

SLAVE NARRATIVES AND THE SENTENCING COURT

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ABSTRACT

The United States incarcerates a greater percentage of its population than any other country in the world. Courts are substantially more likely to sentence African American people to prison than white people in similar circumstances, and African American people in particular represent a grossly disproportionate percentage of the incarcerated population. Violence and other ills endemic to jails and prisons are thus disproportionately experienced by people of color.

This Article argues that criminal defense lawyers should explicitly address conditions of confinement at sentencing. In doing so, a criminal defense lawyer has the opportunity to serve as both advocate and abolitionist. As advocates, defense lawyers can incorporate information about conditions of confinement into sentencing narratives to support arguments for shorter sentences or against imprisonment altogether. As abolitionists, defense lawyers can juxtapose the humanity of their clients with the poor or even dire conditions of confinement in our jails and prisons—not only to influence the court’s decision about an individual client’s sentence, but to impact the court’s view of our systems of incarceration as a whole. Defense lawyers acting as abolitionists thus seek to disrupt and dismantle a system of imprisonment that disproportionately affects African Americans and other people of color in significant and damaging ways.

In examining how defense attorneys should invoke conditions of confinement at sentencing, this Article seeks insight from a tool of abolitionists and advocates from a different time: Civil War-era slave narratives. Slave narratives exposed the hidden conditions of slavery while also seeking to humanize the enslaved people subjected to those conditions. Using slave narratives as a touchstone in a conversation about sentencing advocacy provides a new perspective on the role of storytelling in litigation and social movements, including questions of who tells the story and which stories are told, in the context of systems of control with deep disparate impacts based on race.

I. INTRODUCTION	126
II. MASS INCARCERATION AND RACE.....	128
III. SENTENCING, RACE, AND THE CONDITIONS OF THE CONFINED	133

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A. The Nature of Sentencing and Its Racially Disparate Outcomes	133
B. The Racial Implications of Disregarding Conditions of Confinement at Sentencing	137
IV. DEFENSE LAWYERS AS ADVOCATES AND ABOLITIONISTS.....	141
A. Raising Incarceration Conditions as an Advocacy Tool	143
B. Raising Incarceration Conditions as an Abolitionist Tool.....	148
1. Incarceration and Enslavement.....	150
2. Slave Narratives as Instruments of Abolitionism	158
3. Sentencing Advocacy as an Abolitionist Act	167
C. Challenges to Raising Conditions of Confinement at Sentencing.....	169
V. CONCLUSION	172

This little book is a voice from the prison-house, unfolding deeds of darkness which are there perpetrated.

– Preface, NARRATIVE OF WILLIAMS WELLS BROWN,
A FUGITIVE SLAVE

I. INTRODUCTION

Whatever the purpose of punishment may be in the United States, our criminal justice system seeks to achieve that purpose through incarceration. After more than four decades of escalating reliance on imprisonment, the U.S. now has the highest incarceration rate in the world.¹ Over two million people,² disproportionately African-American and Latino,³ are currently held in our nation’s jails and prisons. Yet despite our system’s dependence on incarceration, the conditions of the confinement imposed—which can include violence from staff and other prisoners, lack of medical and mental health care, contaminated food or water, and a host of other ills—are largely invisible. Even when judges sentence

1. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 33 (2014), <http://www.nap.edu/read/18613/chapter/1> [<https://perma.cc/X3N2-ZH22>] [hereinafter *GROWTH OF INCARCERATION*] (reporting that, in the United States in 2012, “[i]n absolute numbers, the prison and jail population had grown to 2.23 million people, yielding a rate of incarceration that was by far the highest in the world.”).

2. PETER WAGNER & BERNADETTE RABUY, *PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE* 2017 (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html> [<https://perma.cc/LN8C-JFPU>] [hereinafter *MASS INCARCERATION: THE WHOLE PIE*].

3. THE SENTENCING PROJECT, *FACT SHEET: TRENDS IN U.S. CORRECTIONS* 5 (Dec. 15, 2015), <http://www.sentencingproject.org/publications/trends-in-u-s-corrections/> [<https://perma.cc/2CYR-R7LD>] [hereinafter *TRENDS IN U.S. CORRECTIONS*] (“More than 60% of the people in prison today are people of color. Black men are nearly six times as likely to be incarcerated as white men and Hispanic men are 2.3 times as likely. For black men in their thirties, 1 in every 10 is in prison or jail on any given day.”).

individuals to terms of incarceration, they generally do not mention the conditions the convicted person is likely to encounter in prison or jail, the role that those conditions will play in furthering the purported aims of punishment, or the racial implications of differential exposure to harsh conditions of confinement.

This Article advocates for criminal defense lawyers to explicitly address conditions of confinement at sentencing.⁴ By doing so, a criminal defense lawyer has the opportunity to play two interconnected roles: that of advocate and abolitionist. While creating a compelling narrative of the client as an individual, a lawyer can ask the court to consider the implications of exposing that particular individual to the hardships endemic to the prison or jail system to which he or she would be confined.⁵ Defense lawyers can also raise conditions of confinement as abolitionists, meaning, in this context, actors who seek to disrupt and dismantle a system of incarceration that disproportionately affects African American and Latino people in significant and damaging ways.⁶ As abolitionists, defense counsel can educate decision-makers about conditions of confinement that run counter to the values of communities and of the justice system in an effort to both avoid prison for the individual before the court and eradicate the United States' systemic reliance on incarceration altogether.⁷

4. Defense lawyers might consider raising conditions of confinement at other times as well, including plea bargaining, and there can be benefits to doing so that outweigh even their potential use at sentencing. This Article focuses on sentencing alone for several reasons. First, this Article seeks to contribute to the conversation begun by other scholars—including Professor E. Lea Johnston, Professor Anne R. Traum, attorney Ken Strutin, among others—regarding the benefits of considering prison conditions at sentencing. Second, since sentencing is the moment at which sentences to incarceration are imposed, addressing conditions of confinement at such hearings is both practical and dramatic. Finally, because sentencing hearings are public, discussions of conditions of confinement are addressed not only to the court but to the wider community.

5. Scholars have addressed the various ways that judicial consideration of conditions of confinement at sentencing can assist courts in tailoring just and effective sentences. *See, e.g.*, E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625 (2014) (arguing for a system of sentencing that would give courts authority to order particular conditions of confinement at sentencing for people with significant mental health needs); Ken Strutin, *The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement*, 38 WM. MITCHELL L. REV. 1313 (2012) (arguing that mandatory reporting of prison conditions and consideration of prison conditions at sentencing and elsewhere in the system would aid prosecutors in decisions such as plea bargains, defense lawyers in advocating for their clients, and judges in crafting sentences, with the possible result of reducing incarceration rates); Julia L. Torti, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1908 (2013) (arguing that courts should consider the length of terms of incarceration, conditions of confinement, and collateral consequences in order to ensure that sentences meet the proportionality requirements of the Eighth Amendment).

6. As discussed further in Part IV.B, a commitment to prison abolition can include a range of goals, from eliminating prisons altogether to progressively reducing the American criminal justice system's reliance on incarceration. The use of the term prison abolitionist in this Article is meant to encompass efforts to significantly decrease or eliminate incarceration in the United States.

7. Although they may not refer to such strategies as "abolitionist," other scholars have argued that pressing courts at sentencing to consider the impact of mass incarceration on communities and detrimental conditions of incarceration on individuals may reduce overall reliance on incarceration.

In examining whether and when defense attorneys ought to raise conditions of confinement, this Article seeks insight from a tool of abolitionists and advocates from a different time: Civil War-era slave narratives. While the metaphor is imperfect, there are lessons to be drawn from slave narratives, which “broke in upon the convenient ignorance of the Northern white masses”⁸ and sought to expose the unknown and hidden conditions of slavery while also humanizing the enslaved people subjected to those conditions.⁹ Incorporating slave narratives into the conversation about sentencing advocacy allows reflection on the role of storytelling in litigation and social movements. It also raises important questions about who tells these stories and which stories are told, in the context of systems of control with deep disparate impacts based on race.

Part II briefly reviews the contours of mass incarceration and outlines the disparate impact that the extraordinary growth of imprisonment has had on people of color in the United States. Part III then addresses the factors courts can consider at sentencing and the discretion that judges may exercise in imposing sentences. This Part notes that sentencing courts rarely address the conditions of confinement in the prisons and jails where incarcerated persons will live out their sentences and suggests that this omission has racial implications. Part IV discusses the role that defense lawyers can play in raising conditions of confinement at sentencing and argues that doing so allows these attorneys to advocate for their individual clients while implicitly or explicitly drawing attention to questions of race and mass incarceration that are often unacknowledged in the courtroom. In so arguing, this Part reflects upon the history and structure of Civil War-era slave narratives as tools of the abolitionist movement and draws lessons from those narratives that have implications for modern-day sentencing advocacy in an era of mass incarceration.

II.

MASS INCARCERATION AND RACE

‘Mass incarceration’ is significant not only because of the staggering numbers of people sentenced to prisons and jails in the United States, but also because African Americans in particular represent a grossly disproportionate per-

See, e.g., Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423 (2013) (arguing that courts should consider impact of mass incarceration—including harms to the individual, family, and community—at sentencing); Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 105 (2014) (proposing an alternative sentencing model that considers “the hurtful effect of excessive sentences on families and communities” by, among other approaches, reducing reliance on incarceration).

8. Charles H. Nichols, *Who Read the Slave Narratives?*, THE PHYLON Q., 2nd Qtr. 1959, at 155.

9. *Id.* at 155–56.

centage of the incarcerated population.¹⁰ While it can be difficult to determine the number of people who are incarcerated at a given time in this country with precision—the population of local jails is particularly variable¹¹—a recent study concluded that more than 2.3 million people were held in well over 6,000 U.S. incarceration facilities in 2016.¹² The United States, as is well known and widely documented, incarcerates a greater percentage of its population than any other country in the world.¹³

Underlying and influencing all aspects of our criminal justice system is its vastly disparate impact, from arrest to incarceration, on African American as well as Latino people.¹⁴ There is a dramatic racial disparity¹⁵ in the United

10. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2011) (“The racial dimension of mass incarceration is its most striking feature.”). Some use the term “hyper-incarceration” to indicate that exponential growth in incarceration rates has disproportionately affected people and communities of color. See Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 82 (David Garland ed., 2001).

11. See MASS INCARCERATION: THE WHOLE PIE, *supra* note 2 (describing the phenomenon of “jail churn,” in which people, many held pre-trial, are held in jails for periods ranging from hours to days to short terms of years).

