTRUCTION NULLIFIED THE RULE OF LAW: A CASE EXAMPLE

In 1976, Bobby was a slight, fifteen-year-old boy. He was in the ninth grade, testing at the fourth-grade level, and living with his grandparents. On the evening of October 26, he shot and killed his grandfather as he walked in the front door from work.²⁷

²⁵ See *infra* Part VI.

²⁶ See *infra* Part VII.

²⁷ Trial Transcript, *State v. Martin*, Caroline County, (1977) (No. 1040) [hereinafter *Trial Tr.*].

Bobby's murder trial in Caroline County, on the Eastern Shore of Maryland, took two days, from jury selection through closing arguments.²⁸ Before closing arguments, the judge told the jury this:

These instructions are advisory only, for under our State Constitution you and you alone are the sole judges of the law. [In determining what the Maryland law is,] you may consider what the judge has to say on the subject, what the attorneys for both sides have to say, and what you, yourselves, of your own knowledge know the law to be. In other words, you should 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 tell you the law is. And in that manner find what you conscientiously believe the law to be and apply it to what you find the facts in this case to be, and then render your verdict accordingly.²⁹

The essential fact was that the grandfather was a serial abuser. He beat his daughter (Bobby's mother), his wife (Bobby's grandmother), and Bobby. He usually got his guns and rifles out while doing it.³⁰ The grandmother testified at trial that the grandfather, her husband, "used to hit Bobby all the time, but Bobby never hit back, and would never say a word. He would just stand there and take it."³¹

Bobby's defense was self-defense. The grandfather mistakenly thought Bobby had stolen his ring. On the morning of October 26, the grandfather left a note for Bobby on his way to work. The note said: "Bobby put my Ring Back or Ill [sic] Kill you."³² Bobby believed it, with good reason, especially from the perspective of a ninth grader testing as a fourth grader.

The prosecutor asked the judge to instruct the jury that to establish self-defense the victim must have made an overt act, threatening death or serious bodily harm, immediately before the defendant killed him. The judge rejected this instruction because it was

²⁸ *Id.* at 1-365. The trial began on April 25, 1977, at 10 a.m. and ended on the evening of April 26, 1977.

²⁹ *Id.* at 309-10.

³⁰ *Id.* at 213-16, 218.

³¹ *Id.* at 218.

³² *Id.* at 109, 113, 174-75, 224-25.

not Maryland law.³³ He allowed the prosecutor, however, to argue the rejected legal point to the jury.

Recall, the judge had told the jurors that, in determining the law, “you may consider . . . what the attorneys for both sides have to say,” and the judge had added they “may read and argue the law to you.”³⁴ The prosecutor did just that, asking the jury to adopt the overt act rule that the trial judge had rejected, reading from various out-of-state judicial opinions, including from Pennsylvania and California, and quoting from Wharton’s Criminal Law, a treatise.³⁵

The prosecutor asked the jury, as the judge of the law, to impose this “common sense” requirement, echoing the judge’s instruction that the jurors should “apply [their] common sense to what the counsel and the Court tell you the law is.”³⁶

This was very damaging because there was no evidence that just before he was shot, the grandfather had made an overt act that threatened Bobby’s life, although there was lots of evidence that Bobby believed, reasonably, that his grandfather likely was going to kill him.³⁷

Bobby is Black. The jury likely was all, or disproportionately, white.³⁸ Out sixty-eight minutes, it convicted Bobby of first-degree murder.³⁹ At sentencing, the judge cited the Bible, and speaking to Bobby, said: “Your father left your mother when you were about two years old,” “your mother died in an insane asylum,” and the forensic facility that did your competency evaluation found that “you were mentally competent” but “of dull to normal intelligence.”⁴⁰ Then, as the fifteen-year-old boy cried, the judge sentenced him to life imprisonment.⁴¹

Bobby was referred to Maryland Law School’s Clinical Law Program *thirty-six years later*, in 2013. He was then fifty-one years old. He now had an extraordinary opportunity to finally get out of prison based on the *Unger* decision.

³³ See, e.g., *Guerriero v. State*, 132 A.2d 466, 467 (Md. 1957); *Gunther v. State*, 179 A.2d 880, 882 (Md. 1962).

³⁴ Trial Tr., *supra* note 27, at 310.

³⁵ *Id.* at 335-42.

³⁶ *Id.* at 310, 327.

³⁷ *Id.* at 109, 113, 174-75, 224-27.

³⁸ Bobby’s case, like all the Unger cases, was tried prior to the U.S. Supreme Court’s ruling in *Batson v. Kentucky* that prosecutors could not use peremptory challenges to strike jurors on the basis of race. See *infra* Part III.C; see also *Batson v. Kentucky*, 476 U.S. 79 (1986); Millemann et al., *supra* note 6, at 422-23.

³⁹ Trial Tr., *supra* note 27, at 361.

⁴⁰ Sentencing Transcript at 5, *State v. Martin*, Caroline County (1977) (No. 1040).

⁴¹ *Id.* at 14.

PART II: THE JURY'S HISTORIC RIGHT TO DETERMINE THE LAW
INITIALLY PROTECTED DEFENDANT'S RIGHTS

The advisory-only instruction was compelled by Article 23 of the Maryland Declaration of Rights, first adopted in 1851.⁴² It was, however, part of Maryland's practice much earlier.⁴³ Until 1981, in one form or another, all judges in Maryland, in every criminal case tried by a jury, gave it. There was no uniform instruction.⁴⁴

Article 23 provides: "In the trial of all criminal cases, the Jury shall be the Judges of the Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."⁴⁵ There were similar rules and constitutional provisions in fifteen other states in the nineteenth century, with nine in state constitutions.⁴⁶

To find the source of the jury's right to determine the law, one has to go back to common law England,⁴⁷ but we go back only to colonial America. Then, the jury's power to decide the law in criminal cases was a strong protection for liberty, including the freedom of speech. One of the classic examples of this protection was the 1735 prosecution of John Peter Zenger in New York.⁴⁸ Zenger was the publisher of the *New York Weekly Journal*, an opposition newspaper,

⁴² NILES, *supra* note 3, at 340.

⁴³ *Slansky v. State*, 63 A.2d 599, 603 (1949) (citing *2 Debates and Proceedings of Md. Reform Convention*, 766-68 (1851); MD. CONST. art. 10, § 5 (1851)) ("Under the Maryland Constitution of 1776 there was lack of uniformity in procedure with respect to instructions to juries in criminal cases. In some parts of the State it was the practice of the judges to decline to give instructions to the jury in criminal cases under any circumstances; in other parts of the State it was the practice of the judges to give advisory instructions when requested to do so. It was regarded as entirely a matter of discretion with the judge, there being no positive duty requiring him to pursue the one course or the other. In order to make the procedure uniform throughout the State, the members of the Convention which framed the second Constitution inserted the provision that 'in the trial of all criminal cases the jury shall be the judges of law as well as fact.'").

⁴⁴ *Id.*

⁴⁵ MD. CONST., Declaration of Rights, art. 23.

⁴⁶ See, e.g., J.E.R. Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150 (1896); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); 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).

⁴⁷ Mathew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 378, 385 (1999).

⁴⁸ *Crown v. John Peter Zenger*, 1735, HIST. SOC'Y N.Y. CTS., <https://history.nycourts.gov/case/crown-v-zenger/> (last visited July 16, 2021); John R. Vile, *John Peter Zenger*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/1235/john-peter-zenger#:~:text=The%20governor%20of%20New%20York,Hamilton%2C%20a.%20jury%20acquitted%20Zenger> (last visited Oct. 29, 2021).

pro-colonist and anti-royal, which had published a series of anonymous attacks against British Royal Governor, William Cosby.⁴⁹ Zenger had been jailed under horrendous conditions for ten months.⁵⁰ The crime charged, seditious libel, dated back to the powerful and widely despised royal council known as the Star Chamber.⁵¹

King George II had appointed Cosby.⁵² As one commentator observed, colonial governors usually were “members of aristocratic families whose personal morals, or whose incompetence, were such that it was impossible to employ the[m] nearer home.”⁵³ This certainly was true of Cosby. He was arrogant and corrupt; among his misdeeds were election-rigging and bribery.⁵⁴

At stake was whether any freedom of the press and of speech would be allowed in New York. At trial, defense counsel, Andrew Hamilton, observed: “the extraordinary appearance of people of all conditions” in the courtroom.⁵⁵ This gave him “reason to think that those in the administration have by this prosecution something more in view,” and “the people think they have a great deal more at stake, than I apprehended.”⁵⁶

Judges served at the pleasure of the colonial governors. In 1733, Cosby removed Chief Judge Lewis Morris of the State Supreme Court for dissenting in a case *decided in Cosby’s favor*.⁵⁷ The Governor appointed a fellow royalist, James Delancey, as the new Chief Judge; he was presiding, with a second judge, at Zenger’s trial.⁵⁸

Delancey was both prosecutor and judge. Prior to Zenger’s arrest, he had tried unsuccessfully to have Zenger indicted, but three grand juries refused to return an indictment. Delancey then instructed Attorney General Richard Bradley to bring charges against Zenger on

⁴⁹ Douglas O. Linder, *Key Figures in the Trial of John Peter Zenger*, FAMOUS TRIALS (May 11, 2021, 11:48 AM), <https://famous-trials.com/zenger/96-keyfigures>. See *Crown v. John Peter Zenger, 1735*, *supra* note 48; Vile, *supra* note 48.

⁵⁰ *Crown v. John Peter Zenger, 1735*, *supra* note 48; Vile, *supra* note 48. See, e.g., Harry Elmer Barnes, *Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 37-41 (1921).

⁵¹ Eugene F. Miller, *Introductory Note to 1736: Brief Narrative of the Trial of Peter Zenger*, ONLINE LIBR. LIBERTY (May 11, 2021, 4:27 PM), <https://oll.libertyfund.org/page/1736-brief-narrative-of-the-trial-of-peter-zenger>.

⁵² *Id.*

⁵³ Linder, *supra* note 49.

⁵⁴ *Crown v. John Peter Zenger, 1735*, *supra* note 48; Vile, *supra* note 48.

⁵⁵ Douglas O. Linder, *The Trial of John Peter Zenger: An Account*, FAMOUS TRIALS (May 11, 2021, 12:50 PM), <https://www.famous-trials.com/zenger/87-home>.

⁵⁶ *Id.*

⁵⁷ *Id.*; *Crown v. John Peter Zenger, 1735*, *supra* note 48.

⁵⁸ Linder, *supra* note 49.

Bradley's own authority, by filing "an information" (the charging document).⁵⁹

Before trial, Delancey struck the two original defense lawyers from the roster of attorneys, and replaced them with a court-appointed lawyer.⁶⁰ Although this lawyer began the trial, at a dramatic moment, he stepped aside, replaced by Andrew Hamilton.⁶¹ Hamilton then demonstrated why he was one of the great lawyers of the day. By the end of the trial, he had reduced the judge to a frustrated and angry observer as he argued the case, including the law, directly to the jury.

The Attorney General argued that truth was a not a defense; rather, the only issue was whether Zenger had published the articles. "Indeed," he said, "the law says their being true is an aggravation of the crime."⁶² He contended that nothing could be said in defense of Zenger, who had charged: "His Excellency our Governor, who is the King's immediate representative and the supreme magistrate of this province," with "depriving the people of their rights and liberties, and taking away trials by juries, and, in short, putting an end to the law itself."⁶³

Hamilton conceded that Zenger had printed and published the articles, but answered that to be libelous, words had to be "false, scandalous, and seditious," or else there is no crime.⁶⁴ "[J]ust complaints" by "men who suffer under a bad administration," he said, are not libelous.⁶⁵

Both lawyers argued English law, but Hamilton also criticized as "strange doctrine" the argument that "everything" which was law in England should be "law here."⁶⁶

Chief Judge Delancey made it clear that he agreed with the Attorney General that as a matter of law words need not be false to be

⁵⁹ *Id.* (explaining that an "information" was a procedure that permitted the government to bypass a grand jury).

⁶⁰ Miller, *supra* note 51.

⁶¹ *Id.*

⁶² JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley N. Katz ed., Belknap Press of Harvard University 1963) (1736), reprinted in 1 THE ANNALS OF AMERICA, 1493-1754: DISCOVERING A NEW WORLD 400 (Mortimer J. Adler & Charles Van Doren eds., 1968). The Attorney General cited numerous English legal authorities in support of his position. This included a treatise by Sir Edward Coke, the eminent authority on English common law. *Id.*

⁶³ *Id.* at 401.

⁶⁴ *Id.* at 400.

⁶⁵ *Id.* at 401.

⁶⁶ *Id.* at 402. Hamilton linked the authorities that the Attorney General cited to England's notorious Star Chamber, saying he had hoped that "those dreadful judgments," and the "law [they] established," were "long ago laid aside" and would not be "a precedent to us." *Id.*

libelous.⁶⁷ “The law is clear, that you cannot justify a libel [with the truth];” he cited *Coke’s Institutes* and, accordingly, he ruled Zenger was “not to be permitted to prove the facts in the papers.”⁶⁸ He then issued a warning: “Mr. Hamilton, the Court have delivered their opinion, and we expect you will use us with good manners.”⁶⁹ Lest the message be missed, the Chief Judge added, “you are not to be permitted to argue against the opinion of the Court.”⁷⁰

Hamilton responded: “With submission, I have seen the practice in very great courts, and never heard it deemed unmannerly to—”, before the Chief Judge cut him off, saying: “After the Court have declared their opinion, it is not good manners to insist upon a point in which you are overruled.”⁷¹

Hamilton became wonderfully unmannerly. He said, turning to the jury, “Then, gentlemen of the jury, it is to you we must now appeal for witnesses to the truth of the facts we have offered and are denied the liberty to prove.”⁷² He repeated to the jury his argument that to be libelous the jury had to find the words were false.

The Chief Judge interrupted him at this point, one might assume angrily, saying the jury was to find whether “Zenger printed and published those papers, and leave it to the Court to judge whether they are libelous.”⁷³ As with a “special verdict,” the Chief Judge said, the jury would “leave the matter of law to the Court.”⁷⁴

Hamilton responded that “the jury may do so,” but “they may do otherwise” as well.⁷⁵ Without objection from the court, he said: “*I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so.*”⁷⁶

The Chief Judge then observed:

The great pains Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of the judges. I shall therefore only observe to you that as the facts or words in the information are confessed, the only thing

⁶⁷ Linder, *supra* note 49.

⁶⁸ ALEXANDER, *supra* note 62, at 407.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Linder, *supra* note 49.

⁷⁴ ALEXANDER, *supra* note 62, at 410.

⁷⁵ Linder, *supra* note 49.

⁷⁶ ALEXANDER, *supra* note 62, at 410 (emphasis added).

that can come in question before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt, and which you may leave to the Court.⁷⁷

The jury did not leave it to the judge; they deliberated and in a “small time” returned a not guilty verdict.⁷⁸ The courtroom audience erupted in cheers that it sustained over the contempt threats of Chief Judge Delancey.⁷⁹ Today, the case is a landmark in the protection of free speech rights. This was a development imposed by a jury over the objections of the presiding Chief Judge.

The need to control Tory judges was only one reason that juries in criminal cases in our country’s early experience had the right to determine the law. Judges were not lawyers, and when they were, there was overriding “trust in the public’s sense of justice.”⁸⁰ Juries were viewed as “an obstacle to oppressive government” and, therefore, “unquestionably ha[d] jurisdiction of both fact and law.”⁸¹ Despite “incorporation” provisions, it was not clear what laws applied, and in any event, there was a resistance to English law, especially the law of the Star Chamber.⁸² There was a deep belief in natural law, as well, and a deep commitment to the “sanctity of individual conscience.”⁸³ In 1771, John Adams wrote in his diary:

Is it not an absurdity to suppose that the law would oblige [jurors] to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience[?] . . . It is not only [the juror’s] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, tho[ugh] in direct opposition to the direction of the court.⁸⁴

⁷⁷ *Id.* at 416.

⁷⁸ *Id.*; Linder, *supra* note 49.

⁷⁹ Linder, *supra* note 49.

⁸⁰ For example, “A farmer justice of the New Hampshire Supreme Court instructed a jury to use common sense rather than the common law, saying that ‘[a] clear head and an honest heart are [worth] more than all the law of the lawyers.’” Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 906 (1994).

⁸¹ THE FEDERALIST NO. 81 (Alexander Hamilton); DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 114 (2016).

⁸² Millemann et al., *supra* note 6, at 379 & n.65.

⁸³ *Id.*

⁸⁴ John Adams, Diary Notes on the Right of Juries, in 1 LEGAL PAPERS OF JOHN ADAMS 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). For a scanned version of the diary, see

This explains why nine states by constitutional provision or statute, and six states by common law rule, adopted jury-judge-of-the-law provisions and rules.⁸⁵ In the nineteenth and early twentieth centuries, many courts rejected these provisions because the reasons for them had ceased to exist.

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.⁸⁶

The courts cited many, in retrospect obvious, reasons for their decisions: juries deciding the law violated the separation of powers; legislatures make laws, and courts sometimes announce common law rules; the jury right gutted the judicial role; and it left legal decisions invisible and unreviewable. Generally, it violated the Rule of Law and

John Adams, 1771. Feby. 12, in PAPER BOOK NO. 16, 1771-1772, 1, 7-8, (1772) <https://www.masshist.org/digitaladams/archive/doc?id=D16>.

⁸⁵ Millemann et al., *supra* note 6, at 379; Bressler, *supra* note 46, at 1157-58. See Slansky v. State, 63 A.2d 599, 601-02 (Md. 1949) (“In some of the New England Colonies it was fully understood that the judges held office not for the purpose of deciding causes, for the jury decided all questions of both law and fact, but merely to preserve order and see that the parties were treated fairly before the jury. This procedure received patriotic justification as increasingly oppressive measures were taken by the royal officials; however, the fact that many of the judges had not studied law was probably an additional explanation for the procedure.”); see also Howe, *supra* note 46, at 582, 584, 614-15; Scott, *supra* note 46, at 416-17.

⁸⁶ Millemann et al., *supra* note 6, at 379. Justice Story, then a Circuit Court trial judge, stated to a jury in 1835 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, 1043 (C.C.D. Mass. 1835) (No. 14,545). The Supreme Court agreed with this in 1895, when it held that a judge’s instructions to the jury were binding in federal criminal cases. *Sparf v. United States*, 156 U.S. 51, 64 (1895). Though the issue had not been “concluded by any direct decision of this court,” the Court reasoned, quoting Justice Curtis, that the “power and corresponding duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen.” *Id.* at 64, 107 (quoting *United States v. Morris*, 26 F. Cas. 1323, 1336 (C.C.D. Mass. 1851) (No. 15,815)).

was unfair to both the defendant and society.⁸⁷ Nevertheless, until 1980, Maryland was one of the last two holdouts, as we describe in Part IV.⁸⁸

PART III: THE JURY'S RIGHT TO DETERMINE THE LAW WAS A WAY FOR
JURORS TO GIVE EFFECT TO THEIR RACISM AND ANGER AT CRIME IN
THE 1960S AND 1970S

The occasional scholar argues that the advisory-only instruction continues to protect the rights of defendants.⁸⁹ While these arguments may work in trials of sympathetic defendants charged with crimes that are inconsistent with developing norms—for example, simple possession of marijuana by an adult—they fail entirely in the context of the murder and rape trials of largely Black defendants in Maryland in the 1960s and 1970s.⁹⁰ There was no social norm that supported the conduct underlying these crimes, but rather strong, and usually angry, public reactions to them.⁹¹

We focus on the possible interplay of the advisory-only instruction and the pervasive racism and politically inspired anger at crime that existed in Maryland in the 1960s and 1970s. As we will explain, we believe these factors, often in combination, likely affected

⁸⁷ *Hamilton v. People*, 29 Mich. 173, 191 (1874) (“[I]f the court is to have no voice in laying down these rules, it is obvious that there can be no security whatever, either that the innocent may not be condemned, or that society will have any defence against the guilty . . . Parties charged with crime need the protection of the law against unjust convictions, quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of any one.”). *See, e.g.*, *State v. Gannon*, 52 A. 727 (Conn. 1902) (holding that the judge’s instructions are binding and summarizing similar decisions in New Hampshire); *Pierce v. State*, 13 N.H. 536, 554 (1843); *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 198 (1857); *State v. Smith*, 6 R.I. 33, 34 (1859). In addition to Maryland, there are two states that today have the jury decides the law role in their constitutions: Georgia and Indiana. GA. CONST. art. I, § 1, ¶ XI(a); IND. CONST. art. 1, § 19. However, Georgia’s provision has been interpreted to limit the jury’s law finding power since 1871. *See Anderson v. Georgia*, 42 Ga. 9, 32-33 (1871) (stating that the jury is bound by judge’s instructions and is limited to applying law to facts); *Anderson v. State*, 5 N.E. 711, 712 (Ind. 1886) (explaining that Indiana courts have not given juries full power to decide the law since 1886).

⁸⁸ *See infra* Part IV.

⁸⁹ *See, e.g.*, Marcus Alexander Gadson, *State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound*, 93 ST. JOHNS L. REV. 1, 2 (2019).

⁹⁰ *See supra* Part I; *see also infra* Section III.A.

⁹¹ In the Unger cases, all of the rape cases involved violence; there were no nuanced issues of consent. The murders often were parts of robberies; there were no cases in which, for example, an old, long married and loving husband or wife helped their partner end their life because of a painful, terminal disease. There may have been some defendants who were acquitted of more nuanced homicide and sexual assault charges who benefitted from the advisory-only instruction, but there were no facts in the Unger cases that would support such a conclusion.

the outcomes of some trials and the continued incarcerations of many of the 237 members of the Unger group. For them, this was not “past discrimination” because it occurred in the 1960s or 1970s, but instead a discrimination they felt every day for decades until they were released. James Baldwin said:

History, as nearly no one seems to know, is not merely something to be read. And it does not refer merely, or even principally, to the past. On the contrary, the great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally *present* in all that we do.⁹²

The angry racism of the 1960s and 1970s was “present in all that” many members of the Unger group did, and what happened to them, for decades.⁹³

Of the 236 men and one woman in the Unger group, 84% for whom race is known were Black.⁹⁴ This is grossly disproportionate to the relative percentages of Black people and whites charged with homicide in the 1960s and 1970s, when the members of the Unger group were arrested and convicted.⁹⁵ For example, in 1965 the FBI’s *Uniform Crime Report* reported data on arrests in the United States. There were 4,558 homicide arrests of white individuals compared to 4,245 homicide arrests of Black persons.⁹⁶ This suggests that there should have been slightly more whites than Black people in the Unger group.

The gross disproportionality, we believe, is the result of three interrelated factors: (1) the pervasive racism in Maryland during this period;⁹⁷ (2) discrimination in the criminal justice system, from charging decisions to pre-trial dispositions (including through plea

⁹² James Baldwin, *The White Man’s Guilt*, EBONY, Aug. 1965, at 47, 47 (emphasis in original).

⁹³ *Id.*

⁹⁴ Millemann et al., *supra* note 6, at 369, 422.

⁹⁵ See, e.g., Darnell F. Hawkins, *Black and White Homicide Differentials: Alternatives to an Inadequate Theory*, in RACE, CRIME, AND JUSTICE: A READER, 1, 245 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (discussing historical homicide offending rates by race). See generally KATHERINE J. ROSICH, AM. SOCIO. ASS’N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM (2007), <https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf> (reviewing research on racial disparities and discrimination in the criminal justice system). Some of the Unger group were convicted in 1980 before the Maryland Court of Appeals prohibited the advisory-only instruction.

⁹⁶ FBI UNIFORM CRIME REPORT 117 (1965).

⁹⁷ See *infra* Section III.A.

bargaining) through jury selection at trials;⁹⁸ and (3) the invitation by judges to these juries to create their own legal rules.⁹⁹ We address these factors in this order.

A. There Was Pervasive Racism in Maryland

Before we describe this racism, we will say more about our thesis that the advisory-only instruction invited, or least allowed, jurors to express their racism in their decisions. Research on the impact of jury instructions has found that jurors who did not receive jury instructions, or who received a strong nullification instruction, were substantially more likely to rate Black defendants as guilty compared to jurors who received instructions.¹⁰⁰ Although the advisory-only instruction did not explicitly invite jurors to nullify the law, it directed them to determine it, and had the same effect as explicitly inviting the jurors to disregard established law.

Second, research on capital trials found that jurors who had a low comprehension of the instructions were more likely to sentence Black defendants to death.¹⁰¹ The advisory-only instruction, at a minimum, would have been confusing to most jurors and hard for even a person of average cognitive function to comprehend.

Finally, research about employment decision-making has found that white individuals exhibit greater racial bias when making choices in an ambiguous context.¹⁰² Today's racism, due to evolved social norms, can be more subtle than that of the past and tends to manifest "when the individual expressing the prejudicial attitudes or discriminatory behaviors perceives the situation as ambiguous enough

⁹⁸ See *infra* Section III.B.

⁹⁹ See *infra* Part IV.

¹⁰⁰ See, e.g., Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCH. 1713 (1991); Jeffrey E. Pfeifer & Daniel J. Bernstein, *Expressions of Modern Racism in Judgements of Others: The Role of Task and Target Specificity on Attributions of Guilt*, 31 SOC. BEHAV. & PERSONALITY 749 (2003); E.L. Hill & J.E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 CONTEMP. SOC. PSYCH. 6 (1992); Neil A. Rector, Michael R. Bagby & R. Nicholson, *Effect of Prejudice and Judicial Ambiguity on Defendant Guilt Ratings*, 133 J. SOC. PSYCH. 651 (1993).

¹⁰¹ Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 356 (2000); Suzanne Mannes, Elizabeth E. Foster & Shana L. Maier, *Jury Instructions: How Timing, Type, and Defendant Race Impact Capital Sentencing Decisions*, 14 APPLIED PSYCH. CRIM. J. 154, 158, 168 (2018).

¹⁰² John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCH. SCI. 315, 318 (2000).

to allow for the expression.”¹⁰³ This form of bias has been termed “aversive racism” and “may lead otherwise seemingly fair and impartial persons to manifest racial hostility when the norms against such bias become ambiguous or conflicting.”¹⁰⁴ Again, the total context of the advisory-only instruction, followed by the other “regular” instructions, would have been ambiguous at best.

For all these reasons the general societal racism of the 1960s and 1970s likely influenced the decisions of many jurors. There were many examples of such racism in Maryland before and during this time period.

The oldest of the 237 in the Unger group was Charles Edret Ford.¹⁰⁵ He was a Black man who had been convicted of murder by a jury in Charles County, Maryland in 1952. When Ford was released on March 23, 2016, he was eighty-four years old and had maintained his innocence.¹⁰⁶ At a post-*Unger* hearing on his behalf, Ford’s lawyer 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.¹⁰⁷

Maryland’s status as a “Southern” or “Northern” state is a continuing debate and highlights the state’s varied geographic, demographic, and political makeup.¹⁰⁸ By referring to Maryland’s

¹⁰³ Pfeifer & Bernstein, *supra* note 100, at 751.

¹⁰⁴ Lynch & Haney, *supra* note 101, at 340. See also Elizabeth Ingriselli, *Mitigating Jurors’ Racial Biases: The Effects of Content and Timing on Jury Instructions*, 124 YALE L.J. 1690, 1696, 1738 (2015).

¹⁰⁵ 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>.

¹⁰⁶ Millemann et al., *supra* note 6, at 384 n.91.

¹⁰⁷ *Id.* at 384-85 n.91.

¹⁰⁸ Frederick N. Rasmussen, *Are we Northern? Southern? Yes.*, BALTIMORE SUN (Mar. 28, 2010), <https://www.baltimoresun.com/maryland/bs-xpm-2010-03-28-bal-md-backstory28mar28-story.html>; Patrick Ottenhoff, *Where Does the South Begin?*, ATLANTIC (Jan. 28, 2011), <https://www.theatlantic.com/national/archive/2011/01/where-does-the-south-begin/70052/>. A Facebook group, called “Maryland is a Southern State,” stresses Maryland’s southern status, including posts with images of Confederate monuments and flags. Wayne Doerflein, *Maryland is a Southern State*, FACEBOOK, <https://www.facebook.com/groups/MarylandisSouthern/> (last visited July 16, 2021).

southern status, Ford's attorney recognized the role race played in Maryland criminal justice in the 1960s and 1970s. There was significant evidence of racism in Maryland during this period.

i. George Wallace and the 1964 Presidential Primary

In 1964, Alabama governor George Wallace, whose mantra was "segregation now, segregation tomorrow, segregation forever," ran in the Maryland Presidential Primary against a stand-in for President Lyndon Johnson, Senator Daniel Brewster of Maryland.¹⁰⁹ At the time, the 1964 Civil Rights bill was pending in Congress and being subjected to a Southern-led filibuster.¹¹⁰ Throughout his presidential campaign, Wallace repeated his opposition to that bill. An article in the *Baltimore Sun* described one of his Maryland campaign rallies:

Wallace shook his fist in the air as he spoke. "I stand here in the great Border State of Maryland and I speak for every white Marylander who believes in the right to associate with whomever you please. I call on every white Marylander to join me in opposing President Johnson's civil rights bill and send Lyndon Johnson a message he'll never forget."¹¹¹

Wallace's "visceral connection to his crowds" was apparent at this rally, and, as in many other speeches, he tapped into the "modern politics of fear in America," a fear tightly connected to race.¹¹²

Wallace won 42.73% of the vote in Maryland, winning the majority-white precincts.¹¹³ It was his best showing in a presidential primary, better than in Wisconsin, where he won 34% of the votes, and Indiana, where he won 30% of the votes.¹¹⁴ The only thing that stopped him from winning the Maryland primary was the Black vote,¹¹⁵ as he

¹⁰⁹ Charles Whiteford, *Brewster Beats Wallace; Alabamian Gets 42% of Vote; Tydings is Winning*, *BALT. SUN* (May 20, 1964), at 1; Robert D. Loevy, *Campaigns and Elections: George Wallace for President*, in *ON THE FORWARD EDGE: AMERICAN GOVERNMENT AND THE CIVIL RIGHTS ACT OF 1964*, Ch. 11 (2005). Some accounts of the election give Wallace's percentage of votes as 42%; other accounts give his percentage as 43% depending on if the account rounds up or down from the decimal percentage (42.73%).

¹¹⁰ Loevy, *supra* note 109, at 207.

¹¹¹ *Id.* at 208.

¹¹² JON MEACHAM, *THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS* 219 (2018).

¹¹³ Loevy, *supra* note 109, at 208.

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 220. Then, Black people were twenty percent of the Maryland population. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 36 (101st ed. 1980).

pointed out after the primary, stating: “If it hadn’t been for the black bloc vote, I’d have won it all. I got a majority of the white vote.”¹¹⁶ Speaking to reporters before leaving Maryland, Wallace said: “You people of Maryland have done a great service to the nation.”¹¹⁷ This sentiment was echoed by other political leaders, including Senator Richard B. Russell of Georgia, who “interpreted the results as evidence of increasing sentiment against the civil rights bill.”¹¹⁸ Wallace echoed Russell’s sentiments, stating: “You have shown there is a new trend against the use of federal force” to compel integration and racial justice.¹¹⁹ Though Wallace failed to win the Democratic nomination, his strong showing in Maryland demonstrates the appeal of his segregationist sentiments in the state.

Wallace also tapped into fears that Black people were contributing to growing crime and that courts, prominently the U.S. Supreme Court, were not holding criminals accountable. He referred to Supreme Court justices as “black-robed despots” who would enforce the Civil Rights Bill—“a tyranny more brutal than that imposed by the British monarchy”—but would not hold criminals accountable.¹²⁰ Wallace did not draw distinctions between violent criminal activity and non-violent civil rights demonstrations.¹²¹

ii. *The Events in Baltimore After the Assassination of Dr. Martin Luther King, Jr.*

The public anger at crime and racial tensions was heightened by the events in Baltimore after the assassination of Dr. Martin Luther King, Jr. in 1968. One commentary summarized what happened, as in many other urban areas, after the assassination.

¹¹⁶ Loevy, *supra* note 109, at 220.

¹¹⁷ *Maryland Primary Vote Surprises Even Wallace But Winner Denies Effect On Rights Bill*, DESERT SUN, May 20, 1964, at 1.

¹¹⁸ *Id.* Wallace ran well in Baltimore City as well as in the rest of the state. In the 1960s and early 1970s, the majority of the population of Baltimore was white, with a significant white working-class base and a growing Black population. KENNETH D. DURR, *BEHIND THE BACKLASH: WHITE WORKING-CLASS POLITICS IN BALTIMORE, 1940-1980* 197 (2003). See generally HAROLD A. MCDUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* (1993).

¹¹⁹ *Maryland Primary Vote Surprises Even Wallace*, *supra* note 117.

¹²⁰ George C. Wallace, *The Civil Rights Movement: Fraud, Sham, and Hoax* (July 4, 1964) (transcript available at *A Segregationist’s View of the Civil Rights Movement, 1964*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/lbj-wallspeech/> (last visited Oct. 29, 2021)).