12. These facilities included “1,719 state prisons, 102 federal prisons, 901 juvenile correctional facilities, 3,163 local jails, and 76 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories.” *Id.* This number reflects an almost 500% increase in incarceration rates in the past forty years, when—for a variety of cultural and political reasons—our criminal justice system began its increasing dependence on imprisonment. See TRENDS IN U.S. CORRECTIONS, *supra* note 3, at 2; see also GROWTH OF INCARCERATION, *supra* note 1, at 70–103 (stating that “[t]he increase in U.S. incarceration rates over the past 40 years is preponderantly the result of increases both in the likelihood of imprisonment and in lengths of prison sentences—with the latter having been the primary cause since 1990,” and reviewing the political, social, and legal factors leading to these increases).

13. TRENDS IN U.S. CORRECTIONS, *supra* note 3, at 1. Following sentencing and other reforms, incarceration rates have recently declined in some jurisdictions, while holding steady or increasing in others. See THE SENTENCING PROJECT, FACT SHEET: U.S. PRISON POPULATION TRENDS 1999–2014: BROAD VARIATION AMONG STATES IN RECENT YEARS 1 (2016), <http://sentencingproject.org/wp-content/uploads/2016/02/US-Prison-Population-Trends-1999-2014.pdf> [<https://perma.cc/SHC4-WQ3H>] [hereinafter THE SENTENCING PROJECT, FACT SHEET] (reporting a 2.9% decline in the total prison population in the U.S. since 2009, as a result of “measures [such] as drug policy sentencing reforms, reduced admissions of technical parole violators to prison, and diversion options for persons convicted of lower-level property and drug crimes,” but noting that these reductions were not uniform across all states. Although there has been a decline in prison populations in 39 states, “in most states this reduction has been relatively modest,” and in 11 states incarceration rates rose.). See also Christian Henrichson, *Measuring Incarceration: Don’t Overlook Local Jails*, THE MARSHALL PROJECT (July 6, 2016), <https://www.themarshallproject.org/2016/07/06/measuring-incarceration#.a7idZH4m> [<https://perma.cc/KK4A-S3BD>] (reporting that jail and prison populations can, depending on the state, fall together, rise together, or deviate, such that jail populations rise while prison populations fall, or vice versa).

14. See Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL’Y REV. 387, 391–95 (2016) (noting the “disproportionate impact on people of color in the U.S. [criminal justice] system is at every level—policing, arrests, prosecution, plea offers, trial outcomes, and sentencing outcomes” and citing data demonstrating

States' criminal justice system, where African American people are incarcerated at 5.1 times the rate of whites, and Latino people at 1.4 times the rate of whites at the state level.¹⁶ In federal prisons, African American people constitute 38% of the incarcerated population¹⁷—a percentage that is almost triple the proportion of African American people in the general population.¹⁸

Multiple actors have analyzed the social and political factors that have given rise to the distorted racial impact in our system of justice.¹⁹ Many of these analyses have focused on the law enforcement policies and laws arising from the so-called War on Drugs, which has been described as an “ostensibly race-neutral effort” that in actuality has been “waged primarily against black Americans.”²⁰

this disproportionality throughout the system); Eli Hager, *A Mass Incarceration Mystery*, THE MARSHALL PROJECT (Dec. 15, 2017), https://www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20171215-912 [<https://perma.cc/GD2G-8YR5>] (discussing the decline in African American incarceration rates over the last decade and a half, but noting that vast racial disparities still remain).

15. Racial disparity is generally defined as the circumstance in which “the proportion of a racial or ethnic group within the control of the [criminal justice] system is greater than the proportion of such groups in the general population.” THE SENTENCING PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1* (2008), <http://www.sentencingproject.org/publications/reducing-racial-disparity-in-the-criminal-justice-system-a-manual-for-practitioners-and-policymakers/> [<https://perma.cc/XF64-622V>] [hereinafter REDUCING RACIAL DISPARITY].

16. See THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3* (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/27BL-62AL>] [hereinafter THE COLOR OF JUSTICE]. Moreover, this study determined that while white people constitute 62% of the population, the prison population in our state prisons is only 35% white, but while African Americans represent 13% and Latinos 17% of the total population, those groups compose 38% and 21% of state prison populations respectively. In some states, this same study determined, the disparity for African Americans rose to over 10 to 1—and for Latinos, up to 4.3 to 1—when compared to whites. Almost a quarter of the states have prison populations that are more than 50% African American, and in others the Latino prison population soars to over 40%. *Id.* at 3–4.

17. FEDERAL BUREAU OF PRISONS, *INMATE RACE STATISTICS*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [<https://perma.cc/C5PB-YFPE?type=image>] (last updated Nov. 25, 2017) [hereinafter INMATE RACE STATISTICS] (tracking percentage of Asian, Black, Native American, and white prisoners, but not Hispanic or Latino prisoners, which are presumably subsumed within the other categories).

18. See THE COLOR OF JUSTICE, *supra* note 16, at 4; *QuickFacts: United States – People*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045216> [<https://perma.cc/GD2J-M3PF>] (last updated July 1, 2016).

19. A multitude of scholars have turned their attention to this topic. See generally, ALEXANDER, *supra* note 10; DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1273 (2004).

20. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 257 (2009). Fellner argues that factors such as increased sentencing penalties for

But drug policies alone do not fully explain mass incarceration, as evidenced by the large number of people incarcerated for non-drug offenses.²¹ The growth of our prison population and the disproportionate percentage of people of color within it has also been attributed to implicit and explicit racial bias at all levels of the justice system.²² This bias is encompassed and reflected in increased numbers of sentencing laws carrying mandatory minimum sentences;²³ the lengthening of prison sentences and increased imposition of life sentences;²⁴ the massive influence of plea bargaining in our system of justice (itself impacted by questions of prosecutorial bias);²⁵ an increase in the number of felony charges

drug convictions, harsher sentences for “crack” versus “powder” cocaine, and racial profiling lead the war on drugs to disparately impact people of color, despite the fact that for the last two decades “whites have engaged in drug offenses at rates higher than blacks.” *Id.* at 266.

21. See MASS INCARCERATION: THE WHOLE PIE, *supra* note 2 (reporting that in state prisons, where the greatest percentage of prisoners are held, half of the population consists of people convicted of violent crimes, and the rest of the population consists of people convicted of “property,” “drug,” or “public order” offenses; nearly half of federal prisoners are incarcerated non-drug offenses).

22. See, e.g., THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> [<https://perma.cc/N9D2-TC9D>] [hereinafter RACIAL DISPARITIES REPORT] (discussing the role of implicit racial bias as a force behind disparate minority impact throughout the criminal justice system).

23. See Written Submission of the Am. Civil Liberties Union, *Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States*, Inter-Am. Comm’n H.R. Session 153 at 1 (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [<https://perma.cc/8NDQ-N7G9>] [hereinafter ACLU SUBMISSION] (referencing Matthew S. Crow & Katherine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing*, 19 CRIM. JUST. POL’Y REV. 63 (2008)) (“In addition, racial disparities in sentencing can result from theoretically ‘race neutral’ sentencing policies that have significant disparate racial effects, particularly in the cases of habitual offender laws and many drug policies, including mandatory minimums, school zone drug enhancements, and federal policies adopted by Congress in 1986 and 1996 that at the time established a 100-to-one sentencing disparity between crack and powder cocaine offenses.”); cf. GROWTH OF INCARCERATION, *supra* note 1, at 83–85 (describing changes in sentencing “from the mid-1980s through 1996” as “aimed primarily to make sentences for drug and violent crimes harsher and their imposition more certain. The principal mechanisms to those ends were mandatory minimum sentence, three strikes, truth-in-sentencing, and life without possibility of parole laws”).

24. *Id.* at 91.

25. BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011), available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/YA23-34KP>] [hereinafter BJA RESEARCH SUMMARY] (reporting that about 90 to 95 percent of both federal and state court cases are resolved through plea bargaining, and noting that prosecutors often offer African American people less favorable plea bargains than they offer whites); see also Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191, 194–201 (2015) (reviewing the largely unfettered power of prosecutors in making charging and plea bargaining decisions).

filed by prosecutors;²⁶ and policing policies that target communities of color,²⁷ among a host of other factors.

While meaningful reform is a massive undertaking,²⁸ one that requires effort and change at multiple levels,²⁹ any opportunity to address these issues dur-

26. Alkon, *supra* note 25, at 199, 202 (summarizing the research of John Pfaff, who, after analyzing criminal justice data on the state level, concluded “that the main driver for mass incarceration is prosecutors who are filing more felony charges;” “[i]f a crime is a felony, or potentially a felony, the consequences of conviction are more severe”); *see also* Nazgol Ghandnoosh, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL EQUITY IN THE CRIMINAL JUSTICE SYSTEM 16 (Feb. 3, 2015), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> [<https://perma.cc/A4W5-83TX>] (noting that prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites).

27. *See* REDUCING RACIAL DISPARITY, *supra* note 15, at 11–12 (noting that “people of color are overrepresented among those who are stopped, cited, searched, and arrested” by police); *see also* RACIAL DISPARITIES REPORT, *supra* note 22, at 4–6 (reporting that “black drivers were three times as likely to be searched during a stop as white drivers and twice as likely as Hispanic drivers.”); *see, e.g.*, U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (Aug. 10, 2016) (finding multiple violations including a pattern of unconstitutional stops, searches, and arrests, with a disparate impact on African Americans), *available at* <http://s3.documentcloud.org/documents/3009471/Bpd-Findings-8-10-16.pdf> [<https://perma.cc/HV3W-SHR6>].

28. *See* ALEXANDER, *supra* note 10, at 235 (“A civil war had to be waged to end slavery; a mass movement was necessary to bring a formal end to Jim Crow. Those who imagine that far less is required to dismantle mass incarceration . . . fail to appreciate the distance between Martin Luther King Jr.’s dream and the ongoing racial nightmare for those locked up and locked out of American society.”). During the Obama administration, and on the state level in recent years, a variety of criminal justice reform efforts have brought about a reduction in incarceration rates in some areas. Despite these developments, however, our criminal justice system’s reliance on imprisonment has not been markedly altered thus far. *See* THE SENTENCING PROJECT, FACT SHEET, *supra* note 13. Given that the Trump administration policies appear designed to increase reliance on incarceration, *see* Beth Reinhard, *Federal Prison Population Expected to Grow Under Trump*, FOX BUSINESS (June 8, 2017), <http://www.foxbusiness.com/features/2017/06/08/federal-prison-population-expected-to-grow-under-trump.html>, dramatically altering the system of mass incarceration will require even more effort going forward.