¹²¹ *Id.*

For two weeks in April 1968, beginning in the dark hours following the assassination of Martin Luther King Jr., the city of Baltimore was devastated by a series of civil disturbances that left six dead, dozens injured and hundreds of properties, both private and public, burned, shattered and in ruins. The events, which culminated in the deployment of thousands of armed National Guard troops across the city on the orders of Governor Spiro Agnew and the addition of regular Army troops by President Lyndon Johnson, riveted the attention of the nation, which already was reeling from similar riots in other cities across the country.¹²²

Though spurred by the assassination of Martin Luther King, Jr., the deeply segregated nature of Baltimore and the economic struggles of Black people living in the city also contributed to the civil unrest. Baltimore reflected what the Kerner Report found: “Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans.”¹²³

The racist reaction of then-Maryland Governor Spiro Agnew to the Baltimore uprisings was the first step in his becoming Vice President. In 2015, reflecting on the events of 1968, the *Baltimore Sun* wrote:

Agnew quickly called out the National Guard and then pointed fingers at Baltimore’s mayor, Tommy D’Alessandro, and his staff, accusing them of willfully ignoring signs of impending violence in the city. A D’Alessandro assistant told Theo Lippmann of The Baltimore Sun, “Agnew told us he didn’t think Martin Luther King was a good American, anyway!”

Agnew saved his real public vitriol, however, for Baltimore’s Black political leadership. Calling them to a

¹²² UNIV. OF BALT., BALTIMORE ‘68: RIOTS AND REBIRTH, <http://archives.ubalt.edu/bsr/>. See also Charles Holden, Zach Messitte & Jerald Podair, *Channeling Spiro Agnew in the Baltimore Riots*, BALT. SUN (May 9, 2015), <https://www.baltimoresun.com/opinion/bs-ed-freddie-gray-agnew-20150509-story.html>.

¹²³ NAT’L ADVISORY COMM’N ON CIVIL DISORDER, REPORT ON THE CAUSES, EVENTS, AND AFTERMATH OF THE CIVIL DISORDERS OF 1967 1 (1967), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-commission-civil-disorders-report>. The Report is known as the Kerner Report, after Illinois Governor Otto Kerner, who chaired the National Advisory Commission on Civil Disorders. *Id.* at vi.

special meeting at the state office building in Baltimore, he excoriated the group for its failure to take responsibility for the violence and a “perverted concept of race loyalty.”¹²⁴

Although the Black community was outraged, there was national support for Agnew’s reactions, particularly among Republicans. This caught the eye of the staff of presidential candidate Richard Nixon, who was refining his “law and order” campaign.¹²⁵

Pat Buchanan, then an eager, young staff aide to presidential candidate Richard Nixon, clipped the text of the speech and saved it for his boss. By May, *The Washington Post* put Agnew, then just eight years removed from finishing fifth in a five-way race for Baltimore County Circuit Court Judge, as a legitimate VP contender. Three months later Richard Nixon named Spiro Agnew his running mate.

Agnew’s handling of the Baltimore riots brought him on to the national stage and helped define political buzzwords like: “law and order,” “Southern strategy,” and “silent majority” to the body politic.¹²⁶

Though Agnew was not a prominent figure in the Republican party when Nixon selected him as his running mate, his profile quickly rose during the campaign and as Vice President. He became a stronger proponent of law and order and “gave voice to the anxieties of the amorphous sociological entity, Middle America, on such issues as crime, race, radical demonstrators and the communications media.”¹²⁷

iii. *The 1968 Presidential Campaign*

In 1966, an aide to President Lyndon B. Johnson encapsulated Democratic losses in the 1966 midterm elections, stating:

¹²⁴ Holden, et al., *supra* note 122.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Robert Mitchell, ‘Nattering Nabobs of Negativism’: *The Improbable Rise of Spiro Agnew*, WASH. POST (Aug. 8, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/08/08/nattering-nabobs-of-negativism-the-improbable-rise-of-spiro-t-agnew/>.

The single issue that appeared to be critical . . . was that of race rioting and the pace of Negro advances in our society This is one problem that will not go away, and which will cause even more difficult problems in the next two years.¹²⁸

The 1968 presidential campaign of Richard Nixon and Spiro Agnew played to the fears of white voters—the “silent majority”—who were alarmed by race riots and the social advancements of Black people, as well as antiwar demonstrations at the 1968 Democratic Convention.¹²⁹ Nixon stated that “[t]he wave of crime is not going to be the wave of the future in the America. We shall reestablish freedom in America.”¹³⁰ The “law and order” driven campaign was also a response to George Wallace’s strong showing as a third-party presidential candidate.¹³¹ Stoking racial fears and strategically selecting Agnew—who could appeal to “urban Northern ethics and white southerners”—as a running mate, was seen as a way to counter Wallace’s appeal, especially in the south.¹³²

The centerpiece of Nixon’s successful presidential campaign was the exploitation of the white majority’s fears regarding Black militants, rioting, and urban crime in general. Under the banner of law and order, Nixon succeeded in tapping into the discontent among white voters.¹³³ Nixon chose Agnew as a running mate at least partly because of his tough stand on “law and order” and the associated issues of civil rights.¹³⁴ For example, during the Baltimore City riots, Governor Agnew met with Black leaders and criticized them for not condemning

¹²⁸ Jeremy D. Mayer, *Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Presidential Campaign*, 64 HISTORIAN 351, 351 (2002) (quoting Marvin Watson to Johnson, 12 January 1967, box 77, Confidential Files, Lyndon Johnson Library, Austin, Texas).

¹²⁹ Terrence McArdle, *The ‘Law and Order’ Campaign that Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), <https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/>.

¹³⁰ Austin Sarat, *Trump’s Law-and-Order Campaign Relies on a Historic American Tradition of Racist and Anti-Immigrant Politics*, CONVERSATION (Sept. 8, 2020, 8:18 AM), <https://theconversation.com/trumps-law-and-order-campaign-relies-on-a-historic-american-tradition-of-racist-and-anti-immigrant-politics-145366>.

¹³¹ McArdle, *supra* note 129.

¹³² Mayer, *supra* note 128, at 357-58.

¹³³ *Id.*

¹³⁴ *Id.*

a local leader of the Student Non-Violent Coordinating Committee (SNCC) and other Black leaders, whom he called “black racists.”¹³⁵

Political calls for “law and order” did not start with Nixon,¹³⁶ but his campaign utilized many of the racial undertones of the phrase to stoke fears—fears that infected the juries that convicted many in the Unger group.

B. Racism in the Criminal Justice System Is a National Problem

Because this article is about the advisory-only instruction and the Unger group, we will focus on the racism in selecting jurors in Maryland in the 1960s and 1970s and the secondary effects of race in keeping the Unger group in prison.¹³⁷ However, we take a slight detour here to discuss the national problem of race and criminal justice and argue that much of what we say about the Unger group and race applies nationally.

The Unger group’s experiences are part of a long history of racism in the U.S. criminal justice system. Today, Black people comprise about 13% of the total U.S. population but make up approximately 33% of the U.S. prison population.¹³⁸ Although the imprisonment rate of Black people and all other races has fallen in the last fifteen years, “[t]he racial and ethnic makeup of U.S. prisons continues to look substantially different from the demographics of the country as a whole.”¹³⁹

Analysis of policing data and behavioral science research “identify a statistically significant relationship showing that Black people and Latinos are perceived and treated differently than

¹³⁵ Holden, et al., *supra* note 122. See also Spiro Agnew, Md. Governor, Opening Statement by Governor Spiro T. Agnew at Conference with Civil Rights and Community Leaders in Baltimore, Maryland (Apr. 11, 1968) (transcript available at <https://msa.maryland.gov/megafile/msa/speccol/sc2200/sc2221/000012/000041/pdf/speech.pdf>).

¹³⁶ See, e.g., Mayer, *supra* note 128, at 351; Sarat, *supra* note 130.

¹³⁷ See *infra* Section III.C & III.D.

¹³⁸ *Quick Facts: United States Population Estimates*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219>; John Gramlich, *Black Imprisonment Rate in the U.S. has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.

¹³⁹ Gramlich, *supra* note 138. For example, white adults constitute about 63% of the total U.S. population, but only about 30% of the U.S. prison population. *Id.*; *Quick Facts: United States Population Estimates*, *supra* note 138.

Whites”¹⁴⁰ Prosecutors play a significant role in pre-trial dispositions. In 1940, U.S. Supreme Court Justice Robert H. Jackson observed that the prosecutor has “immense power” and “at his best is one of the most beneficent forces in our society, [but] when he acts from malice or other base motives, he is one of the worst.”¹⁴¹

Prosecutors have broad discretion to decide whether a person is charged with a crime and, if so, what charges will be filed. Justice Powell in *Wayte v. United States*, recognized that:

[i]n our criminal justice system, the Government retains “broad discretion” as to whom to prosecute . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.¹⁴²

Prosecutorial discretion supports judicial economy and efficiency and assists prosecutors in negotiating plea agreements, yet prosecutorial discretion also provides opportunities for prosecutorial misconduct.¹⁴³ There is evidence that bias, whether conscious or

¹⁴⁰ Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 103, 105 (2014).

¹⁴¹ Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

¹⁴² 470 U.S. 598, 607-08 (1985) (internal citations omitted).

¹⁴³ David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 L. & SOC. INQUIRY 115, 131 (1994). In 1994, former prosecutor and public defender David Lynch lamented that plea bargaining had “turned our criminal courts into centers of hustling, more

unconscious, influences prosecutorial decisions about plea bargaining and sentencing requests, and generally, creates inconsistencies in the criminal justice system.¹⁴⁴ The biased exercise of prosecutorial discretion is most striking in death penalty cases. Approximately 58% of individuals on death row are people of color, and approximately 75% of victims in death penalty cases are white “even though only half of murder victims are white.”¹⁴⁵

More research has been done on the impact of race in death penalty cases, but the research that has looked at the impact of race on other charging decisions points to similar problems. For example, recent analysis of felony murder cases in Cook County, Illinois found “that enforcement of the felony murder rule is staunchly more affective of Black people both in proportion and raw count.”¹⁴⁶ Specifically, “74.8% of initiated cases have black defendants [], and only 7.8% have white defendants”¹⁴⁷ Though this analysis focused on only one Illinois county, the findings support earlier research that found “the felony murder rule quantitatively emphasizes racial inequality, to the severe detriment of Black people.”¹⁴⁸ For example, in Pennsylvania, 70% of the over 1,000 people convicted of felony murder and serving life sentences without parole are Black.¹⁴⁹ A 2018 analysis of data from the Wisconsin Circuit Court found:

worthy of an open-air market than a courthouse, and far distanced from the ideal versions of the rule or practice of law.” *Id.* For individuals already facing a criminal justice system biased against them, plea bargains can feel like their best option. *See id.* at 131-32.

¹⁴⁴ *See, e.g.,* Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 618 (1992).

¹⁴⁵ NGOZI NDULUE, DEATH PENALTY INFO. CTR., ENDURING JUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 28-29 (Sept. 2020), <https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>. *See generally* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (examining the impacts of racial discrimination in death penalty cases through empirical research).

¹⁴⁶ Kat Albrecht, *Data Transparency & the Disparate Impact of the Felony Murder Rule*, DUKE CTR. FOR FIREARMS L. BLOG (Aug. 11, 2020), <https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/>. *See also* Molly Greene, *States Should Abolish “Felony Murder” Laws*, APPEAL (Mar. 30, 2021), <https://theappeal.org/the-point/states-should-abolish-felony-murder-laws/> (citing to Duke’s Center for Firearms study finding “that in Cook County, Illinois, 81.3% of people sentenced under the felony murder rule are Black”).

¹⁴⁷ Albrecht, *supra* note 146.

¹⁴⁸ *Id.*

¹⁴⁹ Shobha L. Mahadev & Steven Drizin, *Felony Murder, Explained*, APPEAL (Mar. 4, 2021), <https://theappeal.org/the-lab/explainers/felony-murder-explained/>.

[w]hite defendants are twenty-five percent more likely than black defendants to have their most serious initial charge dropped or reduced to a less severe charge . . . [and] white defendants initially charged with misdemeanors are approximately seventy-five percent more likely than black defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.¹⁵⁰

There is no reason to believe that the disproportionately white prosecutors in Maryland in the 1960s and 1970s were immune from racism and every reason to believe it influenced their charging decisions, including in the Unger group's cases.

C. There Was Clear Race Discrimination in the Selection of Jurors in Criminal Trials in Maryland in the 1960s and 1970s, When Almost All in the Unger Group Were Tried and Convicted

In the 1960s and early 1970s, in Baltimore City and throughout Maryland, most Black people either were not summoned for jury duty or, if they were summoned, were removed from jury panels by prosecutors exercising peremptory challenges when defendants were Black people. Until 1969, Baltimore City had a “key man” system in which the seventeen judges on the circuit court asked friends (known as “key men”) to nominate jurors for criminal trials.¹⁵¹ Jury selection procedures were revised in 1969 to draw potential jurors from selected registered voters rather than “key men” nominations.¹⁵² The new procedures increased representation of Black people on Baltimore City juries. But, even after the “key man” system ended, Black people in Baltimore City, as well as throughout Maryland and the United States,

¹⁵⁰ Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018).

¹⁵¹ 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). All circuit court judges 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>; *Judge Harry A. Cole*, BALT. SUN (Feb. 24, 2007), <https://www.baltimoresun.com/features/bal-blackhistory-cole-story.html>.

¹⁵² Colbert, *supra* note 151, at 114 n.562 (“In 1969, Baltimore revised its jury 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))).

were frequently stricken from juries through prosecutors' use of peremptory challenges in trials involving Black defendants.¹⁵³ It was not until 1986 that the U.S. Supreme Court held, in *Batson v. Kentucky*, that prosecutors could not use peremptory challenges to strike minorities from a jury.¹⁵⁴ The trial of every member of the Unger group was before *Batson* was decided.¹⁵⁵

This is highly detrimental discrimination. Diversity in juries improves the decision-making process.¹⁵⁶ Social science research has begun to demonstrate “that decision making varies by jury racial composition, as the greater the proportion of Whites on a jury, the harsher that jury tends to be toward non-White defendants.”¹⁵⁷ One study on the impact of diversity on jury decisions found that white participants “made fewer inaccurate statements when in diverse versus all-White groups.”¹⁵⁸ This study suggests “that White jurors processed the trial information more systematically when they expected to deliberate with a heterogeneous group.”¹⁵⁹

In this study, a 2006 mock-jury experiment, Sommers found that racially heterogeneous groups “deliberated longer and considered a wider range of information than did homogeneous groups.”¹⁶⁰ This was not just due to the individual perspectives of Black participants: “White participants were largely responsible for the influence of racial composition, as they raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group.”¹⁶¹ From this, Sommers concluded: “White jurors processed the trial information more systematically when they expected to deliberate with a heterogeneous group. Such a conclusion is consistent with previous findings that motivations to avoid

¹⁵³ *Id.* at 117.

¹⁵⁴ 476 U.S. 79, 99 (1986).

¹⁵⁵ *Id.* See also Colbert, *supra* note 151, at 114 n.562 (noting the revised jury selection procedures “increased black jury representation from 30% to 46.7% in the years 1969 to 1974.” (citation omitted)). Legal challenges to the exclusion of racial minorities from juries in Maryland generally failed throughout the 1960s and 1970s. See, e.g., *Brooks v. State*, 240 A.2d 114 (Md. Ct. Spec. App. 1968) (stating that only 14 of 400 prospective jurors were Black, but this disparity—along with other evidence of race-based exclusion—was insufficient to establish a prima facie case of purposeful discrimination).

¹⁵⁶ See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006); Margaret Bull Kovera, *Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions*, 75 J. SOC. ISSUES 1139 (2019).

¹⁵⁷ Sommers, *supra* note 156, at 598.

¹⁵⁸ *Id.* at 606.

¹⁵⁹ *Id.* at 606-07.

¹⁶⁰ *Id.* at 606.

¹⁶¹ *Id.*

prejudice lead Whites to a more systematic and thorough processing of information conveyed by or about Black individuals.”¹⁶²

The deliberation and communication processes within juries are also affected by the racial makeup, and “the points of view raised by Black participants in diverse groups, especially with regard to discussion of race-related issues,” are very important.¹⁶³ Overall, research has found that “[i]n many circumstances, racially diverse groups may be more thorough and competent than homogeneous ones.”¹⁶⁴

In sum, diverse juries are less likely to convict Black defendants and have more thorough case discussions than all-white juries.¹⁶⁵ All-white, or disproportionately white, juries convicted those in the Unger group during times when political rhetoric was sowing race-based fear in whites. Judges told these juries that “*you and you alone are the sole judges of the law.*”¹⁶⁶ This invited them to give effect to their bias and fear.