29. *See* Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL’Y 1, 2 (2016) (reviewing policy reforms aimed at reducing mass incarceration, such as “reducing the quantity differential between crack and powder cocaine that results in racially disparate sentencing outcomes at the federal level and in certain states; reclassifying certain felony offenses to misdemeanors; expanding voting rights and access to public benefits for persons with felony convictions; and adopting fair chance hiring policies for persons with criminal records”); *see, e.g.*, Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African Americans?*, THE NEW YORKER (May 11, 2015), <http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> (describing data-based reform efforts undertaken by John Chisholm, the District Attorney in Milwaukee County, to reduce racially disparate prosecutions in his district, as well as bipartisan political attention to mass incarceration); THE SENTENCING PROJECT, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Ending-Mass-Incarceration-Charting-a-New-Justice-Reinvestment.pdf> [<https://perma.cc/3S46-VULG>] (reviewing the background and evaluating the outcomes of the Justice Reinvestment Initiative, a state-level legislative reform effort aimed at “stabilizing corrections populations and budgets”); THE SENTENCING PROJECT, CRIMINAL JUSTICE

ing the course of a criminal case is arguably an opportunity to contribute to the dismantling of mass incarceration. Sentencing hearings are one opportunity for lawyers to craft an emotionally and factually persuasive narrative on behalf of their clients.³⁰ Because sentencing hearings cover a wide range of topics and are based on narratives about the individual about to be sentenced, these hearings provide a particularly powerful moment within which to consider the complicated and often racially-influenced questions of who our system incarcerates and why.

III.

SENTENCING, RACE, AND THE CONDITIONS OF THE CONFINED

A. The Nature of Sentencing and Its Racially Disparate Outcomes

The racial disparities seen throughout the criminal justice system are also present at sentencing. While “in a fair, equitable, and non-discriminatory justice system, sanctions should be imposed equally on offending populations,”³¹ the U.S. criminal justice system does not abide by this principle. Courts are substantially more likely to sentence African American and Latino people to prison than white people in similar circumstances.³² Federal courts sentence African American men to longer prison sentences than white men arrested for the same offenses and with similar criminal backgrounds, and African American people constitute a disproportionate percentage of prisoners serving life sentences.³³

Because a vast percentage of convictions in both state and federal courts are obtained through guilty pleas,³⁴ sentencing hearings play a particularly pivotal role in the criminal justice system and allow courts to learn and consider more about the person being sentenced. A sentencing hearing often affords the court

FACTS, <http://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/7AJD-76TT>] (last visited Aug. 31, 2017) (reporting state and federal level reform efforts).

30. Steve Baxley, *Speaking for the Accused: Creating Stories and Themes*, CHAMPION, Mar. 2007, at 26 (encouraging defense lawyers to marshal facts into “a persuasive story that engages the mind and moves the heart” to be successful at trial and effective at sentencing).

31. Fellner, *supra* note 20, at 278.

32. See ACLU SUBMISSION, *supra* note 23 (referencing Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, U OF MICH. LAW & ECON., EMPIRICAL LEGAL STUDIES CENTER PAPER NO. 12-002 (2012)).

33. *Id.* at 1–2. In 2012, African American people represented “65.4 percent of prisoners serving [life sentences without the possibility of parole] for nonviolent offenses”—in some state prison systems and in the federal system, that percentage is significantly higher. *Id.* at 2.

34. BJA RESEARCH SUMMARY, *supra* note 25, at 3; see also *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> [<https://perma.cc/KV5R-94FE>]; Benjamin Weiser, *Jury Trials Vanish, and Justice Is Served Behind Closed Doors*, N.Y. TIMES, Aug. 8, 2016, at A1 (describing the sharp decline in trials across the country, with a focus on three federal courts in New York, and discussing the reasons behind this decline and its social and legal implications).

the best opportunity to carefully consider the case and the defendant charged,³⁵ and sometimes provides the only moment of public advocacy by the defense on behalf of the accused.³⁶ The rules of evidence do not apply at sentencing,³⁷ and thus courts may rely on hearsay and other information that would otherwise be constrained or prohibited by evidentiary considerations. While the federal court system and the states each have their own sentencing laws or guidelines, under all of these systems courts can consider a wide range of material when reaching a sentencing decision, including the defendant's prior convictions, prior arrests, military service, community support, and work history.³⁸ Courts are required by statute to focus on ostensibly unbiased aggravating and mitigating sentencing factors³⁹ and, increasingly, rely on 'evidence-based' instruments designed to de-

35. See Traum, *supra* note 7, at 447 ("Aside from trial, sentencing is the phase of a criminal case when judges are most active and engaged At sentencing, the court assesses the defendant as a person"); see also D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 2d 147 (2011) (emphasizing the importance of sentencing and arguing that "[i]n a world of vanishing trials, these public communal rituals are vital opportunities for federal courts to interact openly and regularly with citizens").

36. See Cait Clarke & James Neuhard, "From Day One": *Who's In Control as Problem Solving and Client-Centered Sentencing Take Center Stage*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 13 (2004) (noting that "plea bargains and sentencing make up most of lawyers' criminal practice, fill most of the courts' dockets, people the probation programs, and load the prison buses").

37. 21 C.J.S. CRIM. PROC. & RTS. OF ACCUSED § 2266 (2016) (rules of evidence do not apply at sentencing hearings, although evidence introduced must be relevant, reliable, and accurate); see *Williams v. Oklahoma*, 358 U.S. 576, 583 (1959) (holding that court can rely on unsworn, out-of-court statements at sentencing without violating the defendant's constitutional due process rights).

38. See Carissa Byrne Hessick, *Why Are Only Bad Acts Sentencing Factors?*, 88 B.U. L. REV. 1109, 1128–29 (2008) (describing the larger number of aggravating factors versus mitigating factors in the Federal Sentencing Guidelines and state-level sentencing statutes); see also Mirko Bagaric & Theo Alexander, *First-time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing*, 78 ALB. L. REV. 397, 403–10 (2015) (describing "circumstances that are set out in [the federal sentencing guidelines] which allow a court to deviate from the prescribed sentencing range," including lack of criminal history and family obligations, and circumstances courts consider in some state sentencing regimes, such as the defendant's "good character" and "good reputation"); Claudia Catalano, *Annotation, Admissibility of Evidence, Other than Testimony Given at Sentencing, Within Meaning of U.S.S.G. § 6A1.3, Which Requires Such Information Be Relevant and Have "Sufficient Indicia of Reliability to Support Its Probable Accuracy"—Concerning Unsworn Information*, 47 A.L.R. Fed. 2d 367 (2010) ("District courts traditionally have wide latitude as to the information they may consider at sentencing, as access to the most information possible—so long as relevant and reliable—is essential to fixing an appropriate sentence."); *U.S. v. Tomko*, 562 F.3d 558, 571 (2009) (court considered Mr. Tomko's "negligible criminal history, his employment record, his community ties, and his extensive charitable works" when deciding not to impose an incarceration sentence).

39. See Hessick, *supra* note 38, at 1125–26 (2008) (describing an "aggravating sentencing factor" as "any fact or circumstance that warrants an increase in the defendant's punishment," and a "mitigating factor" as "any fact or circumstance that warrants a reduction in the defendant's punishment").

termine if the defendant is prone to recidivate or poses a continuing threat to society.⁴⁰

Despite this flexibility in sentencing hearings, several factors largely beyond the control of judges can limit the sentences they are able to impose. Decisions that prosecutors have already made regarding the severity of charges brought against the defendant,⁴¹ the application of sentencing enhancements,⁴² and stipulations in plea agreements regarding the type and duration of punishment that will be imposed can severely reduce judicial discretion at the sentencing hearing.⁴³ The crimes that the defendant was convicted of at trial, or, more commonly, to which the defendant pled guilty, may carry sentences mandated by statute, including specific terms of prison or jail.⁴⁴

Nevertheless, courts do retain significant amounts of autonomy over many aspects of the sentences they impose. Although there was a radical swing away from the latitude in sentencing traditionally allocated to courts beginning in the 1970s,⁴⁵ that judicial discretion has been at least partially restored in recent years. In *United States v. Booker*, the Supreme Court increased judicial independence at sentencing by making the federal sentencing guidelines discretionary rather than mandatory.⁴⁶ There has also been a movement away from some

40. See, e.g., NAT'L INSTITUTE OF CORR., A FRAMEWORK FOR EVIDENCE-BASED DECISION MAKING IN LOCAL CRIMINAL JUSTICE SYSTEMS 13–14 (2010), available at <http://info.nicic.gov/ebdm/sites/info.nicic.gov/ebdm/files/sites/default/files/docs/Framework.pdf> [<https://perma.cc/YX7T-R8RC>] (describing a framework for making evidence-based decisions, including at sentencing).

41. Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 63 (2015) (“By selecting the charges, prosecutors strongly influence the sentence.”).

42. See Mark Osler & Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 147–48 (2014) (describing the power of the prosecutor to make decisions about charging and sentencing enhancements, which means that “[t]he prosecutor can choose whether or not to bind the judge” to a particular sentencing outcome).

43. See McConkie, *supra* note 41, at 63–64 (describing the federal criminal justice system’s heavy reliance on plea bargaining, which occurs between defense lawyers and prosecutors with very little oversight, and noting that while judges can reject plea bargains, in the end, “the defendant is usually sentenced consistent with the plea agreement”).

44. See Bagaric & Alexander, *supra* note 38, at 401 (“A defining feature of sentencing in the United States is the heavy reliance on standard or fixed penalties. Most jurisdictions in the United States have some form of standard or mandatory penalty provisions. These penalties are normally set out in grids which utilize two main variables in arriving at the set penalty: offense seriousness and criminal history. The penalties prescribed in the grids are generally severe and this has contributed to a steep increase in prison numbers over the past two decades.”).

45. See Ryan W. Scott, *The Skeptic’s Guide to Information Sharing at Sentencing*, 2013 UTAH L. REV. 345, 349–52 (2013) (noting that “[i]n indeterminate sentencing systems, which prevailed in almost all U.S. jurisdictions until the 1970s, judges enjoyed essentially unfettered discretion in choosing the type and severity of sentences,” but this freedom was substantially curtailed by subsequent sentencing reforms driven by disenchantment with the concept of rehabilitation and a focus on rationality and consistency in sentencing).

46. 543 U.S. 220, 227 (2005). The Supreme Court increased sentencing discretion for federal judges in subsequent cases. In *Kimbrough v. United States*, 552 U.S. 85, 91 (2007), the Supreme

other laws, such as mandatory minimums for drug offenses, that have limited sentencing options at both the state and federal levels.⁴⁷ Judges can often choose whether to send a person to prison or not, and, if the court chooses to order a sentence to incarceration, they can determine, albeit often within a statutorily-proscribed range of years, how long that sentence should be.⁴⁸

Judges have not typically used the autonomy and flexibility of sentencing and sentencing hearings to consider or address broader questions of mass incarceration or racial inequities.⁴⁹ Instead, sentencing hearings are generally focused on the specifics of the individual defendant, crime, and victim.⁵⁰ Indeed, courts

Court held that federal trial courts could find that a sentence within the Guidelines was “greater than necessary,” and in so doing could disagree with the policies supporting the sentencing discrepancies between power and crack cocaine in the Guidelines. In *Gall v. United States*, 552 U.S. 38, 41 (2007), the Supreme Court held that, since federal trial courts could deviate from the sentencing ranges provided in the Guidelines even absent extraordinary circumstances, by considering the factors in 18 U.S.C. § 3553(a) or the circumstances of the case or the defendant, federal appellate courts must review sentences outside the Guidelines range under a deferential abuse-of-discretion standard.