D. A Race-Based Presidential Ad Campaign in 1988 Affected the Decisions of Maryland Governors to Effectively End Parole for Life-Sentenced Prisoners in Maryland, Including Those in the Unger Group

All of the 237 Unger prisoners were sentenced to life with the possibility of parole, but none had been paroled even though the Maryland Parole Commission had recommended many for parole, some up to three or four times.¹⁶⁷ When the members of the Unger group were sentenced to life imprisonment, everyone involved—the judge, prosecutor, and defense counsel—expected that if the defendant exhibited good behavior in prison, he or she would be paroled in fifteen

¹⁶² *Id.* at 607 (citation omitted).

¹⁶³ *Id.* at 606.

¹⁶⁴ *Id.* at 608.

¹⁶⁵ See, e.g., *id.*; Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 L. & CRIMINOLOGICAL PSYCH. 171 (2007).

¹⁶⁶ Trial Tr., *supra* note 27, at 335-42 (emphasis added).

¹⁶⁷ See generally WALTER LOMAX & SONIA KUMAR, STILL BLOCKING THE EXIT (2015), <https://www.aclu-md.org/en/publications/still-blocking-exit> (examining Maryland’s parole system regarding individuals serving life sentences). Until 2021, Maryland governors had to approve the parole of some life-sentenced prisoners or disapprove the parole of the others. MD. CODE ANN., CORR. SERVS. § 7-301(d)(4) (LexisNexis 2013); Ovetta Wiggins & Rebecca Tan, *Maryland Revokes Governor’s Authority to Overturn Parole Decisions Involving People Serving Life Terms*, WASH. POST (Dec. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/07/maryland-parole-governor-criminal-justice-prison/>.

to twenty years.¹⁶⁸ That was the established practice, and the established pathway to parole was through work release or furlough programs.¹⁶⁹

In the 1988 presidential campaign, supporters of George H.W. Bush produced two “Willie Horton” campaign ads that attacked Michael Dukakis, the Democratic candidate, for being soft on crime and leading to Horton’s crimes.¹⁷⁰ Horton was a Black man who had been convicted of murder in Massachusetts and had run away from a work-release center in Massachusetts in 1987 when Dukakis was governor. He then traveled to a Maryland suburb of Washington, D.C., where he raped a white woman twice and brutally assaulted her fiancé.¹⁷¹ The TV ads were among the most racially divisive in modern political history. They appealed to white fear and the worst Black stereotypes.

Five years later, a life-sentenced prisoner in Maryland on work release killed a woman and himself.¹⁷² The state immediately closed down the work-release centers throughout the state and transferred all the inmates back to medium-security prisons.¹⁷³ Many in the Unger group were on work release and doing well: taking a bus to work every day; getting good job reviews; and after eighteen months to two years in work release, going home on weekend leaves. They were proving they were no threat to society.

After being returned to maximum security prisons, all but a handful of the Unger group would have died in prison but for the *Unger* decision. That is because two Democratic governors, who undoubtedly understood the political significance of the Willie Horton story, functionally ended parole for the parole-eligible Unger group members.

¹⁶⁸ 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, during his testimony for the sentencing of convicted murderer Abras Q. Morrison, “the lifers now on parole served an average of 20.6 years before being released . . .”).

¹⁶⁹ Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015, 6:37PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

¹⁷⁰ *Willie Horton* (National Security PAC 1988), <http://www.livingroomcandidate.org/commercials/1988/willie-horton>; *Revolving Door* (Bush-Quayle ’88, Oct. 3, 1988), <http://www.livingroomcandidate.org/commercials/1988/revolving-door>.

¹⁷¹ See Editorial, *George Bush and Willie Horton*, N.Y. TIMES, Nov. 4, 1988, at A34; Schwartzapfel & Keller, *supra* note 169.

¹⁷² Michael James, *134 Lifers Taken from Prerelease System: Midnight Move to Higher Security Follows Murder, Escapes*, BALT. SUN (June 4, 1993), http://articles.baltimoresun.com/1993-06-04/news/1993155079_1_lifers-prerelease-preparing-inmates.

¹⁷³ *Id.*; 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/>; ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 14 (2013).

In 1995, one of those governors, Governor Paris Glendening, publicly announced that “life means life,” and thereafter rejected all of the recommendations by his Parole Commission that lifers be paroled.¹⁷⁴ Governor Martin O’Malley, the other democratic governor, continued this no-parole policy during his two terms.¹⁷⁵ This was the reason there were so many in the Unger group.

Racism and the legacy of racism continued to plague the Unger group.

¹⁷⁴ Kate Shatzkin, *Glendening Acts to End Parole for Inmates with Life Sentences: Those on Work Release Summoned Back to Prison*, BALT. SUN, Sept. 29, 1995, at 2B. In 2018, former Governor Glendening said that he regretted his no-parole policy. He described the policy as “completely wrong” and “a serious mistake” and expressed support for legislation to end the government’s power over parole for lifers. 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; Parris N. Glendening, *I Made a Serious Mistake as Maryland Governor. We Need Parole Reform.*, WASH. POST (Mar. 1, 2021), <https://www.washingtonpost.com/opinions/2021/03/01/i-made-serious-mistake-maryland-governor-we-need-parole-reform/>. After stalling in the legislature for several years, a bill to remove the governor from the parole process, SB202, passed during the 2021 Maryland General Assembly Session. Hannah Gaskill, *Legislature Votes to Remove the Governor From the Parole Process*, MD. MATTERS (Apr. 13, 2021), <https://www.marylandmatters.org/2021/04/13/legislature-votes-to-remove-governor-from-the-parole-process/>. Governor Hogan subsequently vetoed the bill, and the legislature overrode the Governor’s veto in December 2021. Steve Thompson, *Slew of Hogan Vetoes Includes Bills on Parole, Procurements, Immigrant Protections*, WASH. POST (May 28, 2021), https://www.washingtonpost.com/local/md-politics/hogan-veto-parole-immigrants-maryland/2021/05/28/93cf315e-bef7-11eb-83e3-0ca705a96ba4_story.html; Ovetta Wiggins & Rebecca Tan, *Maryland Revokes Governor’s Authority to Overturn Parole Decisions Involving People Serving Life Terms*, WASH. POST (Dec. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/07/maryland-parole-governor-criminal-justice-prison/>.

¹⁷⁵ Justin Fenton, *O’Malley Increases Pardons, But Remains Stingy Overall*, BALT. SUN (Dec. 18, 2014), <https://www.baltimoresun.com/politics/bs-md-omalley-pardons-20141213-story.html>. From 1989 to 2017, Maryland governors permitted the parole (excluding medical parole) of only three lifers out of a population of approximately 2,500. Two of those paroled were recently released by current Governor Larry Hogan; prior to his administration, Maryland went over twenty years without approving a lifer for parole. See Editorial, *Get Governors Out of Parole Decisions*, BALT. 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). Some additional lifers have been released early through commutations that reduced life sentences to a term of years, but even this form of relief is very rare. *Id.* See also Alison Knezevich, *Number of U.S. Prisoners Serving Life Sentences Has Quadrupled*, BALT. SUN (Jan. 31, 2017), <http://www.baltimoresun.com/news/maryland/crime/bs-md-sentencing-report-20170131-story.html>.

PART IV: THE MARYLAND LITIGATION CHALLENGING THE ADVISORY-
ONLY INSTRUCTION SPANNED THREE DECADES

Maryland was one of the last two states to prohibit or severely limit the jury's role in determining the law.¹⁷⁶ There were earlier critics of this, however. During the 1940s and 1950s, judges in Maryland, including two Chief Judges of the Maryland Court of Appeals, criticized the jury's role in determining the law in extra-judicial statements, often in blunt and colorful language. One, in 1943, called it "[a] constitutional thorn from the flesh of Maryland's body of Criminal Law"¹⁷⁷ In 1947, a second said it is "[o]ur unique and indefensible procedure."¹⁷⁸ In 1955, a third deemed it "'a blight upon the administration of justice in Maryland' and declared it to be 'archaic, outmoded, and atrocious.'"¹⁷⁹

So why did they and other judges uphold this patently unconstitutional provision when on the bench? We believe it was an uncritical allegiance to history and precedent, a minimalistic conception of the judicial role, and a dying conception of states' rights in Federalism.

What changed? As the Warren Court in the 1950s and 1960s constitutionalized criminal procedure, it became the big train on the track. Anyone who looked could see the imminent collision. These fundamental constitutional rights, including the presumption of innocence and the requirement of proof beyond a reasonable doubt, were not just good advice; they were the law.¹⁸⁰

In late 1980, the Maryland Court of Appeals in *Stevenson v. State* addressed the apparent tension between the federal constitutional rights recognized by the Warren Court and the language of Maryland's Article 23.¹⁸¹ In an unpersuasive application of past opinions, the majority said that Maryland courts had *always* interpreted Article 23 to

¹⁷⁶ *Wyley v. Warden*, 372 F.2d 742, 747 (4th Cir. 1967) ("[A]mong 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.") (citations omitted).

¹⁷⁷ Samuel K. Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34, 34 (1943).

¹⁷⁸ *Wyley*, 372 F.2d at 747 (quoting William L. Henderson, *The Jury as Judges of Law and Fact in Maryland*, 52 MD. S.B.A. 184, 199 (1947)).

¹⁷⁹ *Id.* (quoting Stedman Prescott, *Juries as Judges of Law: Should the Practice Continue?*, 60 MD. S.B.A. 246, 257 (1955)).

¹⁸⁰ *See, e.g., In re Winship*, 397 U.S. 358, 365 (1970) (holding that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged).

¹⁸¹ 423 A.2d 558, 559 (Md. 1980).

dramatically limit the jury's law-determination role. Under this interpretation of Article 23, the jury's law-determination role was limited to deciding what an element of a crime was if it was reasonably in dispute. The law on all other issues, including constitutional rights, was binding and fixed; the jury was not free to interpret it as they saw fit.¹⁸² This interpretation of Article 23 so narrowed it as to effectively nullify it.¹⁸³ There is rarely a dispute over the elements of an offense, and there is no reported decision since 1980 in which a jury has decided such a legal dispute.¹⁸⁴

The *Stevenson* majority stated that the propriety of jury instructions was not before it, and that it was only resolving the constitutionality and scope of Article 23.¹⁸⁵ However, it opined that jury instructions should reflect the limited scope of Article 23, as the Court was now interpreting it, and make clear to jurors that instructions on federal constitutional rights were binding.¹⁸⁶ In other words, juries should be instructed that a judge's instructions on the law are binding, except in cases where the elements of a crime happen to be in dispute.¹⁸⁷ The next year, in *Montgomery v. State*,¹⁸⁸ the Court formally held that jury instructions should reflect the limited scope of Article 23 as it had been defined in *Stevenson*. Thus, the only acceptable advisory instructions would be on a good-faith dispute about the elements of a crime. Other legal instructions, including those about federal constitutional rights, would be binding. *Montgomery* reiterated *Stevenson*'s holding that such instructions were consistent with long-settled Maryland law on the scope of Article 23.¹⁸⁹

¹⁸² *Id.* at 565.

¹⁸³ *Hunt v. State*, 252 A.3d 946, 959 n.20 (Md. 2021) ("Attempting to avoid a perceived conflict with the Federal constitutional provision, the *Stevenson I* court adopted a novel interpretation of Article 23 which rendered it a dead letter effectively."). See also Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 181 n.33 (1998) (explaining that the right of juries to determine the law had been "eviscerated by state court decisions" in Maryland).

¹⁸⁴ See *Stevenson*, 423 A.2d at 565 (reviewing *Stevenson* and a post-*Stevenson* decision, the Court of Special Appeals said in *Allnut v. State*, 478 A.2d 321, 325 (Md. Ct. Spec. App. 1984): "Instances of dispute of the law of the crime are an endangered species rapidly approaching extinction. Once an appellate court has ruled on the "law of the crime," the matter then becomes settled law, and thereafter the jury is no longer the judge of the law with respect to that particular matter. Consequently, disputes of the law of the crime will decrease in number with each successive appellate ruling.").

¹⁸⁵ *Stevenson*, 423 A.2d at 559.

¹⁸⁶ *Id.* at 565.

¹⁸⁷ *Id.*

¹⁸⁸ 437 A.2d 654 (1981).

¹⁸⁹ *Id.* at 657-58.

There were many problems with *Stevenson*'s interpretation of Article 23. Most importantly, the unqualified text of Article 23 flatly contradicted it. *Stevenson* acknowledged this tension, noting Article 23's "facial breadth" and that the article "does not mean precisely what it seems to say."¹⁹⁰ The court added that "the word 'law' as it is used in Article 23 is not as all-encompassing as it otherwise may be when used in some other context."¹⁹¹

Stevenson's interpretation also was a great surprise to the bench and bar in 1980. In implementing the *Unger* decision, Maryland Carey Law School's clinical law faculty and students read sixty-two transcripts of pre-1980 trials.¹⁹² In *none* did either counsel request this limiting instruction. *No* court ever gave it. *No* defense lawyer (or prosecutor) ever objected to the uniformly given, unqualified instruction.

Indeed, the *Stevenson* court's interpretation contradicted the Court of Appeals' own Rule, in effect before and at the time of *Stevenson*. That rule read, with *no qualifications*: "The [trial] court shall in every case in which instructions are given to the jury [this was in all cases], instruct the jury that they are the judges of the law and that the court's instructions are advisory only."¹⁹³

Dissenting in *Stevenson*, Judge Eldridge pointed out all these flaws in the majority's opinion. He began, however, by disagreeing that the majority's limiting interpretation, if one accepted it, saved Article 23.¹⁹⁴ In his view, allowing the jury to make the legal decision about disputed elements of a crime was as unconstitutional as allowing the jury to decide any other rule of law. He said that "the violation of a due process right does not become justifiable by limiting the circumstances under which the violation will be upheld."¹⁹⁵

More basically, he disagreed that the court had ever so limited Article 23: "In the seven years I have been a judge of this Court, reviewing hundreds of criminal cases, I have never come across a jury instruction comporting with this Court's present view of Article 23.

¹⁹⁰ *Stevenson*, 423 A.2d at 563 (quoting *Brady v. Maryland*, 373 U.S. 83, 89 (1963)).

¹⁹¹ *Id.* at 566.

¹⁹² Information provided by Millemann, who co-taught all of the Unger clinical courses.

¹⁹³ *Stevenson*, 423 A.2d at 575 n.3; MD. R. 756b (revised 1977). Rule 756b stated: "The court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law and that the court's instructions are advisory only." In 1977, the rule was revised and renumbered as MD. R. 757b, which included a virtually identical provision. In 1984, the rule was once again revised and restructured as Rule 4-325, which omitted the advisory-only provision. MD. R. 4-325.

¹⁹⁴ *Stevenson*, 423 A.2d at 570 (Eldridge, J., dissenting).

¹⁹⁵ *Id.*

Experienced Maryland criminal trial lawyers have never encountered such an instruction.”¹⁹⁶ He pointed out that Article 23 flatly states, in unambiguous language, that in “all criminal cases the Jury shall be the Judges of the Law,” and that “the instruction given in this case, the instruction required by this Court’s Rule 757, and the standard instruction given in virtually all Maryland criminal jury trials, is based upon the language of Article 23 as if that provision meant precisely what it says.”¹⁹⁷ He concluded that “the defendant should be awarded a new trial.”¹⁹⁸

So why did the *Stevenson* majority interpret Article 23 in such a tortured way? One realpolitik possibility is that the potential practical consequences of directly addressing the constitutional issue drove the court’s decision. In the cases of all Maryland prisoners convicted by juries, the jurors had received advisory instructions based on Article 23. The court’s dilemma was how to invalidate Article 23, which was in clear tension with Warren Court precedent, without announcing a new rule that would apply retroactively and require hundreds of new trials. By holding in *Stevenson* that its interpretation was established law based on long-standing precedent, the court avoided that dilemma. There was no new rule to apply retroactively. Ostensibly, all defense lawyers should have known about this purportedly well-established interpretation of Article 23. By failing to object to the unqualified jury instruction, which was based on Article 23, the lawyers had thus waived any challenge by their convicted clients to the unqualified instruction. This was the effect of *Stevenson* and *Montgomery*.

The result was that the prisoners who had this instruction in their trials were not getting new trials. The instruction could not be given in the future, but the door was shut on the past. The members of the Unger group had suffered a double injury. They were denied fair trials when their juries were told that they were the ultimate judges of the law. Then, in *Stevenson*, they were unfairly denied the right to challenge their illegal convictions.

Following *Stevenson*, and until the *Unger* decision in 2012, and including *State v. Adams*,¹⁹⁹ Maryland’s courts held that prisoners who tried to challenge their advisory instructions had waived these challenges because their trial lawyers should have objected to the

¹⁹⁶ *Id.* at 576-77.