47. See Mark W. Bennett, *A Slow Motion Lynching?: The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 878 (2014) (reviewing the continued development of federal sentencing laws, and observing that “in the arc of just twenty years, federal sentencing has gone from virtually unlimited sentencing discretion, to virtually no sentencing discretion, back to sentencing discretion that emphasizes the ‘reasonableness’ of the sentence imposed”); FAMILIES AGAINST MANDATORY MINIMUMS, RECENT STATE-LEVEL REFORMS TO MANDATORY MINIMUMS LAWS (May 10, 2017), <http://famm.org/wp-content/uploads/2017/05/Recent-State-Reforms-May-2017.pdf> [https://perma.cc/57H4-GDAM] (summarizing reform or repeal of mandatory minimums laws at the state level).

48. Anthony LoMonaco, *Disproportionate Impact: An Impetus to Raise the Standard of Proof at Sentencing*, 92 N.Y.U. L. REV. 1225, 1230 (2017) (describing the shift from the mandatory to advisory federal sentencing guidelines and increasing flexibility in sentencing for judges); Christine Gwinn, *Judicial Discretion in Sentencing: Is Presumptive or Mandatory Reassignment on Remand the Most Ethical Directive for All Parties?*, 30 GEO. J. LEGAL ETHICS 837, 844 (“[J]udges can make any sentencing decision that they feel is appropriate based on their own ideals, prejudices, etc., with little to no outside intervention.”); Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1084–86 (2009) (discussing the restoration of discretion to federal and state sentencing judges post-*Booker*).

49. Traum, *supra* note 7, at 437 (“In criminal adjudication, courts typically resolve individual cases, not systemic wrongs.”).

50. Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 738–39 (2012) (arguing that courts are guided at sentencing by “formal criteria for assessing punishment . . . contained in criminal codes,” which generally focus on the offense itself and the characteristics and background of the defendant, but that courts also look to other factors, such as the defendant’s remorse or good deeds, when imposing sentences); Further, overarching sentencing philosophies regarding the purpose of punishment inform sentencing decisions, and questions of deterrence, rehabilitation, incapacitation, and retribution thus lie behind the sentencing choices made by courts. See Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1145–46 (2013) (stating that “[p]ure consequentialists punish in order to promote crime deterrence and the incapacitation and rehabilitation of dangerous people” while “[r]etributivists, by contrast, usually require proportional punishment and always prohibit knowingly or recklessly punishing people in

explicitly strive to be race-neutral in the imposition of punishment on individual defendants.⁵¹ In doing so, courts lose an opportunity to address the racial disparities in the criminal justice system—and may even contribute to them, given critiques that purportedly neutral mitigating and aggravating factors play a role in perpetuating racial disparities in sentencing.⁵²

B. The Racial Implications of Disregarding Conditions of Confinement at Sentencing

What is rarely addressed at sentencing, even as judges and the attorneys practicing before them bear witness to the vast numbers of people incarcerated each year, are the conditions that incarcerated people are subjected to in our nation's prisons and jails.⁵³ While courts may recommend that the defendant receive mental health treatment or that he or she enter into a particular program available in the prison system, in general courts do not focus on the conditions that a convicted person will experience in his or her term of imprisonment or the adequacy of these recommended programs.⁵⁴ At sentencing, courts rarely consider whether the jurisdiction's prisons or jails are adequately staffed; whether prisoners within them commit suicide at high rates; whether medical care and mental health treatment is available or of sufficient quality; whether prisoners are frequently placed into solitary confinement, for how long, and for what reasons; whether a prisoner is likely to be sexually and/or physically assaulted; or, indeed, any aspect of the conditions that the convicted person may or will be subjected to while he or she is incarcerated.

The lack of attention to conditions of confinement at sentencing has a variety of possible explanations. While criminal courts are concerned about cruel and unusual punishment, the focus at sentencing is generally on the proportionality

excess of what they deserve"); see Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1053–59 (2012) (describing changes in theories of punishment from retribution to consequentialism—rehabilitation, deterrence, and incapacitation—back to the current focus on retribution).

51. Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 127 (2010) (noting that modern courts “express an explicit commitment” to imposing race-neutral sentences); see, e.g., *United States v. Kaba*, 480 F.3d 152, 156 (2d Cir. 2007) (quoting *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994)) (“A defendant’s race or nationality may play no adverse role in the administration of justice, including at sentencing.”).

52. See, e.g., Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (critiquing evidence-based tools for sentencing designed to predict recidivism as imprecise, misdirected, and representing “an explicit embrace of otherwise-condemned discrimination, sanitized by scientific language”).

53. See Strutin, *supra* note 5, at 1348 (“The criminal trial judge’s role is confined to setting a term of years with studied indifference to the conditions imposed by delegating to the jailer its total administration.”).

54. *Id.* at 1313–14 (“Every sentence to a term of years pronounced by a judge is incomplete. The length of time to be served is imposed without any mention or consideration of the conditions of confinement.”).

of sentence length, rather than contemplation of future suffering that the defendant may or may not endure in prison.⁵⁵ Further, while some state statutes and guidelines direct courts to consider whether the defendant would be unduly harmed by prison or jail conditions as a mitigating factor, such consideration is not universally required.⁵⁶ Criminal courts have little power to control prison conditions in any event,⁵⁷ and may also be unwilling to imagine theoretical future hardships that have not yet come to pass while making a sentencing determination. It is also possible that judges and lawyers in criminal courts, who are extremely unlikely to have been incarcerated themselves, are simply uninformed about the conditions of confinement in correctional facilities. As discussed further in Part IV below, there is a great deal of secrecy about what happens in our prisons and jails, which are highly restricted facilities, often located in remote areas with heavy limitations placed on prisoner communication, generally operated without neutral oversight bodies, and protected by laws that hamper prisoner litigation efforts and defer to prison officials. For all these reasons, it is not easy to know what takes place within prison walls.

There is evidence that courts have at least some knowledge, or at least assumptions, about the conditions in jails and prisons and that this information is used to justify giving non-carceral sentences in serious cases. Judges have at times even made explicit reference to the ways that conditions of confinement are shaping their decisions. In 2015, a judge in New Mexico informed an African American man before her for sentencing on a burglary conviction that, should he be sent to prison, he would be “beat up,” “raped every day,” and be forced to become “somebody’s bitch.”⁵⁸ A sentence to prison rather than probation, the court

55. Torti, *supra* note 5, at 1921–22 (explaining that when courts, in analyzing the proportionality of a sentence, consider the “harshness of the penalty,” the focus is exclusively on the length of the sentence).

56. See E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 152 (2013) (noting that “[s]ome, but not all, states recognize vulnerability to harm in prison as a mitigating factor in their statutory sentencing frameworks or sentencing guidelines”). However, courts might consider conditions of confinement under sentencing factors or philosophies that are not explicitly about those conditions. See, e.g., Strutin, *supra* note 5, at 1345 (“The mental status or physical condition of a defendant . . . can mitigate or eliminate punishment, and to some extent the criminal justice system factors in the sensitivity and vulnerability of persons sent into the prison system.”); Traum, *supra* note 7, at 448–49 (arguing that courts can consider the impact of mass incarceration at sentencing under the ordinary sentencing considerations of the defendant’s background and the “court’s task of imposing an ‘appropriate sentence’”).

57. E. Lea Johnston, *supra* note 5, at 626 (“Judges presently lack the authority to order any condition of confinement, or to prevent the imposition of a particular condition, even if they believe a condition is critical to the humaneness of an offender’s carceral sentence or to the effectuation of its objectives.”).

58. *Judge Gives Teen Harsh Warning, Describes What Would Happen to First-Time Offender in Prison*, (K-FOR TV television broadcast Oct. 20, 2015), available at <http://kfor.com/2015/10/30/judge-gives-teen-harsh-warning-describes-what-would-happen-to-first-time-offender-in-prison/> [<https://perma.cc/8CJG-3VQG>].

further opined, would cause the defendant “trauma” and “destroy [his] life.”⁵⁹ In 2016, in a case that garnered intense negative attention for its perceived racial and gender bias, a California judge sentenced a young white man convicted of sexual assault to jail for six months, justifying the imposition of the relatively short jail sentence despite the seriousness of the crime by stating that a prison sentence would “have a severe impact on him.”⁶⁰ That same year, a judge in Colorado sentenced a young white man convicted of sexual assault to a jail sentence, followed by a lengthy term of probation, after having contacted prison and jail officials to determine what treatment would be available to the defendant in confinement and expressing concern that he would not be provided an adequate opportunity for rehabilitation if incarcerated.⁶¹

There is also evidence that judges see poor conditions of confinement as positive and a reason to impose a carceral sentence. Advocates and academics have noted our cultural celebration of prison violence, particularly sexual violence, as vindication fit for particularly disturbing crimes.⁶² The United States prison system has ballooned under ‘tough on crime’ policies that require prisons to be harsh and even brutal places in order, at least theoretically, for them to perform their punitive function.⁶³ Judges are bound to uphold the constitutional

59. *Id.*

60. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?mcubz=0&_r=0 [https://nyti.ms/2k56YCs]. In another highly publicized case, a federal judge in New York sentenced a woman to probation rather than prison for a drug offense because the court determined that the extensive collateral consequences of her conviction were sufficient punishment for her crimes. The ruling, in the words of the defense attorney, involved consideration of “ramifications that a lot of people don’t even know about, much less consider, when they think about a person being sentenced.” Benjamin Weiser, *U.S. Judge’s Striking Move in Felony Drug Case: Probation, Not Prison*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/nyregion/in-a-striking-move-brooklyn-judge-orders-probation-over-prison-in-felony-drug-case.html> [https://nyti.ms/2jVJuA1].

61. Noelle Phillips, *Rapist’s Lenient Sentence Sparks Anger, Criticism*, THE DENVER POST, Aug. 13, 2016, at 18A (quoting Brie Franklin, executive director of the Coalition Against Sexual Assault, critiquing the court’s concern for the perpetrator: “[j]udges don’t make those types of considerations in other types of crimes, Franklin said. No one worries that a prison sentence will harm the future of a bank robber.”).

62. See Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 568–69 (2006) (discussing legal obstacles to prisoners seeking legal remedies for sexual assaults in prison, and noting the prevalence of joking references to prison rape in U.S. culture, which may be a sign that Americans believe incarcerated people deserve this kind of treatment).

63. See Porter, *supra* note 29, at 1 (noting that “the culture of punishment, in part driven by political interests leveraging ‘tough on crime’ policies and practices marketed as the solution to the ‘fear of crime,’ has been implemented at every stage of the criminal justice process: arresting, charging, sentencing, imprisonment, releasing, and post-incarceration experiences in the era of mass incarceration”).

prohibition against cruel and unusual punishment, but they are not immune from the cultural impulse that finds satisfaction in the concept of ‘prison justice.’⁶⁴

These examples demonstrate that prison conditions may influence judicial sentencing determinations, but that role remains largely unarticulated at the vast majority of sentencing proceedings. Silence about conditions of confinement at sentencing has troubling implications in the era of mass incarceration, in which people of color have borne the brunt of rising rates of imprisonment and thus are disproportionately exposed to the conditions of prisons and jails. Analysts of the American criminal justice system have argued that the disparate racial impact of mass incarceration is driven by a societal conviction that African American and Latino people are more criminally inclined and more dangerous than white people and that they therefore belong in prison more than white people do.⁶⁵ Because of the cultural narrative that African American and Latino people belong in prison,⁶⁶ courts are not called upon to interrogate the conditions of confinement and ask whether the defendant ought to be exposed to them. If such an inquiry is at bottom a determination of whether a particular person belongs in prison—whether prison will “destroy his life” and whether or not that matters—societal understandings about race and crime that underlie mass incarceration have already answered that question: such exposure is simply what people of color deserve because of who they are.

The pervasive silence about prison conditions at sentencing is concerning, because it reflects larger systemic silence about the racial inequities and biases that have contributed to the disparity in incarceration rates. If prison conditions are invisible and unaddressed at sentencing, the court and other actors in the justice system can more easily avoid explicit consideration of the sentencing laws and norms, along with cultural and individual biases, that contribute to the assumption that African American and Latino people are more deserving of incarceration and the conditions that accompany it.

64. See, e.g., *Cecil New Sentenced to “Prison Justice”*, (WDRB Fox 41 television broadcast Dec. 21, 2010), <http://www.wdrb.com/story/13702615/cecil-new-sentenced-to-prison-justice> (noting that a Kentucky court, when sentencing a man convicted of murdering a child, stated that “life in the general population would be ‘hell’ . . . , adding that, ‘death is easy’ but that, “[l]iving outside of death row in general population in fear of prison justice every day is a hell more suited to you”).

65. See, e.g., Jonathan Rapping, *What About Those Who Speak for the Voiceless? By Ignoring Public Defenders, the Democratic Party Platform Can’t Ensure Equal Justice*, NAT’L ASS’N FOR PUB. DEF. (July 25, 2016), <http://www-old.publicdefenders.us/?q=node/1115> [<https://perma.cc/G257-SVJ2>] (“Most police, prosecutors, and judges are not intentionally acting to subvert justice. They have been shaped by a criminal justice narrative that sees poor people, and people of color, as dangerous. They have embraced a world-view that sees our most marginalized communities as needing to be monitored, punished, and controlled.”).

66. As Professor Michelle Alexander has explained, “mass incarceration is predicated on the notion that an extraordinary number of African Americans (but not all) have freely chosen a life of crime and thus belong behind bars . . . their imprisonment can be interpreted as their own fault.” ALEXANDER, *supra* note 10, at 248.

IV.

DEFENSE LAWYERS AS ADVOCATES AND ABOLITIONISTS

While criminal defense lawyers serve individual clients, their role offers particular opportunities and incentives to address larger questions of racial injustice and other inequities in the criminal justice system.⁶⁷ Criminal defense lawyers, according to the American Bar Association's Criminal Justice Standard for the Defense Function, have a duty both to act as their client's "counselor and advocate with courage and devotion" and "to seek to reform and improve the administration of criminal justice."⁶⁸ Scholars have noted that, in representing an individual charged with a crime, the criminal defense lawyer also stands up against unconstitutional and unethical behavior by police officers, prosecutors, and judges.⁶⁹ Defense lawyers have an opportunity to address racial injustices as well. Although defense lawyers cannot "use the client as a vehicle to effect social change if the client does not share that goal,"⁷⁰ a client-centered defense lawyer has multiple opportunities, albeit potentially risky ones, to explicitly raise questions of racial discrimination and bias throughout the course of a criminal case.⁷¹ Indeed, the interconnection between race and the enforcement of the criminal law is so complex and entrenched that "there may well be racial significance in every defense theory, every defense strategy, every defense."⁷²

Sentencing provides a particularly rich opportunity for defense lawyers to advocate for individual clients while addressing larger questions of social and racial injustice. At sentencing, a powerful narrative on the client's behalf can

67. See, e.g., Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1016–19 (2013) (discussing how defense lawyers, while owing "a duty of fidelity to one individual; the client," might, with the client's permission, undertake "strategies . . . to combat the disparate racial impact fostered by the effects of [implicit racial bias]" in the criminal justice system); *But cf.* Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2238 (2013) (contending that the constitutional right to counsel in criminal cases "has not been and likely cannot be a remedy for systemic racial disproportionality in the criminal justice system").

68. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION S. 4–1.2, (AM. BAR. ASS'N 1993), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfnc_blk.html#1.1 [<https://perma.cc/E3J9-64SE>].

69. Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, CHAMPION, June 2012, at 38, 38 ("Defense counsel might accurately be considered law enforcers. While representing a lone individual against the all the power of the state," defense lawyers must ensure that police officers, prosecutors, and judges are adhering to their constitutional, professional, and ethical obligations.).

70. See Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2263 (2014).

71. See Robin Walker Sterling, *Raising Race*, CHAMPION, Apr. 2011, at 24, 24 (suggesting ways in which defense lawyers can incorporate considerations of race into various aspects of client representation).

72. Abbe Smith, *Burdening the Least of Us: 'Race-Conscious' Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1595, 1601 (1999).

impact the court's decision-making in significant ways.⁷³ By drawing on the powerful storytelling traditions common to all societies, defense lawyers have an opportunity to craft an emotionally and factually persuasive narrative at sentencing.⁷⁴ In so doing, defense lawyers can seek to disrupt the "cookie cutter calculations" of routine sentencing hearings and center the hearing on their client's story, so that "not only should judges agonize over the proper sentence in each case, but they must truly feel the client's pain as they do so."⁷⁵ Although many defense lawyers labor under the heavy caseloads endemic to public defender's offices and suffer from insufficient resources,⁷⁶ all defense attorneys should nevertheless undertake the significant effort required to develop emotionally and factually persuasive sentencing narratives.⁷⁷ This effort requires lawyers to understand and incorporate the facts of the offense; its impact on society and the complaining witness, if one exists; and the role their client played, if any, within it.⁷⁸ Defense lawyers must gather information about the client's character, work history, mental and physical health, educational struggles and achievements, potential for a positive and law-abiding future, and a host of other facts in order to credibly advance the client's sentencing goals.⁷⁹ In so doing, criminal defense lawyers must be mindful of their own biases and prejudices, while also seeking to comprehend, and perhaps articulate to the court, the racial and economic ineq-

73. Thomas P. Gressette Jr., *A Practical Guide to Storytelling at Sentencing*, CHAMPION, Jan. 2009, at 16, 16 (arguing that "[y]our clients stand to gain or lose freedom in direct proportion to the story you tell for them").

74. See, e.g., Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1606, 1616 (2015) (urging criminal defense lawyers to employ narrative to "convey the human context of stop and frisk" and noting that "[s]cholars have long recognized that narrative has the power to make human experience accessible and universal and that it can reveal social inequities in a way that stimulates change").

75. Doug Passon, *Using Moving Pictures to Build the Bridge of Empathy at Sentencing*, CHAMPION, June 2014, at 14, 14.

76. RACIAL DISPARITIES REPORT, *supra* note 22, at 7 (reporting that an average state or local public defender handles 371 cases a year, and over 70% of public defender offices reported that a lack of adequate funding and low salaries hindered their ability to provide services to their clients).

77. Hugh M. Mundy, *It's Not Just for Death Penalty 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 (2013) (discussing the thorough investigation required to prepare for sentencing in capital cases, and the ways in which that evidence "must be transformed into a coherent, compelling, and comprehensive narrative of the defendant's life," and advocating for the value of such an investigation in non-capital cases).

78. See, e.g., Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 CLINICAL L. REV. 187, 191, 204–06 (2008) [hereinafter Thomas, *Sentencing*] (discussing the complexities of developing a case theory for sentencing).

79. See, e.g., THE SENTENCING PROJECT, THE THINKING ADVOCATE'S LIST OF MITIGATING FACTORS, http://lobby.la.psu.edu/049_Criminal_Justice_Reform/Organizational_Statements/Sentencing%20Project/SP_Mitigating_frna.pdf [<https://perma.cc/RC9G-6LNS>] (last visited Oct. 15, 2017) (including factors such as the defendant's role in the offense, lack of violence in the offense, the client's character and employment and educational background, and recent positive conduct during the course of the case).

unities as well as cultural influences that may have impacted their client's life. This effort can provide the court with information that acts to center and humanize the convicted person and disrupt judicial inclinations, be they implicit or overt, to base sentences on conclusions derived from bias.⁸⁰

A. Raising Incarceration Conditions as an Advocacy Tool

Defense lawyers have been encouraged to incorporate information about the punishment that may be imposed upon their clients, including the collateral consequences of convictions, into their sentencing advocacy.⁸¹ Despite this increased attention to sentencing consequences, the jail and prison conditions to which the person would be exposed if incarcerated remain largely unaddressed. Although it can be challenging to gather such information—this Article will offer thoughts about how to do so in Part IV—the story told on the client's behalf at sentencing is arguably incomplete if it doesn't incorporate what might happen to that person in prison or jail. By incorporating information about conditions of confinement into sentencing narratives, a criminal defense lawyer can argue for shorter sentences or against imprisonment altogether, particularly if he or she can help courts connect concerns about such conditions to the factors and goals that guide judicial decision-making at sentencing.

Defense lawyers can introduce data about prison and jail conditions that could help the court understand systemic issues in incarceration settings and the likelihood that the defendant would be exposed to them. Information about the number of people who have died in custody—in Texas, for example, more than 7,000 people died in jails and prisons between 2005 and 2016⁸²—can paint a picture about the dangers of incarceration. Information about the rate of suicide and attempted suicide in the incarcerated population may also be valuable for sentencing courts to understand.⁸³ In Arizona's prison system, for example, al-

80. Rapping, *supra* note 65 (stating that defense lawyers must provide courts with information “necessary to understand the whole person and to counteract the human instinct to judge based on stereotypes and biases”).