¹⁹⁷ *Id.* at 577.

¹⁹⁸ *Id.*

¹⁹⁹ 958 A.2d 295 (2008).

advisory-only instruction and had failed to do so.²⁰⁰ *Unger* was a 4-2 decision written by then-retired Judge Eldridge, the dissenting judge in *Stevenson*, sitting by special designation.²⁰¹ The majority opinion unsurprisingly read like Judge Eldridge's dissent in *Stevenson*. The *Unger* court reversed *Stevenson*, holding that *Stevenson* had announced a new interpretation of Article 23 and thus had established a new state constitutional standard.²⁰² It rejected the *Stevenson* court's reasoning that prior Maryland cases supported its narrow interpretation of Article 23, which led inexorably to the holdings in *Montgomery* and *Adams* that attorneys should have known to request jury instructions that reflected the Article's limited scope.²⁰³ As a result, defense counsel in pre-*Stevenson* cases who failed to assert the *Stevenson* court's novel interpretation had not waived challenges to advisory-only instructions. The *Unger* court said: "Those portions of the Court's *Stevenson*, *Montgomery*, and *Adams* opinions, holding that the interpretation of Article 23 in *Stevenson* was not a new State constitutional standard, were erroneous and are overruled . . . [t]his Court has not hesitated to overrule prior decisions which are clearly wrong."²⁰⁴ The practical import of this holding was that *Stevenson* now applied retroactively.²⁰⁵

In response to the *Unger* decision, several organizations created the Unger Project. The Unger Project partners included: the Maryland Office of the Public Defender (OPD); the Maryland Restorative Justice Initiative and its Executive Director, Walter Lomax; the Unger Project Advisory Committee;²⁰⁶ private and pro bono lawyers;²⁰⁷ the Open Society Foundation that provided multi-year funding for two social workers and reentry support; and the University of Maryland Carey

²⁰⁰ *Id.* at 310-11. In *State v. Adams* the Maryland Court of Appeals held that because *Stevenson* merely recognized the (ostensibly) limited scope of Article 23, which was (ostensibly) based on long-standing Maryland law, defense counsel should have foreseen that any broad advisory jury instruction was erroneous prior to 1980. *Id.* at 315-16. The *Adams* court acknowledged that "[t]here is some facial justification for Adams's argument that, prior to *Stevenson*, there appeared to be some level of misconception afield among some contingent of the Bench and Bar regarding the proper role of the jury in criminal cases." *Id.* at 321. However, it pointed to *Stevenson*'s holding that Article 23 had always been of limited scope, as well as a smattering of earlier challenges to Article 23 and related advisory instructions, in holding that Adams' attorneys should have known to raise the issue earlier. *Id.* at 305, 310-11, 315-16.

²⁰¹ *Unger v. State*, 48 A.3d 242, 244 (Md. 2012).

²⁰² *Id.* at 258.

²⁰³ *Id.* at 258-59.

²⁰⁴ *Id.* at 261-62.

²⁰⁵ *Id.* at 261.

²⁰⁶ The Advisory Committee consisted of representatives of programs that had roles in providing reentry services for the Unger clients and was chaired by Walter Lomax. *See infra* note 218 and accompanying text.

²⁰⁷ Private and pro bono lawyers were recruited by the Clinical Law Program and the OPD.

School of Law Clinical Law Program. The latter included both teaching lawyers and law students and teaching social workers and social work students. As they were released, many of the members of the Unger group and their families joined the Project.

Over the next five years, the Project partners represented the 237 members of the Unger group, helped to plan for their releases, fought off the state's efforts to reverse or strictly limit *Unger*, and created and implemented model reentry plans for the 200 who were released.

PART V: THE UNGER PROJECT, THOSE RELEASED, AND THEIR FAMILIES
CREATED A MODEL REENTRY PROGRAM THAT INCLUDES A VIBRANT
COMMUNITY

The Maryland Court of Appeals released its *Unger* decision on May 24, 2012.²⁰⁸ Many prosecutors disagreed that it required new trials for the 237 prisoners. Some trial judges agreed with these prosecutors and denied the prisoners' initial motions to reopen their post-conviction proceedings so they could assert their *Unger* claims. These prosecutors also pledged to ask the Court of Appeals to reverse or strictly limit the *Unger* decision, which the state did in two cases.²⁰⁹ From 2012 through 2016, the Unger Project responded to these challenges, and the Court of Appeals rejected all of the State's arguments in the two cases.²¹⁰

However, during these four years, some prosecutors, especially in Baltimore City, were implementing, not resisting, the *Unger* decision by negotiating the releases on probation of selected prisoners.²¹¹ They understood that the vast majority of these older people posed no threat to public safety, and that re-prosecuting them would waste scarce resources better used to prosecute contemporary crimes, especially the large number of murders in Baltimore City.²¹² Eventually, with the Court of Appeals' rejections of the State's efforts to reverse or limit the *Unger* decision, the other prosecutors agreed to negotiate releases as

²⁰⁸ 48 A.3d 242.

²⁰⁹ *State v. Waine*, 122 A.3d 294, 298-99 (Md. 2015); *State v. Adams-Bey*, 144 A.3d 1200, 1208-09 (Md. 2016).

²¹⁰ *Waine*, 122 A.3d at 298-300; *Adams-Bey*, 144 A.3d at 1208-11.

²¹¹ Millemann et al., *supra* note 6, at 382.

²¹² See, e.g., *Baltimore Homicide Rate is on a Record High, Deadlier than Detroit and Chicago*, USA TODAY (Sept. 25, 2018), <https://www.usatoday.com/story/news/2018/09/25/baltimore-homicide-murder-rate-fbi-statistics-death-crime-killings/1426739002/> (describing the record-breaking homicide rate in Baltimore City for a decade).

well.²¹³ The members of the Unger group were released in small groups or individually starting in spring 2013 and continuing for five years.

While the *Unger* decision did not generate a public response, the initial releases in Baltimore City one year later in the spring and early summer of 2013 did, with front page headlines and news stories about releases of “murderers.”²¹⁴ There were also to be understandably sympathetic articles about the survivors of the victims.²¹⁵

Unger Project leaders feared that one “bad case,” a released prisoner who committed a violent crime, would sink the whole Project. Maryland prosecutors are elected, and their willingness to negotiate releases and the willingness of trial judges to accept them depended implicitly, if not explicitly, on the good conduct of those released. A bad case or significant numbers of failures also might have given some judges on the Maryland Court of Appeals second thoughts about the wisdom of the *Unger* decision. The Project leaders had in mind the “Willie Horton” experience where one bad case had affected a presidential election.²¹⁶ This made the social work component of the Unger Project, the reentry plans and services the social workers and students developed and provided, essential.

There was also a strong sense of community responsibility among most of the members of the Unger group. As they came out of prison, many of those released said they understood they had responsibilities to those still inside and could not fail, not only for themselves and their families but also for these other prisoners. Over time, they created a vibrant, supportive community of those released and their families.

In this community, like many, there are group dinners, bowling trips, and barbecues 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

²¹³ In the end, prosecutors retried only eight of the Unger cases and obtained new convictions in seven. There was an acquittal in one. Some of the reasons for settling cases, rather than retrying them, were the weaknesses of the cases. Even with the use of the trial transcripts, it was today’s rules of criminal procedure that applied in the retrials, not the original rules that favored the State. In addition, the juries sitting in the retrials would not be all, or disproportionately, white. Millemann et al., *supra* note 6, at 383.

²¹⁴ See, e.g., Knezevich, *supra* note 22; Duncan & Wenger, *supra* note 22.

²¹⁵ See, e.g., Knezevich, *supra* note 22; Duncan & Wenger, *supra* note 22.

²¹⁶ See *supra* note 171 and accompanying text.

settlement hearings to support those coming home. This community has a motto: “Failure is not an option.”²¹⁷

An important leader of this Unger community was, and is, Walter Lomax, the Executive Director of the Maryland Restorative Justice Initiative. He spent thirty-nine years in prison for a crime he did not commit; he was eventually released and exonerated.²¹⁸ He knew many members of the Unger group in prison, where he was also an important leader. Like many of the Unger group, Lomax is Black. His trial was in 1968, and thus his judge gave his all-white jury the advisory-only instruction,²¹⁹ which may have contributed to his wrongful conviction. The jury convicted Lomax in the face of strong evidence that he could not physically have committed the crime.²²⁰ Lomax led regular meetings of those released and their families, which initially the social workers and social work students in the law school’s clinic helped to organize and to staff.

The Unger community had an important intangible: a widespread expectation of success. This was a new expectation for many of those released. This sense of shared responsibility was captured in a *Huffington Post* article about “The Ungers” in 2016.²²¹ A reporter for the *Huffington Post* who interviewed several of those released quotes one of the early leaders of this Unger community: “‘You don’t mess up, so you don’t mess up the chances of the guy behind you comin’ out,’ Kareem Hasan told me. ‘That’s one of the things we stress when we get everybody together. That’s why we try to grab them right when they come out the door.’”²²² The reporter further explained:

The [Unger release] experiment is young and tenuous.
The state of Maryland is looking to prevent future
releases and recently filed the latest in a series of legal

²¹⁷ Millemann et al., *supra* note 6, at 421.

²¹⁸ *Walter Lomax*, CENTURION, <https://centurion.org/cases/walter-lomax/> (last visited June 30, 2021). Conducting its own investigation, the Conviction Integrity Unit of the Baltimore City State’s Attorney’s Office uncovered extensive exculpatory evidence never provided to the defense, and agreed 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). For an overview of Mr. Lomax’s story, see *Walter Lomax*, CENTURION, <https://centurion.org/cases/walter-lomax/> (last visited June 30, 2021).

²¹⁹ Michael Millemann, Elliot Rauh & Robert Bowie Jr., *Teaching Professional Responsibility Through Theater*, 17 HASTINGS RACE & POVERTY L.J. 399, 415 (2020).

²²⁰ *Id.* at 413, n.69.

²²¹ Fagone, *supra* note 23.

²²² *Id.*

challenges to *Unger v. State* in appellate courts. If a single member of the Unger family fails in a big way—and even advocates recognize there’s a risk of that—everyone could be affected. The guilt would be a lot to bear

[O]f the 143 Ungers who have been released, not a single one has been convicted of anything more serious than a traffic offense. There has only been one probation violation, a technical infraction that resulted in a stern talking-to. Zero of the Ungers have violated parole. Zero have been sent back to prison.²²³

The Unger Project presented data about this extraordinary success in the briefs and arguments before courts, including in the two post-*Unger* cases decided in favor of the Unger litigants by the Maryland Court of Appeals.²²⁴ They also provided this information to the public generally through the media. Eventually, due to the successes of the Project, the perceptions of trial judges, prosecutors, and the public shifted. They came to accept the *Unger* decision and the Project’s purposes. Media accounts, both locally and nationally, also shifted from front-page stories of “murderers” being released to positive accounts of the Unger group’s success.²²⁵

In the end, 84% of the 237 in the Unger group were released with only a 3% re-incarceration rate.²²⁶ As noted in the Introduction, this is especially impressive because these 200 people were not “cherry-picked,” i.e., limited to only those who had demonstrated clearly in prison that they were ready for release and who had been approved by the prison system or the Parole Commission. Rather, they were 84% of all state prisoners in Maryland convicted by juries of violent crimes before 1981.²²⁷

We emphasize that the social workers and social work students, both in the *Unger* clinic and the OPD, were critically important partners in the Unger Project. They provided essential services to the Unger

²²³ *Id.*

²²⁴ *State v. Waine*, 122 A.3d 294 (Md. 2015); *State v. Adams-Bey*, 144 A.3d 1200 (Md. 2016).

²²⁵ Millemann et al., *supra* note 6, at 397.

²²⁶ UNGER PROJECT DATA, *supra* note 5.

²²⁷ *Id.* For the complete accounting of the 237 members of the Unger group as of May 14, 2021, see *supra* note 11.

group members from prison, through their litigation, and after their releases. One group that evaluated the Unger Project said:

We need to emphasize the importance of reentry: The success of the Unger group has been the direct result of an ambitious reentry effort. The University of Maryland began its reentry approach while the Unger group was still inside the facility and followed through with individualized treatment and services in the community.²²⁸

Rebecca Bowman-Rivas, the Manager of the Clinical Law Program's Law and Social Work Services Program, headed the social work team. It also was comprised of social work students and forensic social work fellows and worked closely with the OPD social workers and students. Each client was assigned to a student and one of the forensic social work fellows, both of whom Bowman-Rivas supervised.²²⁹

The social work team provided two essential services to clients. First, in support of the legal advocacy, it developed the release plans that the legal team used to try to persuade prosecutors and judges to agree to settlements.²³⁰ To develop the release plans, the students interviewed clients and gathered records. Then they talked to institutional staff, including social work and medical staff; family members; and community medical, mental health, housing, and other service providers; as well as administrators of reentry programs.

Second, in cases where the clinic was successful in obtaining clients' releases, the social work team helped them to reenter the free world. That involved helping to implement the release plans and providing a multitude of other services. The members of the Unger group, who had been incarcerated for decades, included many who

²²⁸ *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, JUST. POL'Y INST. 3 (2018), https://abell.org/sites/default/files/files/JPI_The%20Ungers%205%20Years%20and%20Counting_Nov_2018.pdf. See Millemann et al., *supra* note 6, at Section III.C.-IV.C. for a complete description of the social workers' and students' work.

²²⁹ Ms. Bowman-Rivas also taught a classroom component of the year-long placements.

²³⁰ Judges and prosecutors made it clear that these release plans were a prerequisite to settlements. Millemann et al., *supra* note 6, at 395. Simply put, the clinic would not have obtained relief for clients without them.

entered prison as juveniles. All of the members faced a dizzying array of challenges in adjusting to life in the community.²³¹

The returning citizens were almost all poor and disproportionately Black, returning to communities that often lacked access to resources and where many residents faced serious challenges. In an ideal world, the State would provide the services that the Unger Project provided to those whom it was releasing. However, in the real world, that burden fell on the social work team.²³²

Together the released prisoners and their families, and the social workers and students, created an innovative and comprehensive reentry program that stands as a model for the release of older prisoners. In one important way, it stands on its head the typical parole condition imposed on paroled prisoners that they do not associate with other ex-felons.²³³ In the Unger Project, it was the ex-felons who often were the most

²³¹ The social work team helped them meet those challenges, which included obtaining government documents like state identification and Social Security Cards and applying for cash assistance, food stamps, Medicaid or Medicare benefits, transportation assistance, prescribed medications, and required medical care. The social work team also helped some clients—many of whom were excluded from public housing due to their criminal records—find a stable place to live and helped other clients to obtain necessary drug and alcohol treatment and mental health services. The link between criminality and untreated mental illness and addiction, and the enhanced likelihood of recidivism by released prisoners who suffer from those issues, is well established in academic literature. E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 518 (2019); Jason Matejkowski & Michael Ostermann, *Serious Mental Illness, Criminal Risk, Parole Supervision, and Recidivism: Testing of Conditional Effects*, 39 L. & HUM. BEHAV. 75, 76 (2015); Mirko Bagaric & Sandeep Gopalan, *A Sober Assessment of the Link Between Substance Abuse and Crime - Eliminating Drug and Alcohol Use from the Sentencing Calculus*, 56 SANTA CLARA L. REV. 243, 295 (2016). Certainly, the link is implicitly understood by prosecutors and judges who have experience in the sentencing of repeat offenders, and who are reluctant to grant release to someone who will go on to endanger the community (and create a public perception that that judge or prosecutor is soft on crime). Finally, the social work team helped clients deal with the emotional and psychological upheaval of adjusting from life in prison to life in the outside world. That often included belatedly dealing with the deaths or absence of friends and family. See generally Millemann et al., *supra* note 6.

²³² Government services offered to prisoners reentering society are generally meager and insufficient for the significant needs faced by the formerly incarcerated. The gap between what former prisoners need and what the state provides is either addressed by other actors (such as private citizens) or not addressed at all. See, e.g., Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 304 (2016); Michael Manganelli, *Recidivism in Former Mentally Ill Prisoners Connected to Lower Funded Mental Health Programs in Prisons*, 29 ANNALS HEALTH L. ADVANCE DIRECTIVE 163, 164 (2020); Crystal S. Yang, *Does Public Assistance Reduce Recidivism?*, 107 AM. ECON. REV. 551, 551, 554 (2017).

²³³ Standard supervised release conditions include the following instruction: “You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.” ADMIN. OFF. OF THE U.S. CTS., OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 32 (2016).

important counselors and advisers to those released and the strongest advocates for their lawful conduct. They helped to create and sustain the ethic of shared responsibility that animated the group.