81. See, e.g., Gabriel Chin, *What Are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH. L. REV. 151 (2012) (urging defense lawyers to incorporate considerations of collateral consequences into various aspects of client representation); McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479 (2005) (arguing that defense lawyers should take collateral consequences into account in their representation and providing advice as to how to do so).

82. TEXAS JUSTICE INITIATIVE, <http://texasjusticeinitiative.org/> [<https://perma.cc/VDM4-HKAA>] (last visited Oct. 25, 2017) (tracking the cause of death for each of the 7,729 people who died in custody in Texas from 2005–2016; “the top three causes of death in custody were natural causes/illness, suicide, and justifiable homicide,” and over 2,100 had not been convicted of a crime).

83. See *Deaths in Custody Reporting Program*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=19> [<https://perma.cc/X6WF-34UZ>] (last visited Sept. 17, 2017) (collecting data on deaths that occur in the process of arrest, or in local jails or state prisons).

most 500 prisoners made attempts to harm or kill themselves in 2015.⁸⁴ Defense lawyers may wish to present information about violence in the prison system; in 2011–2012, approximately 4% of prisoners in state and federal prisons, and 3.2% of those in jails, reported having being sexually assaulted by other prisoners or members of the staff in the past twelve months.⁸⁵ Defense attorneys also could consider the benefits of presenting data about prison populations, rates of assault, understaffing, or the number of medical personnel in a particular facility.⁸⁶

While data are a helpful resource, attorneys can also think broadly about the incarceration experience in order to highlight diverse aspects of imprisonment beyond statistical evidence. Defense lawyers might highlight possible dangers involved in transporting prisoners to prison, journeys in which incarcerated people have spent days traveling in the back of enclosed vans, without access to bathrooms or medical care, and have died or been seriously injured as a result.⁸⁷

84. Lily Lieberman, *Hundreds of Arizona Inmates Have Used Razors, Drugs In Self Harm or Suicide Attempts*, KTAR NEWS (Mar. 29, 2016), <http://ktar.com/story/989998/report-hundreds-of-arizona-prison-inmates-attempted-suicide-in-2015/> [<https://perma.cc/66VR-U4FP>]. Similar incidents are happening in other jails and prisons throughout the country. See, e.g., Matt Zapotosky & Mark Berman, *This Jail is So Troubled That Prisoners Are Hurting Themselves to Get Away From It*, WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/04/25/this-jail-is-so-troubled-that-prisoners-are-hurting-themselves-to-get-away-from-it/?utm_term=.9b5d52d5660a [<https://perma.cc/P676-AQJ7>] (describing 50 suicide attempts in eleven weeks in 2016 in the Orleans Parish, Louisiana, jail); Derek Gilna, *Suicides, Poor Conditions at D.C. Jail Remain Critical Issues Despite Progress*, PRISON LEGAL NEWS (Feb. 29, 2016), <https://www.prisonlegalnews.org/news/2016/feb/29/suicides-poor-conditions-dc-jail-remain-critical-issues-despite-progress/> [<https://perma.cc/KA3Q-8CCY>] (reporting that 165 prisoners had attempted suicide in the D.C. Jail since 2011).

85. BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, NATIONAL INMATE SURVEY 2011–2012 6 (May 2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<https://perma.cc/X2GC-J76Q>].

86. See generally INMATE RACE STATISTICS, *supra* note 17; MASS INCARCERATION: THE WHOLE PIE, *supra* note 2; Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 22 J. CORRECT. HEALTH CARE 58, 58 (2009) (reporting that almost 21% of male prisoners studied had been physically assaulted by other prisoners or by prison staff in a six month period, and between 2 and 5% of prisoners was sexually assaulted in the same time frame); Kevin Johnson, *Nurses Thrust Into Guard Duty at Federal Prisons*, USA TODAY (Apr. 26, 2016), <https://www.usatoday.com/story/news/nation/2016/04/26/nurses-federal-prisons-public-health-service-security/83517298/> [<https://perma.cc/VQ3D-XRJL>] (reporting that medical staff have been “routinely assigned guard duties and other security-related shifts to fill chronic personnel gaps”).

87. Eli Hager & Alysia Santo, *Inside the Deadly World of Private Prisoner Transport*, THE MARSHALL PROJECT (July 6, 2016), <https://www.themarshallproject.org/2016/07/06/inside-the-deadly-world-of-private-prisoner-transport#NOS0HYRbl> [<https://perma.cc/4ZVN-LH3V>] (reporting on the death of four prisoners and the hardships inflicted on others during transportation trips with the private contractor Prisoner Transportation Services of America); Eli Hager & Alysia Santo, *Another Death on a For-Profit Extradition Vehicle*, THE MARSHALL PROJECT (Mar. 23, 2017), <https://www.themarshallproject.org/2017/03/23/another-death-on-a-for-profit-extradition-vehicle#.mSChqfN9r> [<https://perma.cc/R568-68KF>] (reporting on the conditions that incarcerated

Defense lawyers might inform the court about issues with polluted water,⁸⁸ contaminated food,⁸⁹ excessive heat or cold,⁹⁰ or the fact that local jails or prisons are built on property that is environmentally unsafe.⁹¹ In juvenile settings, lawyers may also wish to gather information about the schooling provided in detention, including the curriculum and teacher training and turnover; in adult facilities, lawyers might find it useful to obtain information about the availability of educational or job training programs.⁹² Evidence about inadequate medical care,⁹³ violence against those with mental illnesses,⁹⁴ the use of solitary con-

people experience on private transport vans, as well as the death of a man who repeatedly sought medical attention from van operators who ignored his requests).

88. See, e.g., Dee J. Hall, *Water Tainted with Lead, Copper at Two Wisconsin Prisons*, POST-CRESCENT (Apr. 10, 2016), <http://wisconsinwatch.org/2016/04/water-tainted-with-lead-copper-at-two-wisconsin-state-prisons/> [<https://perma.cc/JTA3-9MT6>] (citing reports of water contaminated with lead and copper at two state prisons).

89. See, e.g., Alan Johnson, *Maggots Found in Food in Two Ohio Prisons*, THE COLUMBUS DISPATCH (July 8, 2014), <http://www.dispatch.com/article/20140707/NEWS/307079843> [<https://perma.cc/GD7F-83JN>] (reporting several incidents of maggots in food meant for prisoner consumption).

90. See, e.g., Matt Clarke & David M. Reutter, *Heat-Related Deaths in Texas Prisons Lead to Lawsuits, Reluctant Changes*, PRISON LEGAL NEWS (Aug. 8, 2014), <https://www.prisonlegalnews.org/news/2014/aug/8/heat-related-deaths-texas-prisons-lead-lawsuits-reluctant-changes/> [<https://perma.cc/SM5Q-TMW6>] (describing recent lawsuits challenging excessive heat in Texas prisons, which has been linked with the deaths of at least 14 people since 2007); Alysia Santo, *It's Not the Heat: Prisoners Are Dying of Cold – Why?*, THE MARSHALL PROJECT (Dec. 9, 2014, 3:45 PM), <https://www.themarshallproject.org/2014/12/09/it-s-not-the-heat> [<https://perma.cc/LHW8-E569>].

91. Panagioti Tsolkas, *Incarceration, Justice, and the Planet: How the Fight Against Toxic Prisons May Shape the Future of Environmentalism*, PRISON LEGAL NEWS (June 3, 2016), <https://www.prisonlegalnews.org/news/2016/jun/3/incarceration-justice-and-planet-how-fight-against-toxic-prisons-may-shape-future-environmentalism/> [<https://perma.cc/LDV8-4C7D>] (discussing environmental issues at prisons, including “black mold infestations, contaminated water, hazardous waste and sewage overflows”).

92. See, e.g., Donna Macomber, Thomas Skiba, Jaime Blackmon, Elisa Esposito, Lesley Hart, Elisa Mambrino, Thompson Richie & Elena L. Grigorenko, *Education in Juvenile Detention Facilities in the State of Connecticut: A Glance at the System*, 61 J. CORREC. EDUC. 223 (2010) (discussing “challenges inherent to any detention or correction setting: complicated systems of oversight, high staff turnover, a shortage of resources, difficulties obtaining educational records of detained or incarcerated students, and the competing priorities of education and security”); LOIS M. DAVIS, ROBERT BOZICK, JENNIFER L. STEELE, JESSICA SAUNDERS & JEREMY N. V. MILES, RAND CORPORATION, *EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS* (2013), https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf [<https://perma.cc/5RFP-FBXX>] (determining the correlation between correctional education and recidivism as well as rates of future employment).

93. Elizabeth Stuart, *Lack of Adequate Health Care Is a Death Sentence for Arizona Inmates*, PHOENIX NEW TIMES (May 17, 2016), <http://www.phoenixnewtimes.com/news/lack-of-adequate-health-care-is-a-death-sentence-for-arizona-inmates-8300897> [<https://perma.cc/AG78-AWPS>] (reporting the death of a woman who received inadequate medical care for her cervical cancer while in custody, along with reports of inadequate or absent medical care throughout the prison system); *Paying the Price: Failure to Deliver HIV Services in Louisiana Parish Jails*, HUMAN RIGHTS WATCH (Mar. 29, 2016), <https://www.hrw.org/report/2016/03/29/paying-price/failure->

finement and the mental and physical harms associated with such use,⁹⁵ the length of waiting lists for treatment programs, and the treatment of disabled prisoners⁹⁶ might help advance the client's sentencing goals in some cases.

Defense lawyers could also contemplate providing the court with information about troubling, sometimes even harrowing, individual events that have occurred in local jails and prisons. By discussing a brutal attack by a correctional officer or prisoner or an incident where a prisoner's health needs were ignored, lawyers can argue that these individual occurrences are indicative of systemic issues within the correctional facilities in which the defendant might be incarcerated. Unfortunately, examples are numerous. In Oregon, an injured man was left alone in a cell for hours without medical attention, despite multiple requests for help, leading to his death.⁹⁷ In California, three prison guards were convicted of murder for a brutal assault on a mentally ill prisoner while he screamed for his life; one of the officers involved in the incident had sent a series of texts that referred to prisoners being "twisted up," "kicked," "slapped," and "beaten . . . down."⁹⁸ In Utah, at least 416 prisoners have died in custody since 2000, among them a woman who died from heavy internal bleeding⁹⁹ and another who hanged

deliver-hiv-services-louisiana-parish-jails [https://perma.cc/TY2V-7NZ3] (reporting that HIV care in the jails is "limited, haphazard, and in many cases, non-existent").

94. See, e.g., *United States: Force Against Prisoners with Mental Illness: Pain and Punishment for Symptoms Behind Bars*, HUMAN RIGHTS WATCH (May 12, 2015), <https://www.hrw.org/news/2015/05/12/united-states-force-against-prisoners-mental-illness> [https://perma.cc/MYT5-6AXB] (reporting the use by jail and prison staff of "unnecessary, excessive, and even malicious force" against mentally ill prisoners); Eyal Press, *Madness: In Florida Prisons, Mentally Ill Inmates Have Been Tortured, Driven to Suicide, and Killed By Guards*, THE NEW YORKER (May 2, 2016), <http://www.newyorker.com/magazine/2016/05/02/the-torturing-of-mentally-ill-prisoners> (discussing the serious abuse of mentally ill prisoners by prison guards in Florida prisons).

95. See generally LISA GUENTHER, *SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES* (Univ. of Minn. Press 2013) (describing the history, circumstances, and destructive mental and medical consequences of solitary confinement).

96. See, e.g., Rachael Seevers, *Making Hard Time Harder: Programmatic Accommodations for Inmates with Disabilities Under the Americans with Disabilities Act*, AVID PRISON PROJECT (June 22, 2016), <http://avidprisonproject.org/Making-Hard-Time-Harder/> [https://perma.cc/EU4J-PGYM] (reporting extensive violations of the ADA, including denial of accommodations such as accessible showers and toilets, therapeutic diets, or assistance with daily needs; in addition, disabled prisoners receive longer sentences, more sanctions in prison, and less access to programming than do other prisoners).

97. Max Bernstein, *Inmate Who Died in Jail Tried to Get Help 19 Times Over Five Hours*, THE OREGONIAN (May 11, 2017), http://www.oregonlive.com/portland/index.ssf/2017/05/yamhill_county_jail_inmate_ass.html [https://perma.cc/T3E5-HWRR].

98. Tracey Kaplan & Robert Salonga, *Michael Tyree Jury: San Jose Jail Guards Convicted of Murdering Mentally Ill Inmate*, THE MERCURY NEWS (June 2, 2017), <http://www.mercurynews.com/2017/06/01/breaking-jury-reaches-verdict-in-san-jose-jail-guard-murder-case/> [https://perma.cc/R6CD-2YJQ].

99. Taylor W. Anderson, *Jail Staff Missed Signs of Davis County Inmate's Fatal Internal Injury*, THE SALT LAKE TRIBUNE (May 12, 2017), <http://www.sltrib.com/news/2017/05/12/jail-staff-missed-signs-of-davis-county-inmates-fatal-internal-injury/> [https://perma.cc/7M6W-5FX7].

herself after allegedly being denied her mental health medications, neither of whom received medical attention.¹⁰⁰ In Oklahoma, a paralyzed man was denied medical attention for over fifty hours as he lay on the floor of a cell, where he eventually died.¹⁰¹

Not every prisoner is exposed to such extreme conditions, and certainly some prisons and jails have introduced programs and policies managed by competent professionals. Some have engaged in important reform efforts, such as reduction in reliance on solitary confinement or innovative programming.¹⁰² Defense attorneys may find it helpful to present information about those positive developments to the court as well, perhaps in arguments for a shorter sentence based on increased chances for rehabilitation due to participation in a productive program. Despite improvements in some prisons or throughout some systems, however, most prisoners can expect, at best, to serve their sentences in facilities that provide little to nothing in the way of meaningful educational or employment training, far from family and friends, with limited medical and mental health care.

These facts matter at sentencing, because they, along with length, define the contours of a sentence. Defense lawyers can link these conditions to the factors considered by courts when imposing sentences, including the purpose of sentencing,¹⁰³ the characteristics of the defendant, and the kinds of sentences available. They may argue that such conditions make incarceration unnecessarily punitive for particularly vulnerable defendants; Professor E. Lea Johnston has

100. Taylor W. Anderson, *Dying Behind Bars: Exploring a Series of Questionable Deaths in Utah Jails*, THE SALT LAKE TRIBUNE (Mar. 26, 2017), <http://archive.sltrib.com/article.php?id=5095207&itype=CMSID> [<https://perma.cc/2YE3-SQZ4>].

101. Curtis Killman & Kyle Hinchey, *Jury Awards \$10.2 Million Dollars to Elliott Williams's Estate After Death in Tulsa Jail*, TULSA WORLD (Mar. 21, 2017), http://www.tulsaworld.com/homepagelatest/jury-awards-million-to-elliott-williams-estate-after-his-death/article_f16bb091-7caf-5c4d-bd60-ece84a1a615e.html [<https://perma.cc/BV3Z-EAY8>].

102. See, e.g., Bill Keller, *A Prison That Offers Hope*, TIME (June 30, 2016), <http://time.com/4389086/a-prison-that-offers-hope/> [<https://perma.cc/H322-DZE9>] (describing volunteer-run programs at San Quentin Prison that include music classes, yoga, meditation, and college courses); *Milestones in Solitary Reform*, SOLITARY WATCH, <http://solitarywatch.com/resources/timelines/milestones/#> [<https://perma.cc/5NMY-J4ZB>] (last visited Nov. 19, 2017).

103. Scholars who have called for courts to consider conditions of confinement at sentencing have persuasively argued that a failure to do so is troubling in part because it impedes the court in achieving its sentencing goals. The court cannot evaluate, for example, whether a particular person can be rehabilitated in a prison system that is notoriously violent, nor can it determine whether the risk of sexual assault or lack of mental health treatment transforms a proportionately punitive sentence to one of usual cruelty. See, e.g., Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (arguing that courts cannot evaluate whether a sentence is proportional without considering the defendant's subjective experience of the particular punishment imposed); E. Lea Johnston, *supra* note 5, at 151 (contending that the particular vulnerability of mentally ill people is "morally important and, if present above a certain threshold, should factor into sentencing to effectuate proportionate punishment"); Torti, *supra* note 5 (stating that courts cannot evaluate whether a punishment is proportional without considering how conditions of confinement contribute to the severity of the sentence).

addressed how such an argument might help convicted people with severe mental health concerns.¹⁰⁴ As other scholars have noted, they might also seek to persuade the court that severe sanctions make an incarceration sentence disproportionate to the crime for which the defendant was convicted,¹⁰⁵ or that the severity of the conditions merit a shorter incarceration sentence than the court might otherwise impose.¹⁰⁶ Defense lawyers can demonstrate that both the defendant, and by extension, society, might be harmed by exposing the defendant to violence, lack of mental health care, or other deprivations of our penal institutions instead of allowing him or her to remain in the community. Courts may even be swayed against incarceration if, as some scholars have suggested, they look beyond the conditions of imprisonment itself to consider the larger community devastation brought about by mass incarceration.¹⁰⁷ For all these reasons and more, defense lawyers may consider information about conditions of confinement to be a useful tool in the creation of effective sentencing narratives on behalf of their convicted clients.¹⁰⁸

There are of course risks to raising conditions of confinement at sentencing, as discussed further in Part IV, and defense lawyers and their clients may therefore choose not to raise these concerns at sentences. But when prison and jail conditions are never addressed, an opportunity for effective sentencing advocacy may be lost. Without that information, the court cannot accurately weigh the sufficiency or severity of the punishment it seeks to impose. Further, silence in the sentencing court about conditions of confinement perpetuates secrecy surrounding institutions which disproportionately affect people of color. By shedding light on the nature of the institutions of mass incarceration, lawyers can participate in the effort to dismantle them. They can, in other words, act as both advocates and abolitionists.

B. Raising Incarceration Conditions as an Abolitionist Tool

Scholars and practitioners have called for a prison abolitionist movement. The concept of prison abolition can incorporate the goal of eradicating prisons

104. See generally E. Lea Johnston, *supra* note 5; see also Robinson, Jackowitz & Bartels, *supra* note 50, at 760 (noting that while “[s]uffering from an offender’s official punishment is rarely a ground for mitigation,” courts may consider whether “[h]ardship beyond that typically inherent in and intended by a sentence may be used as a mitigating factor”).

105. See Strutin, *supra* note 5, at 1364; see generally Torti, *supra* note 5.

106. See E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 475–76 (2015) (using mentally ill prisoners as an example, arguing that judges could modify or reduce sentences “in recognition that a shorter prison term under harsh conditions roughly equates to a longer term under gentle conditions”).

107. Traum, *supra* note 7.

108. But see Scott, *supra* note 45 (calling into question whether “information sharing” at sentencing has any meaningful impact on judicial decision-making).

entirely,¹⁰⁹ but it also can reference a spectrum of responses to mass incarceration that include a “gradual project of decarceration” during which imprisonment is replaced by other sentencing options or reduced through a series of legal and social reforms.¹¹⁰ Many prison abolitionists make explicit connections between mass imprisonment and racial injustice as they seek to end or decrease our criminal justice system’s reliance on incarceration and its disparate impact on people of color.¹¹¹ By raising conditions of confinement at sentencing, defense lawyers can potentially strengthen their sentencing advocacy for their individual clients. By encouraging courts to avoid or limit incarceration sentences and by making hidden prison conditions visible, defense lawyers are also acting as agents of prison abolitionism.

Not everyone would agree that criminal defense lawyers should take on an abolitionist role in the course of representing a client. Some may argue that the obligation of defense counsel is solely to the individual client, or that such efforts are best left to activists outside the courtroom. Others might add that defense lawyers already have a heavy burden in zealously representing an individual against the state without adding to it the onus of larger social and criminal justice reform. Because the majority of defense lawyers have not been incarcerated and are not people of color, others might suggest that they may be ill-equipped to effectively identify and address systemic racial inequities in our systems of imprisonment. Some may feel that it would be more just for others in the system—lawmakers, judges, and prosecutors among them¹¹²—to bear responsibility for dismantling the system of mass incarceration that they helped create.

109. See Press Release, Nat’l Lawyers Guild, NLG Adopts Resolution Supporting Prison Abolition (Dec. 17, 2015), <https://www.nlg.org/nlg-adopts-resolution-supporting-prison-abolition/> [<https://perma.cc/6XYF-S399>] (announcing that the National Lawyers Guild is seeking “the dismantling and abolition of all prisons and of all aspects of systems and institutions that support, condone, create, fill, or protect prisons”).

110. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015) (discussing a “prison abolitionist ethic” that consists of “a framework of general decarceration, which entails a positive substitution of other regulatory forms for criminal regulation”).

111. See, e.g., Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 263 (2007) (employing a theoretical framework which describes the criminal justice system as “refashion[ing] past regimes of racial control to continue to sustain white supremacy” and calling for the abolition “of criminal justice institutions with direct lineage to slavery and Jim Crow”).