PART VI. THE UNGER GROUP'S SUCCESS HAS NATIONAL SIGNIFICANCE

One assessment of the Unger Project said it “provides a blueprint for safely and smartly reducing length of stay, mitigating the harmful impacts of mass incarceration, and saving taxpayer money.”²³⁴ It concluded that the Unger Project “offers powerful lessons for policymakers and stakeholders interested in tackling mass incarceration.”²³⁵ In addition to demonstrating the great value of a reentry program for older prisoners and creating such a model program, there are several other lessons from the Unger Project experiences. They include the following four lessons.

Lesson one: As a 2018 Justice Policy Institute report found, “[w]e can safely release people who have committed a serious, violent offense,” especially if they have been incarcerated for a significant period of time and are older, as the members of the Unger group were.²³⁶ The recidivist rate, generally, for older, longer-incarcerated released prisoners is very low, especially when they receive reentry support.²³⁷ The percentages of prisoners serving longer sentences are on the rise, so this is an important lesson for today and the future.²³⁸

²³⁴ THE UNGERS, 5 YEARS AND COUNTING, *supra* note 228, at 8.

²³⁵ *Id.* at 3.

²³⁶ *Id.*

²³⁷ Many studies show that elderly people released from prison have a far lower rate of recidivism than the general population, and the few who do recidivate are unlikely to commit a violent crime. *See, e.g.*, Caroline M. Upton, *A Cell for A Home: Addressing the Crisis of Booming Elder Inmate Populations in State Prisons*, 22 ELDER L.J. 289, 300-01 (2014); Johnny Thach, Note, *Not Far Enough: The Rising Elderly Prison Population and Criminal Justice and Prison Reform Following the First Step Act of 2018*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 631, 687 (2020). That includes prisoners who had been convicted of, and were serving sentences for, violent crimes. J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1675-76, 1688 (2020); Michael O’Hear, *Early Release for Prisoners Convicted of Violent Crimes: Can Anyone Escape the Incapacitation-Retribution Catch-22?*, 52 CONN. L. REV. 653, 665-66, 671-72 (2020); Bagaric et al., *supra* note 24, at 1000. Finally, the relationship between aging and reduced rates of recidivism is linear: the older a person is when they are released from prison, the less likely they are to commit new crimes. Bagaric et al., *supra* note 24, at 1002; Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 974-75 (2018).

²³⁸ *E.g.*, THE UNGERS, 5 YEARS AND COUNTING, *supra* note 228 (“The population share of individuals serving 25 or more years in Maryland prisons has increased 211 percent between 2000 and 2012 and 66 percent for those serving 20–25 years. People who have served at least 20 years in prison now account for more than 7 percent of the population, or 1,577 individuals.

Lesson two: There are many prisoners who can be safely released in the fast-growing population of geriatric prisoners,²³⁹ and there are good economic reasons to do this. The aging prison population contributes to the overall rise in annual prison costs, but these costs do little to increase public safety.²⁴⁰ A recent economic analysis of the Unger Project confirmed the cost savings of releasing older prisoners, finding “[r]eleasing the Unger group resulted in a projected savings of \$185 million for Maryland taxpayers.”²⁴¹ The economic analysis also projected that the savings from releasing older prisoners could be over a billion dollars a decade and stated:

The story of the Unger group makes it clear that the prison population that accounts for most of the correctional health care budget can be safely reduced. Millions of dollars can be saved, and the resources can be invested in effective reentry supports similar to the program implemented by the University of Maryland to assure that any individual leaving the system after decades in prison can successfully and safely return to the community.²⁴²

About one in six people in a Maryland prison had served at least a decade in 2012 (3,857 individuals). This was a 23 percent (3,128 individuals) increase since 2000.”).

²³⁹ *Id.* at 3.

²⁴⁰ See, e.g., Cyrus Ahalt et al., *Paying the Price: The Pressing Need for Quality, Cost and Outcomes Data to Improve Correctional Healthcare for Older Prisoners*, 61 J. AM. GERIATRICS SOC’Y 2013, 2013-14 (2013); JUSTICE POLICY INSTITUTE, *supra* note 228, at 3, 6-7 (“Across the country, the increasing size of the aging prison population has been in the making for decades. In 1995, there were 32,600 incarcerated individuals over 55 years old; by 2010 that number had increased 283 percent to 124,900. With the United States’ continued commitment to long sentences, it is estimated that by 2030 that number will have increased by 220 percent to more than 400,000 geriatrics incarcerated.”).

²⁴¹ JUSTICE POLICY INSTITUTE, *supra* note 238, at 18. Analysis by Dr. James Austin of JFA Associates found: “At the time of release, the average age of the Unger cohort was 64 years old. According to the Centers for Disease Control and Prevention, the life expectancy for the Unger group would be 81 years old, which would mean an additional 18 years in prison had they not been released. According to Maryland’s Department of Public Safety and Correctional Services (DPSCS), the per diem cost of incarceration is approximately \$46,000 per year, which includes a \$7,956 allocation for medical and mental health services. However, including the additional resources the aging population demands, the cost of imprisoning the Unger group is even higher. Based on estimates that 34 percent of the total health care related costs in the United States is accounted for by individuals 65 and over, and assuming the percentage of health care costs to the general public is the same for the Unger population, the variable health care share for the Unger group is \$18,361 per year. This increases the annual cost to incarcerate an Unger group member to \$53,832.” *Id.* at 17-18.

²⁴² *Id.* at 18, 20.

We are not saying all older prisoners should be released, only that there are a lot of data, including from the Unger Project, demonstrating that many older prisoners can be safely released, and it is cost-effective to do so.²⁴³

Lesson three: States should reconsider life without parole laws and the elimination of parole. Maryland and many other states have eliminated or severely restricted parole and other prisoner release programs in the last two decades.²⁴⁴ What was said about the Maryland parole system based on the Unger Project experiences applies in many other states:

Maryland can significantly reduce the size of its prison population, and the impact on its budget, without negatively affecting public safety by rethinking parole strategies, particularly for those people who have served long prison terms. The current approach to parole is too heavily focused on the offense. Too often, the state fails to appropriately take into consideration a research-based assessment of the risk of reoffending when making release decisions.²⁴⁵

Lesson four: There are good reasons, based in equity, fairness, and economics, to adopt “second look” resentencing laws and policies that give older prisoners a second chance to demonstrate there is no public safety reason to keep them in prison.²⁴⁶ Very recently, two policymakers in Maryland adopted a second look law, rule, and initiative.

²⁴³ *Id.* at 18. (“[A] previous analysis of people 55 years old or older released from Maryland prisons in 2013 found that only 1 in 5 individuals returned to prison and only 7 percent came back for a new crime. If we apply this 80 percent success rate to assume that 4 in 5 geriatric individuals still in Maryland prisons could be released safely, taxpayers would save an estimated \$120 million in the first year, and more than a billion in a decade.”). There are contrary data as well: “Recent research indicates that 43 percent of the returning geriatric population will be arrested again within nine years of release.” *Id.* at 24.

²⁴⁴ See Beth Schwartzapfel, *Life Without Parole*, THE MARSHALL PROJECT (July 10, 2015), <https://www.themarshallproject.org/2015/07/10/life-without-parole>; MD. CODE ANN., CORR. SERV. § 7-305 (West 2017) (outlining several factors which must be considered prior to an inmate’s release).

²⁴⁵ *Id.*

²⁴⁶ A number of states and Congress have adopted some form of “second look” laws, which generally allow courts to revise sentences of older prisoners. See *infra* notes 212-220, 224, and accompanying text.

First, at its 2021 session, the Maryland General Assembly passed the Juvenile Restoration Act (JRA), effective October 1, 2021.²⁴⁷ It allows individuals who were under the age of eighteen at the time of the offense and who were sentenced to twenty years or more to petition the court for a modification of sentence after serving twenty years.²⁴⁸ The JRA requires the court to hold a hearing on the motion and to make findings regarding an individual's suitability to rejoin the community after considering factors such as the nature of the crime, age at the time of the offense, home and community environment, victim impact, and evidence of maturation and rehabilitation.²⁴⁹

Second, the Baltimore City State's Attorney's Office created its own second look program through a new Sentencing Review Unit.²⁵⁰ It did so in partial response to the COVID-19 pandemic, but it will almost certainly continue after the pandemic is over.²⁵¹ The State's Attorney's Office also offered racial justice and mass incarceration justifications for the new program.²⁵²

Former deputy public defender Becky Feldman leads the Unit, and it reviews cases of certain selected incarcerated people to determine whether the office will support their releases from prisons.²⁵³ The focus is on prisoners who have a documented serious medical condition, according to Centers for Disease Control and Prevention (CDC) guidance, that places them at a higher risk of serious illness or death if they contract COVID-19, and who either are over the age of sixty and have spent more than twenty-five years in prison on a life sentence or have spent more than twenty-five years in prison on a life sentence for a crime committed as a juvenile (age seventeen and under).²⁵⁴ They must also have demonstrated change, remorse, and rehabilitation.²⁵⁵

Maryland's new second-look initiatives are part of the recent "national movement to permit trial courts in criminal cases to retain the power to revise long prison sentences imposed on [identified]

²⁴⁷ S.B. 494, 2021 Gen. Assemb. Reg. Sess. (Md. 2021), (codified as amended at MD. CODE ANN., CRIM. PROC. §§ 6-235, 8-110 (West 2021)).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Sentencing Review Unit*, BALT. CITY STATE'S ATT'Y, OFF., <https://www.attorney.org/office/bureaus-units/sentencing-review> (last visited Oct. 31, 2021).

²⁵¹ *Sentencing Review Unit Frequently Asked Questions*, BALT. CITY STATE'S ATT'Y, OFF., https://www.attorney.org/images/SRU_-_Factsheet_224.pdf (last visited Oct. 31, 2021).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Sentencing Review Unit*, *supra* note 250.

²⁵⁵ *Id.*

persons.”²⁵⁶ Two of the most important parts of the Unger Project are the support it provides nationally for such laws and policies and the action blueprint that it provides for advocates representing clients under these laws and policies.

Many states have adopted some form of second look initiatives. They include new changes in laws that: make certain prisoners eligible to apply to parole or review boards or to governors (through commutation) for release after serving identified periods of incarceration; grant authority to prosecutors to establish second look projects and to file resentencing petitions in courts on behalf of selected prisoners, or to file a resentencing petition in courts at any time after the sentence is imposed; give rights to certain prisoners to petition courts directly for resentencing hearings; grant courts revisory powers over sentences during the durations of the sentences; create discretionary release provisions for certain prisoners sentenced to life without parole; and grant broad authority to a number of decision makers and tribunals to consider the releases of longer-incarcerated prisoners who were convicted as juveniles.²⁵⁷

The successes of the Unger Project have given Maryland policymakers confidence in these initiatives and reasons to adopt them, and should do the same for national policymakers, and provide an advocacy model for those seeking to use second look laws and policies on behalf of prisoners.²⁵⁸

²⁵⁶ 207TH REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3 (Apr. 8, 2021), <https://mdcourts.gov/media/announcement/2021-04/207th-report-standing-committee-rules-practice-and-procedure>.

²⁵⁷ See *Second Look Sentencing Explained*, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM), <https://famm.org/wp-content/uploads/Second-Look-Infographic.pdf> (last visited Oct. 31, 2021); *Second Chance Legislation in the States*, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM) (June 8, 2021), https://docs.google.com/spreadsheets/d/13a-FuNUNGaphzq-GsAd8E54veaZhU_nWkmh2gxy-iCs.

²⁵⁸ In September 2021, the Maryland Court of Appeals rejected a proposal by the Maryland Rules Committee that would have added additional revisory powers over a sentence imposed for a criminal conviction under certain circumstances. Rules Order, Md. Ct. App. (Sept. 20, 2021), <https://mdcourts.gov/sites/default/files/rules/order/ro207supplement3.pdf>; STANDING COMM. ON RULES & PROC., 207TH REPORT (2021). The Committee described these circumstances and explained why it recommended these changes to the court: “One of the functions assigned to the Rules Committee is to “keep abreast of emerging trends and new developments in the law that may affect practice and procedure in the Maryland Courts.” In doing so, the Committee has become aware of a national movement to permit trial courts in criminal cases to retain the power to revise long prison sentences imposed on persons (1) who were juveniles, or under 25, when they committed the crime(s) for which the sentence was imposed, or (2) who have served a significant part of the sentence and reached a certain age (60, 65, 70). With respect to the younger criminal, this movement is based on medical evidence, accepted by the United States Supreme Court and the Court of Appeals, that the

PART VII: FORMER LAW STUDENTS OF THE UNGER CLINIC REFLECT ON THEIR EXPERIENCES

For the Maryland-Carey Law School faculty and students, the Unger clinic had integrated public service and educational goals. With respect to the latter, the faculty designed the clinic to give “students professional relationships with two or more [clients], and the multiple vantage points that come with this; a strong sense of personal responsibility by having ‘your own’ client or clients; and a significant part in a major law implementation and reform project.”²⁵⁹ The faculty thought this would be “a realistic introduction to actual practice; and [would help students to develop] a deep sense of self-fulfillment, which can be transformative.”²⁶⁰ The latter would come, the faculty hoped, when the students came to understand that “they were competent to help someone who really needed it, and second that they really liked this helping role.”²⁶¹

Keeping with the retrospective theme of this article, we decided to ask the former students in the original 2013 Unger clinic to tell us what they learned from their experiences eight years ago. To assure frank responses and as much objectivity as possible, Feder, a former student in the original Unger clinic, conducted the interviews; not

human brain is not fully developed until the age of 25 and that younger people have “a lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking” and “lack the ability to extricate themselves from horrific, crime-producing settings.” With respect to the ageing prison population, it is based on the conclusions of criminologists that the continued incarceration of many prisoners in their sixties, seventies, or eighties often serves no rational or public safety purpose.” *Id.* at 2-6.

The Committee said that the proposed changes would allow trial courts “to consider whether . . . long sentences, which may have been entirely appropriate when imposed, continue to serve a useful societal purpose [or], indeed, may be antithetical to sound judicial policy.” *Id.* at 4. The Committee’s proposal “defines the members of the two target populations who may file a petition or motion for relief,” as: “[I]nmates who have been sentenced to terms of 15 years or more and who (1) committed the last offense for which the sentence or any part of the sentence was imposed before reaching the age of 25 and has served the greater of 15 years or sixty percent of the sentence, or (2) has served at least 15 years of the sentence and has reached the age of 60.” *Id.* at 4-5. The Committee added that under its proposal, the relief a court could grant after a hearing would be “modifying, reducing, or vacating the unexpired term of the sentence, or suspending all or part of the unexpired term and placing the defendant on probation.” *Id.* at 5. Additionally, the proposed rule changes were “not intended to displace or be in competition with the Executive Branch parole system” because “[p]aroles do not affect the sentence that was imposed but merely permit the defendant to serve part of that sentence outside the prison walls [T]he sentence itself remains within the control of the court that imposed it.” *Id.* at 6.

²⁵⁹ Millemann et al., *supra* note 6, at 394.

²⁶⁰ *Id.*

²⁶¹ *Id.*

Millemann, who co-designed and co-taught the clinic.²⁶² Before we discuss the results of the interviews, we first describe the law students' roles and responsibilities in the Unger clinic.

A. The Law Students' Role and Responsibilities in the Unger Clinic

The Unger clinic's scope of representation was substantial but limited. The faculty and students investigated and prepared *Unger* motions and helped to negotiate settlement agreements with the State, if possible.²⁶³ There were settlements in twenty-one of the clinic's cases, resulting in twenty releases. Cases that could not be settled, and which required further litigation (e.g., contested motion hearings, retrials, or appeals) were returned to OPD.

Most students were assigned two cases, with several students volunteering to handle three cases.²⁶⁴ Students were divided into teams comprised of four law students and one social work student. Law students primarily worked on their own cases, but helped other team members with their cases as needed. Their responsibilities were as follows:

1. To write letters of introduction to clients.
2. To schedule and conduct interviews with clients, all of whom were incarcerated. During visits, the students explained, and the clients executed, retainer agreements.
3. To obtain and copy clients' prison records. These included materials like applications for parole, rulings by the parole commission, prison disciplinary records, and documentation of rehabilitative activities (such as classes, treatment programs, and prison jobs).

²⁶² Generally, the interview topics included how they experienced the clinic as students, how the clinic affected their subsequent careers and their views of the criminal justice system, and how their views of the clinic and the criminal justice system have changed since graduating and working for the past seven or eight years. They were promised anonymity to encourage free and open discussions. Feder has assigned each former student a number and refers to them by those numbers in what follows.

²⁶³ The prisoners made the *Unger* argument in motions to reopen their post-conviction petitions. If the trial court agreed, it granted that motion and reopened the proceedings. In the standard terms of the settlement agreements, the parties agreed that the prisoners' convictions would remain in effect, and they would be re-sentenced to life in prison with all but time served suspended. This resulted in their immediate release from prison. The person was placed on probation for one to five years. If, after a hearing, a probationer was found to have violated probation, the judge could impose any of the suspended sentence, up to and including 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 eligible for immediate parole or a "flat-time" release in a limited number of years. See Millemann et al., *supra* note 6, at 370 n.14.

²⁶⁴ Information provided by Millemann, who co-taught all of the Unger clinical courses.

Students also obtained records about their clients' crimes and backgrounds prior to entering prison, such as presentence investigations.

4. To locate trial transcripts and post-conviction records. This was often a challenging task, as the documents were decades-old, and in many cases, the Maryland Circuit Court clerk offices as part of a records retention/destruction policy had destroyed them. In all but a few cases, students obtained transcripts and other records from a variety of sources, including clients, their family members, law libraries, the Office of the Attorney General, and the Maryland State Archives, which thankfully had preserved many of them.²⁶⁵

5. To draft their clients' post-conviction motions based on the *Unger* decision and a review of all documents, and to file motions, after faculty approval. Working off a template, students identified the theories of the prosecution and defense at trial; stated the key facts; summarized the often protracted procedural history; compared the advisory-law instruction in their cases to that given in *Unger*; tried to preempt anticipated counterarguments, especially "harmless error" arguments;²⁶⁶ and compiled appendices, including transcript excerpts and appellate and post-conviction pleadings, orders, and opinions.

6. To prepare memoranda for State prosecutors to try to persuade them to agree to a favorable settlement. These memoranda relied heavily on release plans developed by the social work team.

7. To advise clients on their options, including the strengths and weaknesses of their cases and the advantages and disadvantages of settling or litigating further. Given the uncertain scope of *Unger* until 2016,²⁶⁷ and the delay and chance of losing in further litigation,²⁶⁸

²⁶⁵ Millemann et al., *supra* note 6, at 388 n.107 (discussing the few transcripts the students could not locate).

²⁶⁶ In 2015, the Maryland Court of Appeals decided *State v. Waine* and rejected the State's request that the court reverse *Unger* or impose a "harmless error" limitation on it. 122 A.3d 294, 301 (Md. 2015). Instead, it held that the *Unger* error was "structural" and thus not subject to harmless error review. *Id.* A year later, in 2016, the Court of Appeals decided *State v. Adams-Bey* and rejected the State's argument that 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. 144 A.3d 1200, 1206-11 (Md. 2016).

²⁶⁷ See *Waine*, 122 A.3d 294; *Adams-Bey*, 144 A.3d 1200. In both these cases, the State argued that the Court of Appeals should reverse *Unger* or significantly limit it with harmless error and procedural restrictions. The Court of Appeals reaffirmed *Unger* in *Waine* in 2015 and, in 2016, in *Adams-Bey* the Court of Appeals made it clear that trial judges did not have the discretion to refuse to reopen post-conviction proceedings of those asserting *Unger* claims. *Waine*, 122 A.3d 294, 298-300; *Adams-Bey*, 144 A.3d 1200, 1211-12.

²⁶⁸ There were good reasons to settle. Until *Waine* and *Adams-Bey* were decided, Circuit Courts could deny prisoners' petitions to reopen post-conviction proceedings. And even if a prisoner

students encouraged clients – who were elderly and often faced serious health problems – to take reasonable settlement offers when they were available.

The clinic faculty provided extensive instruction, supervision, and feedback on each of the above tasks.²⁶⁹ They also reviewed all transcripts and other documents with the students, and reviewed, edited, and signed off on pleadings and settlement proposals. The faculty, in consultation with the students, made the critical strategic decisions, such as encouraging clients to settle.

B. What the Former Law Students Say They Learned in the Clinic

i. Appreciating Interdisciplinary and Collaborative Work

Karl Popper, a philosopher of science, wrote about the importance of collaborative, interdisciplinary educational relationships: “We are not students of some subject matter, but students of problems. And problems may cut right across the borders of any subject matter or discipline.”²⁷⁰ Law students—as well as law faculty and practitioners—are “students of problems,” problems that cross all disciplines.²⁷¹

The students in the Unger clinic saw first-hand that collaboration was essential to meet the essential needs of the Unger clients. The collaborative, interdisciplinary nature of the clinic taught students the value of the holistic approach to representing clients who had problems that “cut right across the borders of any subject matter or discipline.”²⁷²

In the interviews for this article, many of the former law students praised the collaboration with the social work team and the

won his motion, the State may well have appealed. Finally, even if a prisoner won his motion and/or any ensuing appeal, the State may have sought to retry the case. This process could take years, and some prisoners lost. *See, e.g.*, *Bonnett v. State*, No. 0193, 2016 Md. App. LEXIS 265 (Md. Ct. Spec. App. June 10, 2016); *Cohen v. State*, No. 1471, 2015 Md. App. LEXIS 801 (Md. Ct. Spec. App. Nov. 23, 2015); *Williams v. State*, No. 2265, 2015 Md. App. LEXIS 1046 (Md. Ct. Spec. App. Nov. 23, 2015); *Nolan-El v. State*, No. 0605, 2015 Md. App. LEXIS 400 (Md. Ct. Spec. App. Aug. 31, 2015).

²⁶⁹ This included classes with assigned readings, lectures, and discussions on applicable law (including Maryland’s highly complex post-conviction process), trainings and mock sessions on interviewing clients, weekly team meetings, and routine meetings and communications between students and professors that addressed discrete issues and concerns as they arose.

²⁷⁰ KARL R. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 88 (1963).

²⁷¹ POPPER, *supra* note 270, at 88.

²⁷² *Id.*

interdisciplinary nature of the clinic.²⁷³ One praised “the holistic aspect of her representation;” she appreciated that it was not just confined to “representing clients in their criminal case.”²⁷⁴ Another former student added, “I really enjoyed the cross-pollination with the School of Social Work. Real credit is due to the social workers.”²⁷⁵ Two others said that they appreciated the opportunity to work with social workers as “partners.”²⁷⁶

ii. *A Transformational Experience and Process of Self-Discovery*

A number of former students reported that the Unger clinic was very important in their development as lawyers or, for those students who did not go on to practice law, in their chosen professions. Some said that it led them to unexpected roles in public interest law and public policy.²⁷⁷ The clinic also taught students valuable professional skills and taught many, including those who had gone directly to law school from college, how to navigate a workplace.

²⁷³ Scholars have encouraged collaboration between social work students and law students. Such collaboration, in the right setting, can result in better education and more effective representation of clinic clients. *See, e.g.*, Susan McGraugh, Carrie Hagan & Lauren Choate, *Shifting the Lens: A Primer for Incorporating Social Work Theory and Practice to Improve Outcomes for Clients with Mental Health Issues and Law Students Who Represent Them*, 3 MENTAL HEALTH L. & POL’Y J. 471, 502-03 (2014); Sara R. Benson, *Beyond Protective Orders: Interdisciplinary Domestic Violence Clinics Facilitate Social Change*, 14 CARDOZO J.L. & GENDER 1, 6-8 (2007).

²⁷⁴ Interview with Student No. 2, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Jan. 23, 2021). “Holistic” defense is a model of public defense. It can be contrasted with the more typical model of public defense, in which a client is represented by an individual attorney whose sole mission is achieving the best possible outcome in a client’s criminal case (e.g., dismissal of charges, acquittal, etc.). In contrast, in offices with a holistic defense model, each client is represented by a team, which includes criminal defense lawyers, social workers, and specialists in areas like housing, immigration, and substance abuse. The holistic model seeks to address a client’s needs beyond the courtroom. *See generally* JAMES M. ANDERSON, MAYA BUENAVENTURA & PAUL HEATON, RAND CORPORATION, HOLISTIC REPRESENTATION: AN INNOVATIVE APPROACH TO DEFENDING POOR CLIENTS CAN REDUCE INCARCERATION AND SAVE TAXPAYER DOLLARS – WITHOUT HARM TO PUBLIC SAFETY 1 (2019), https://www.rand.org/pubs/research_briefs/RB10050.html.

²⁷⁵ Interview with Student No. 13, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (July 13, 2021).

²⁷⁶ Interview with Student No. 3, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Jan. 23, 2021); Interview with Student No. 11, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Mar. 1, 2021).

²⁷⁷ The legal profession recognizes that even lawyers who work exclusively in private, for-profit work have an obligation to engage in—and benefit from engaging in—some pro bono work, and the Unger clinic helped to introduce students to this. MODEL RULES OF PRO. CONDUCT r. 6.1, cmt. 1 (AM. BAR ASS’N 1983).

The clinic experience encouraged students to do public interest work either full-time or as an integrated part of private practice.²⁷⁸ A former student, who now works in healthcare law, reported that “working in the *Unger* clinic changed the trajectory of my career. I was sold on working in corporate law when I entered law school, but after working with these clients, I realized how important it was to help the community.”²⁷⁹

Another said that although she “had not been considering a career in criminal law” before the clinic, the clinic made her realize she had a “passion” for it. She became a public defender in Brooklyn.²⁸⁰ Another said: “I didn’t go to law school to become a public defender. I was going to be a rich, fancy lawyer with big windows . . . the clinic . . . was the reason I went into public defense.”²⁸¹

Still another student became a Judge Advocate General because the clinic “opened his eyes to how much he enjoyed the work” and transformed how he thought of criminal defendants and the criminal justice system. He became far more sympathetic to incarcerated people and developed an “abolitionist” perspective.²⁸²

One former student said that his time in the clinic led him to do substantial pro bono work alongside his private practice: “[t]o see the impact that my representation had firsthand, including getting to see my client’s emotional reunion with his family on the day he was released,

²⁷⁸ Commentators have argued that along with teaching students practical legal skills, law school clinics should work toward social justice goals (e.g., reducing the sentences of indigent prisoners, protecting the environment from pollution, etc.). Commentators have also asserted that clinics should teach the pursuit of social justice as a value. Spencer Rand, *Social Justice as a Professional Duty: Effectively Meeting Law Student Demand for Social Justice by Teaching Social Justice as a Professional Competency*, 87 U. CIN. L. REV. 77, 81, 95-96 (2018); Jennifer Rosen Valverde, *Preparing Tomorrow’s Lawyers to Tackle Twenty-First Century Health and Social Justice Issues*, 95 DENV. L. REV. 539, 542-43 (2018); Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics That Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 564-65 (2011). *But see* Julie D. Lawton, *Teaching Social Justice in Law Schools: Whose Morality Is It?*, 50 IND. L. REV. 813, 818 (2017) (“[m]andatory pro bono, while reflective of my personal ideals, is an encroachment upon law students’ personal morality and an attempt to impose social justice service upon students based upon the moral and ethical lens of professors.”).

²⁷⁹ Interview with Student No. 7, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Feb. 2, 2021).

²⁸⁰ Interview with Student No. 1, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Jan. 20, 2021).

²⁸¹ Interview with Student No. 14, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (July 14, 2021).

²⁸² Interview with Student No. 3, *supra* note 276. For a discussion of abolitionist perspective, see Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want>.

was very powerful.”²⁸³ He added, “I work at a big firm and do trusts and estates and commercial litigation. But because of my time in the *Unger* clinic, I’ve continued to do a lot of pro bono work on criminal appeals and post-convictions.”²⁸⁴

Another former student said that his time in the clinic had led him to do criminal pro bono work, including death penalty work, alongside his day-to-day work at a high-end law firm: “The clinic was my first exposure to that area, and it put me on the path of wanting to do more work like that.”²⁸⁵

Another, who is now writing her dissertation in public policy, said that “seeing what clients went through in the clinic did impact my research interests—it encouraged me to focus on equity in policy outcomes, and how law is used to implement policy in unequal ways.”²⁸⁶

Finally, a former student commented that:

While I am not a litigator or even a traditional lawyer, I consistently remember the lessons I learned during clinic. I work in emergency management policy . . . I often consider and apply the lessons I learned about the criminal justice system and the inequalities in it as I assist emergency management personnel.²⁸⁷

²⁸³ Interview with Student No. 12, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (July 13, 2021).

²⁸⁴ *Id.*

²⁸⁵ Interview with Student No. 13, *supra* note 275.

²⁸⁶ Interview with Student No. 6, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Feb. 3, 2021).

²⁸⁷ Interview with Student No. 10, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Feb. 26, 2021). One noted that “participating in the clinic really helped me develop a persuasive writing style. Using client stories persuasively and as part of advocacy is a useful skill in civil law, which is where I’ve practiced since graduating.” Interview with Student No. 2, *supra* note 274. Another commented that “the clinic taught me the importance of listening as a skill, and of building a rapport with clients, witnesses, etc.” Interview with Student No. 4, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Jan 25, 2021). Another added that his time with the clinic taught him “how to interact with clients with different backgrounds from you, how to manage expectations, and how to help them navigate a system that is often unfair. Those are invaluable skills that stay with you as you represent clients in the real world.” Interview with Student No. 12, *supra* note 283. One former student said that she had struggled badly in her first year of law school, but that in the clinic, “I . . . became extremely organized because I had to. In order to keep up with the tasks, communication with the clients, materials associated with each client, etc . . . I became more structured.” Interview with Student No. 7, *supra* note 279. Finally, another student said that “[d]oing the legwork to obtain” old court files and prison records “taught me some practical lessons about dealing with clerks, what to look

iii. *Learning from the Clients: Challenging Stereotypes and Assumptions*

Many of the former students reported that getting to know their clients changed their preconceived views about incarcerated people, including those convicted of very serious crimes.²⁸⁸ It bears repeating that every clinic client had been convicted of rape or murder, along with other violent crimes. Although some clients appeared to be factually innocent, or were relatively less culpable (e.g., they had a strong self-defense claim), others had committed brutal crimes with no apparent mitigating factors.²⁸⁹ Many students came into the clinic without having previously met, let alone worked closely with, an incarcerated person, particularly one convicted of a very serious crime. The clinic experience changed their views on criminal sentencing and rehabilitation.

One former student said, “I entered the clinic with preconceived notions about incarcerated people Getting to know my clients and working with them closely really changed my perspective.”²⁹⁰ Another commented:

I grew up in a sheltered suburb. I’d never been inside a prison, never mind a maximum-security prison, let alone going by myself to interview someone convicted of murder. Most of what I knew was built on stereotypes

for, and where to look.” Interview with Student No. 8, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Jan. 26, 2021).

²⁸⁸ Although most former students reported that their clinic experiences changed their preconceived notions about the criminal justice system and incarcerated people, others reported that what they saw did not surprise them. These students already had opinions about the criminal justice system or personal experiences with it and incarcerated persons or both, and the clinic experience reinforced them. One student said, “I already knew that the system was terrible and disproportionately impacted poor people and people of color.” Interview with Student No. 1, *supra* note 280. Another student, who had prior internships at public defender offices and had participated in an innocence clinic before transferring from another law school, was not surprised to see how unfair the system was to clients, or that “people who have committed terrible crimes are often kind, reasonable people, and a pleasure to work with.” Interview with Student No. 11, *supra* note 276.

²⁸⁹ We add an important caveat: transcripts of trials where clients had poor representation were particularly unlikely to shed light on any mitigating evidence; if defenses were not developed at trial, and mitigating evidence was not presented at sentencing, a trial transcript might show a client in the worst, and an inaccurate, light. *See, e.g.*, Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 196 (2016); Beth Caldwell, *Appealing to Empathy: Counsel’s Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 402-03 (2012).

²⁹⁰ Interview with Student No. 2, *supra* note 274.

and Hollywood clichés. Representing my client acquainted me that these are real human beings.²⁹¹

Another commented, “I grew up thinking there are good people and bad people, and bad people do bad things and go to jail. In the clinic, I learned that good people sometimes do bad things, and that people are capable of redemption.”²⁹² Another former student said:

It completely changed how I view convicted criminals It was hard to believe that these kindly old men were convicted of murder. I came to see how time changes people and the boys who committed these heinous acts were simply not the same people 40 years later.²⁹³

iv. Shock Value: Introductions to the Real World

A common experience that former students reported was shock. This came in two forms: first, the shock students experienced when starting the clinic and getting acquainted with the criminal justice system for the first time, especially the version of the system that existed in Maryland prior to 1981. Second, former students looking back at the clinic eight years later reported that their time in the clinic may have given them an unrealistic view of what the practice of law, including criminal defense, was like in “the real world.”

Those who reported being shocked by what they saw while in the clinic included those who were shocked by the advisory-only instruction at issue in *Unger*, which contradicted everything the students learned about in classes like Criminal Law and Criminal Procedure. Two former students called the instruction “insane,” with one commenting, “I couldn’t believe that that instruction was actually given to jurors.”²⁹⁴ One of them said, “I was excited to deal with the instruction as an abstract legal issue, just because it was so bizarre.”²⁹⁵

Another former student, who had prior experience interning at public defender offices, also commented on some of the shockingly poor representation that clinic clients received at trial in the 1960s and 1970s. Along the same lines, another commented that he was shocked

²⁹¹ Interview with Student No. 12, *supra* note 283.

²⁹² Interview with Student No. 14, *supra* note 281.

²⁹³ Interview with Student No. 3, *supra* note 276.

²⁹⁴ Interview with Student No. 1, *supra* note 280.

²⁹⁵ Interview with Student No. 13, *supra* note 275.

and saddened by his client's surprise at receiving attentive, engaged representation. He stated:

One shocking thing was a client's gratitude for my work, which seemed to be largely based on his low expectations and bad experiences with prior counsel. The client was grateful that I followed through on promises I'd made, and that I said we have 'our' hearing coming up, rather than 'your' hearing. He wasn't used to that level of investment from an attorney.²⁹⁶

Another former student remarked that when he read his clients' transcripts, he was shocked by "the openly racist tinge to how some of the cases were handled. It's not like we're past that now, or that the criminal justice system isn't affected by racism. But it was shocking to see how open and apparent it was in the transcripts."²⁹⁷ Another expressed shock at:

[t]he inhuman way that the system grinds up those who don't have access to the means of justice. A lot of clients had their files destroyed or lost—not through malice, but through the complete carelessness of the bureaucracy . . . [i]f not for the clinic, our clients would have had no recourse. It revealed a dramatic gulf between the haves and the have nots.²⁹⁸

Another also brought up the destruction of clients' records, calling it "Kafka-esque."²⁹⁹ Another common refrain was that former students only realized what an exceptional opportunity the Unger clinic had been after they had gained experience as attorneys. That included attorneys who represent criminal defendants, but who have had to adjust to far less support and success than they experienced when they were with the clinic. As one said, "naively, I thought the sort of representation the clinic engaged in was typical in criminal cases—thorough, holistic representation with a successful outcome."³⁰⁰ Another said that "as a

²⁹⁶ Interview with Student No. 5, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Jan. 25, 2021).

²⁹⁷ Interview with Student No. 4, *supra* note 287. See *supra* Part III for a description of race and its likely impact on the trials of the members of the Unger group.

²⁹⁸ Interview with Student No. 12, *supra* note 283.

²⁹⁹ Interview with Student No. 13, *supra* note 275.

³⁰⁰ Interview with Student No. 2, *supra* note 274.

defense attorney, I now appreciate what a unique opportunity *Unger* presented to obtain real relief for a large number of clients . . .”³⁰¹

v. *Discovering Other Motivations to Do Good Work*

Criminal defense attorneys are taught that to be effective advocates, they must be able to call upon different motivations in different cases. For example, if an attorney is motivated only by sympathy for clients, how can they effectively represent a particularly unsympathetic client? If an attorney is motivated only by dislike for the system, how can they be effective in a case where the system is being relatively fair and humane? And if an attorney is motivated solely by a broad concern for civil rights and racial justice, how can they effectively represent a client in a case where those concerns are not at issue? The answer is that defense attorneys must be able to draw on multiple separate motivations, which may vary from case to case, so they can represent all their clients zealously and effectively.³⁰²

The clinic students seemed to intuitively develop a similar approach, and to call upon various motivations when necessary. Some students were not emotionally moved by their client’s plight—either because their client was unsympathetic, the student was not inclined to sympathize with people convicted of very serious crimes, or some combination thereof.³⁰³ Some students were also not particularly

³⁰¹ Interview with Student No. 3, *supra* note 276. Another student commented, “as an appellate public defender, I’ve gotten very used to losing. Freeing that many clients serving life sentences was incredible. Working in a resource-starved, often dysfunctional environment, I also really appreciate the high level of supervision and the social worker resources that were available in the clinic.” Interview with Student No. 11, *supra* note 276. A third student, also now a public defender, said: “I only realized what a big deal the clinic was looking back . . . The Unger clinic was an once-in-a-lifetime opportunity to walk clients out of prison after they had served so much time . . . seeing how criminal practice typically works makes the clinic all the more striking in retrospect.” Interview with Student No. 5, *supra* note 296.

³⁰² See generally Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (examining how drawing on multiple motivations, such as empathy and a desire to change the system, can help prevent burnout in defense attorneys).

³⁰³ Examples of this included one former student who described meeting with a client who “was genuinely frightening. That was quite a contrast to the other clients we interacted with . . . it was comforting to know there was a correctional officer in the room.” Interview with Student No. 6, *supra* note 286. Another described a case that “shocked” her. In the “majority” of cases she saw, she thought clients’ factual guilt was in doubt or, at least, their conduct was not especially egregious (for example, they played a relatively minor role in a robbery that resulted in death and were convicted of felony murder. See, e.g., *Watkins v. State*, 744 A.2d 1, 6-7 (Md. 2000)). In those cases, “it was easy to see why our clients deserved early release.” In contrast, the client’s conduct in one case, a home invasion rape that took place near her hometown, was “disturbing” and “hit close to home.” Interview with Student No. 7, *supra* note 279.

reformist or opposed to severe criminal penalties in general. In summary, not every student had the same perspectives as the students who had come to deeply sympathize with Unger clients and to question the carceral system. However, these students were not necessarily less effective advocates. Rather, they found other motivations to represent their clients zealously.

As stated by one former student who subsequently handled both defense and prosecution as a Judge Advocate General:

A big part of the clinic, to me, is respect for the system. And the system had not worked here . . . a lot of the clients were factually guilty. I wasn't focused on that—the important thing is that the process worked correctly, and it had not in these trials.³⁰⁴

Another was motivated not by the pursuit of social justice, or sympathy for clients, so much as ensuring the fair application of the law. He reported, “you can't decide to not uphold justice because you think that it's helping a 'bad person.'”³⁰⁵ He added that “there were some clients whose facts of their case were pretty appalling. However, the bottom line was that their trials were unconstitutional, and any emotional judgments needed to be put aside.”³⁰⁶

vi. *Learning to Manage Stress*

Former students reported various reactions to learning they would be representing real clients in life-sentence cases. Some students initially felt overwhelmed and worried. For many, this was their first experience in the practice of law, and one of their first professional experiences of any kind. And certainly, for the vast majority of students, it was their first experience having a central role in representation that might determine whether or not their client would die in prison.

Former student reactions included that “the work was stressful because of imposter syndrome—I was 22 years old and found myself representing clients serving life sentences.”³⁰⁷ Another said, “it was stressful because this was the first time we had had any kind of real world experience, both with having any client experience (and then

³⁰⁴ Interview with Student No. 4, *supra* note 287.

³⁰⁵ Interview with Student No. 9, Clinical L. Student, Univ. of Md. Francis King Carey Sch. of L. (Jan. 27, 2021).

³⁰⁶ *Id.*

³⁰⁷ Interview with Student No. 6, *supra* note 286.

visiting them in jail) and having any real life courtroom experience.”³⁰⁸ Another commented, “[f]or a law student who hadn’t represented clients before, it was nerve racking to be doing that in any setting, particularly one representing convicted murderers.”³⁰⁹ Still another underscored that for many students, high-stakes criminal law was an unexpected challenge, “I attended law school with a focus on environmental law and policy; this clinic was *way* out of my comfort zone.”³¹⁰ She added that her reaction when finding out what the work would entail was “terror with a dash of excitement. The idea that the work I was doing would directly affect whether my client remained behind bars for the rest of his life or have the chance to live free was overwhelming.”³¹¹ Another said:

I was thrust into this scenario with so much responsibility . . . the workload was heavy, but the real stress was having someone’s fate resting on your shoulders. That was a very different kind of stress from a practice oral argument, or writing a law school exam . . . There’s more at stake than getting a good grade or furthering your career.³¹²

Finally, another former student noted that the stress he felt representing real clients was heightened by how closely he worked with them, and how well he got to know them on an individual basis. “It pushes you to work harder when there’s a real client on the case. . . there’s also a larger sense of stress when there is that personal connection. Because we got to know our clients so well, the stakes felt higher.”³¹³

Along with the potential consequences of their work, some former students were initially intimidated by the workload. One commented, “the sheer amount of work we were presented with initially was overwhelming.”³¹⁴ Another said her experience was, at times, “overwhelming and stressful. We were so busy, we basically lived in the clinic.”³¹⁵ One emphasized the large amount of “physical and logistical work,” such as “going to courthouses and asking for records.”

³⁰⁸ Interview with Student No. 7, *supra* note 279.

³⁰⁹ Interview with Student No. 9, *supra* note 305.

³¹⁰ Interview with Student No. 10, *supra* note 287.

³¹¹ *Id.*

³¹² Interview with Student No. 12, *supra* note 283.

³¹³ Interview with Student No. 13, *supra* note 275.

³¹⁴ Interview with Student No. 7, *supra* note 279.

³¹⁵ Interview with Student No. 14, *supra* note 281.

He added, “it’s such a different kind of work than law students usually do. Like in actual practice, the cases were often more about the facts than the law. After all, the templates were already drafted. Our focus was the investigative work, which can be a huge part of being a lawyer.”³¹⁶

On the other hand, some reported feeling excited by the prospect of doing important work on behalf of a real client.³¹⁷ They said that the weighty, real-world responsibilities of the clinic helped them work with a motivation and clarity they lacked in purely theoretical, doctrinal classes. That included former students who had also reported feeling stressed and intimidated by their responsibilities and what was at stake; those emotions often existed side by side. As one reported, “I was excited to have a client whose case I could have a tangible impact on. Unlike what I’d experienced in law school beforehand, it wasn’t just theoretical.”³¹⁸ Another student remarked:

It was an exciting opportunity to work on something that really mattered and learn a lot while doing it . . . the workload was heavy, but if anything, representing a real client made the workload seem OK because at least you knew that the work was related to a real person.³¹⁹

Articulating a common theme, another former student commented that “along with stress, the high stakes were motivating.”³²⁰ Another said that “I was ridiculously excited that my work could result in helping someone gain his freedom.”³²¹

³¹⁶ Interview with Student No. 13, *supra* note 275.

³¹⁷ A critical pedagogical benefit of clinics is that they expose law students to the nuance and complexity of working with real clients in real cases, and help students build the practical skills essential to effective lawyering. *See, e.g.*, Kathleen G. Noonan & Sarah Davis, *Law in Action: Learning Health Law Through Experience with Stakeholders at the Patient and System Levels*, 9 *IND. HEALTH L. REV.* 557, 563 (2012); Margaret Martin Barry et al., *Experience the Future: Papers from the Second National Symposium on Experiential Education in Law*, 7 *ELON L. REV.* 1, 27 (2015). Scholars have referred to the “twin goals of clinical education: social justice and student learning.” Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 *CLINICAL L. REV.* 39, 44 (2013). *See, e.g.*, Esther Canty-Barnes, *Serving the Needs of Disabled Children: A Look at the Special Education Clinic at Rutgers Law School-Newark*, *N.J. LAW. MAG.*, June 2003, at 71-72.

³¹⁸ Interview with Student No. 4, *supra* note 287.

³¹⁹ Interview with Student No. 9, *supra* note 305.

³²⁰ Interview with Student No. 3, *supra* note 276.

³²¹ Interview with Student No.10, *supra* note 287.

All—including those who initially reported feeling stressed or overwhelmed by the clinic’s responsibilities—reported that they felt empowered by the close supervision they received from experienced clinical professors.³²² Former students commented, “the support provided by the professors helped ensure that I felt capable and up to the task,”³²³ and “I felt really well prepared and supervised.”³²⁴ Another added that because the stakes were so high for her clients, “I was very grateful to have supervisors looking over my work and fixing my mistakes.”³²⁵ When asked if the nature of the work or the workload was stressful, another responded, “not really—[the professors] were so supportive, and they were available whenever I encountered any kinds of difficulties.”³²⁶

vii. *Providing a Basis to Critique the Criminal Justice System*

Along with challenging students’ preconceived notions about incarcerated people, the clinic experience gave students an enriched perspective of the criminal justice system and caused many to become critical of it.³²⁷ One former student said:

I think I was already on the pro-defense ‘team,’ but it had been for more abstract reasons, like the Constitutional right to counsel and to having your day in court. After the clinic, my concerns about the criminal justice system

³²² Scholars have discussed the psychological challenges that clinic students face in representing real clients, particularly in high-stakes cases, and have offered recommendations on how clinic faculty might help them navigate those challenges. See, e.g., Ronald Tyler, *The First Thing We Do, Let’s Heal All the Law Students: Incorporating Self-Care into A Criminal Defense Clinic*, 21 BERKELEY J. CRIM. L. 1, 1, 4, 13, 18, 20, 21 (2016); William Berman, *When Will They Ever Learn? Learning and Teaching from Mistakes in the Clinical Context*, 13 CLINICAL L. REV. 115, 128-134 (2006).

³²³ Interview with Student No. 6, *supra* note 286.

³²⁴ Interview with Student No. 2, *supra* note 274.

³²⁵ Interview with Student No. 14, *supra* note 281.

³²⁶ Interview with Student No. 4, *supra* note 287.

³²⁷ Scholars have argued that one benefit of clinical education is that representing real clients in real cases can offer a more complete, nuanced, and critical view of a legal system that many law students have only encountered in the abstract. See, e.g., Hugh M. Mundy, *It’s Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics*, 50 CAL. W.L. REV. 31, 66 (2013); Emily Hughes, *Taking First-Year Students to Court: Disorienting Moments As Catalysts for Change*, 28 WASH. U.J.L. & POL’Y 11, 11-12, 17, 20 (2008).

became more personal. I had seen that there are good people who get swept up in it.³²⁸

Another, who went on to become a public defender, commented, “I didn’t have any understanding of the criminal justice system before my time in the clinic. Being part of it changed everything for me, including that I started to come to grips with my own privilege.”³²⁹

Still another added, “the clinic caused a total shift in how I viewed incarceration—I had supported life sentences in lieu of death sentences. But working closely with clients helped me appreciate what decades of prison really mean, the import of those sorts of sentences. It was a radicalizing experience.”³³⁰

CONCLUSION

In this article, we describe a project, spurred by a court decision, that has resulted in the releases of 200 older, long-incarcerated prisoners in Maryland who had been convicted of violent crimes. We describe the bizarre (in today’s world) jury instruction that undermined the fairness of the trials of this group conducted decades ago. We note that until 1981 in Maryland, the Maryland Constitution required trial judges to tell the jurors that they, the jurors, were the ultimate judges of the law and that everything the judge said about the law was advisory only. We use one case study to present the instruction and the ways in which it nullified the Rule of Law, and another case study to explain the colonial origins of this jury instruction.

We describe how at the times of these trials, people in Maryland, including jurors, were inflamed by racial divisions and anger at crime. We argue that the advisory-only instruction, which likely generally emboldened jurors, gave jurors motivated by racism and anger a way to give effect to those beliefs and feelings.

We describe the prolonged litigation that led up to the Maryland Court of Appeals’ decision in *Unger v. State*,³³¹ which appeared to require new trials for 237 older, long-incarcerated prisoners, and the four years of litigation after the *Unger* decision that confirmed this.

³²⁸ Interview with Student No. 13, *supra* note 275.

³²⁹ Interview with Student No.14, *supra* note 281.

³³⁰ Interview with Student No. 3, *supra* note 276.

³³¹ 48 A.3d 242 (Md. 2012).

We describe how the Unger Project, a multi-partner, interdisciplinary effort, implemented the *Unger* decision and obtained the releases of 200 prisoners in the Unger group. We note the very low re-incarceration rate for these released prisoners, about three percent, and explain why we believe they have been so successful. We argue that an extraordinary reentry program designed and staffed by social workers and social work students, and the creation of a supportive community by those released and their families, have been two factors in this success.

We identify what we think are the major lessons of the Unger Project, including ones that challenge over incarceration generally and the long-term incarceration of older prisoners specifically, and challenge as well the prevalent assumption that prisoners convicted of violent crimes should be excluded from release programs.

We observe the ways in which the Unger story may be useful in the future. We focus on the growing number of second-look laws, policies, and initiatives that are intended to give long-incarcerated, older prisoners, like those in the Unger group, opportunities for resentencing hearings. We argue that the successes of those released in Maryland as a result of the *Unger* decision should encourage other policy makers to support these second-look initiatives, and that the Unger Project provides a model of interdisciplinary, collaborative advocacy for those who seek to help prisoners under them.

We end by explaining the significant role the Maryland-Carey Law School Clinical Law Program played in the Unger Project and share the views of former students about what they learned in this clinic. This article encapsulates what we learned through the Unger Project and demonstrates how the Project can be a model for creating and supporting thoughtful criminal justice reforms locally and nationally.