112. See, e.g., Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295 (2013) (outlining ways in which the U.S. Sentencing Commission has contributed to mass incarceration at the federal level, and suggesting ways the Commission could now contribute to the reduction in prison populations); Alkon, *supra* note 25 (describing the role that prosecutorial charging discretion has played in the growth of mass incarceration, and suggesting reforms to limit that discretion); Richard A. Oppel, Jr., *States Trim Penalties and Prison Rolls, Even as Sessions Gets Tough*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/states-prisons-crime-sentences-jeff-sessions.html> [<https://nyti.ms/2ruf4Z2>] (discussing state reform efforts aimed at reducing mass incarceration).

These viewpoints are worth consideration, and certainly defense lawyers alone cannot bring an end to the systemic reliance on imprisonment. But because defense lawyers are in regular contact with incarcerated and formerly incarcerated people, they are particularly well-positioned to understand the impact of mass incarceration on imprisoned people and the larger community, the disproportionate nature of that impact on people of color, and the realities of what happens to people incarcerated within our prisons and jails.¹¹³ Defense attorneys, scholars, and activists for criminal justice reform have explicitly called on defense lawyers to “confront[] and nam[e] race in the lawyering and criminal justice process, and recast[] racial identity and narrative in the defense of clients and communities of color.”¹¹⁴ In the words of one criminal defense leader, “I am convinced that through individual representation, our nation’s public defenders are the soldiers who are most likely to usher in a racially just system.”¹¹⁵ Despite these admonishments, defense lawyers should not raise conditions of confinement, at sentencing or elsewhere, if doing so runs a serious risk of harming their client, and in no case without obtaining his or her permission after a discussion of the potential risks and benefits of such a strategy. Errors of defense counsel are frequently visited upon the client.¹¹⁶ But if raising conditions of confinement may assist in effective sentencing advocacy, and if the client consents, then defense lawyers ought to do so while also embracing the opportunity to engage in an abolitionist act.

1. Incarceration and Enslavement

Lawyers can learn lessons about storytelling at sentencing as an act of advocacy and as agent for social change by looking to narratives that advanced these goals in other contexts. Though certainly there are others,¹¹⁷ slave narratives are

113. See Amber Baylor, *Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 6 (2015) (arguing criminal defense lawyers are “in a unique position to expose” conditions of confinement because of their routine contact with their clients in incarceration settings).

114. Anthony V. Alfieri, *Objecting to Race*, 27 GEO. J. LEGAL ETHICS 1129, 1157 (2014).

115. Jonathan Rapping, *Can We Be Committed to Both the Client and the Cause?: Promoting Racial Justice Through Individual Representation*, NAT’L ASS’N FOR PUB. DEF. (Jan. 20, 2014), <http://www-old.publicdefenders.us/?q=node/179> [<https://perma.cc/KSW2-KWDM>].

116. See generally Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2014 (2003) (arguing that “federal trial judges deter criminal defense attorneys from engaging in what the judges perceive to be overzealous advocacy by imposing harsher sentences on their clients”); see generally Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts*, 92 CAL. L. REV. 425 (2004) (documenting the ways in which federal criminal defense lawyers altered their sentencing advocacy for fear that such advocacy would be imputed against clients).

117. Texts that exposed factory conditions or which laid bare the horrors of the holocaust, all serve, like slave narratives, to make hidden injustices visible in order to bring about social and political change. See, e.g., ELIE WIESEL, *NIGHT* (Marion Wiesel trans., Hill and Wang 2006); UPTON SINCLAIR, *THE JUNGLE* (Penguin Books 2006).

one example of texts that sought to expose the nature of a hidden institution in order to dismantle it. ‘Slave narratives’ is a term used to describe written works published in the 18th and 19th centuries, authored by formerly enslaved people themselves or told to others, which usually describe the experiences the person endured in slavery and the author’s eventual escape to freedom.¹¹⁸ By telling their own life stories, authors of slave narratives sought to disrupt stereotypes of African people or people of African descent as lazy, untrustworthy, and dangerous by demonstrating that they themselves were resourceful, intelligent, and brave.¹¹⁹ These authors also sought to bring about the abolition of slavery by revealing the cruelties and deprivations of an institution that was often hidden from public view.¹²⁰ Slave narratives are not a perfect analogy for sentencing advocacy by any means; the fact that defense lawyers are speaking on behalf of their clients at sentencing while the authors of slave narratives spoke for themselves is no small difference. But slave narratives do represent a storytelling tradition that served both to shed light on the conditions of an unjust, racialized institution and to humanize the people placed within it.

One does not need to equate slavery with incarceration in order to draw lessons about sentencing advocacy from the history and structure of slave narratives. Both critics of and participants in the criminal justice system have resisted comparisons between slavery (and Jim Crow laws) and imprisonment. Some find such comparisons to be overblown; there is never justification for slavery, after all, while even strong critics of mass incarceration might agree that some incarcerated people have committed acts that justify removal from society and other social consequences.¹²¹ Others have critiqued such efforts as under-inclusive, as the analogy fails to incorporate the disproportionate impact of incarceration on people of color other than African Americans or the important fact that a signifi-

118. See William L. Andrews, *Introduction* to THE CIVITAS ANTHOLOGY OF AFRICAN AMERICAN SLAVE NARRATIVES 1, 2–7 (William L. Andrews & Henry Louis Gates, Jr. eds., Civitas/Counterpoint 1999) [hereinafter CIVITAS ANTHOLOGY] (describing antebellum slave narratives as stories that “portray[] slavery as a condition of extreme physical, intellectual, emotional, and spiritual deprivation,” in which the author, often after experiencing a “personal crisis,” then “undertakes an arduous quest for freedom that climaxes in his or her arrival in the North”). The University of North Carolina at Chapel Hill has compiled an extensive online collection of slave narratives. See DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/neh/> [<https://perma.cc/V742-EQQ8>] (last updated Jan. 13, 2018).

119. See Nichols, *supra* note 8, at 156 (“The narrators’ protests against enslavement, their courageous flight to freedom gained the admiration of Northern readers. . . . Sensitive readers of the narratives . . . would begin to see that Negroes were not unlike themselves [and] . . . shared with them the ordinary feelings of human beings.”).

120. See *id.* at 155 (“The systematic exploitation of Negro labor began to be more clearly seen, and the myth of the patriarchal institution began to fade.”).

121. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (arguing that the analogy between incarceration and Jim Crow laws, while useful in many ways, is flawed for reasons including the lack of attention paid to the violent crimes for which a substantial portion of the prison population are incarcerated).

cant (although not proportionate) percentage of incarcerated people are white.¹²² Many people maintain that prisoners are incarcerated because of poor choices they made, and those choices and their consequences cannot be analogized to the wholesale kidnapping and brutal enslavement of innocent people. And, as others have noted, while multiple generations of a family may experience incarceration, one is not born into incarceration as children of slaves were born into slavery.¹²³ Even for those who hold these views, slave narratives have lessons to teach about the power of storytelling as an act of advocacy and abolition.

But for those who see parallels between slavery and incarceration, that connection can provide a deeper resonance to the study of slave narratives. Indeed, some have referred to slave narratives as “a voice from the prison house,”¹²⁴ and texts written by prisoners about their incarceration experience have frequently been compared to slave narratives.¹²⁵ While slavery and incarceration are not identical institutions, scholars, attorneys, and others have persuasively argued that they both emerge from the same source and share a variety of features. For many, the pervasive racial disparity in our criminal justice system has compelled the conclusion that mass incarceration, like slavery and Jim Crow laws before it, is a racially-based system of social control. Professor Michelle Alexander has critiqued mass incarceration as a “racial caste system,” arguing that “[l]ike Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”¹²⁶ More black adults are under correctional control now, as Professor Alexander reminds us, than were

122. Jonathan Wood, *The Old Boss the Same as the New Boss: Critiques and Plaudits of Michelle Alexander's New Jim Crow Metaphor*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 175, 181 (2015) (discussing the impact of the criminal justice system on multiple racial groups, and arguing that “[w]hen speaking of mass incarceration, one cannot pick and choose those that are caught up in the dragnet. Conditions are harsh for all prisoners regardless of color.”).

123. See Sterling, *Defense Attorney Resistance*, *supra* note 70, at 2253 (noting differences between slavery and the criminal justice system, including the fact that “[s]lavery was generational while ensnarement in the criminal justice system may not be”).

124. Paul D. Johnson, *Goodbye to Sambo: The Contribution of Black Slave Narratives to the Abolition Movement*, NEGRO AMERICAN LITERATURE FORUM, Autumn 1972 at 79, 79 (referring to slave narratives as providing a “prison-house view” of slavery); see also Frederick Douglass, *Narrative of the Life of Frederick Douglass, An American Slave, Written by Himself*, in CIVITAS ANTHOLOGY, *supra* note 118, at 165 (writing of contemplating friends he left behind when he fled north, “[w]hen I think that these precious souls are today shut up in the prison house of slavery, my feelings overcome me . . .”)

125. See, e.g., JOY JAMES, THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS xxiii (“The old plantation was a prison; and the new prison is a plantation.”); Bharat Malkani, *Voices of the Condemned: A Comparative Study of the Testimonies of Death Row Exonerees and Slave Narratives*, LAW, CULTURE, AND THE HUMANITIES, 1–21 (2014) (comparing slave narratives with the testimonies of death row exonerees, and arguing that, by studying slave narratives, exonerees can “make their testimonies more effective as tools of abolitionism”).

126. ALEXANDER, *supra* note 10, at 13.

enslaved in 1850;¹²⁷ a larger portion of our African American population is incarcerated in the United States than at the height of apartheid in South Africa.¹²⁸ Incarceration, as others have noted, defines the modern day United States just as slavery defined our nation before the Civil War; “[m]ass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps *the* fundamental fact, as slavery was the fundamental fact of 1850.”¹²⁹

The conditions of incarceration share commonalities with slavery as well. Slavery was an institution that completely controlled the enslaved and profited from their bodies and unpaid labor.¹³⁰ Many regions of the United States were financially dependent on slavery and thus highly resistant to abolitionist efforts.¹³¹ Those who owned and sold enslaved people were governed by some laws regarding their treatment, but it was extremely difficult for enslaved people to ask for or receive legal relief and thus those laws were generally unenforced.¹³² Enslaved people received inadequate or nonexistent medical care¹³³ and were forced to work in extremes of heat and cold and in other unpleasant or dangerous conditions.¹³⁴ They had no freedom to choose the circumstances of their enslavement, including what they ate or drank,¹³⁵ where they lived, and whether or not they were sold away to others and separated from their families.

127. *Id.* at 180.

128. *Id.* at 6.

129. Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, THE NEW YORKER, Jan. 30, 2012, at 72, 73, available at <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

130. See JAMES, *supra* note 125, at xxiii (“Plantations, historically, were penal sites—prisons for the exploitation of agricultural, domestic, and industrial labor and the dehumanization of beings.”).

131. See Nichols, *supra* note 8, at 154–55 (examining the financial arguments against abolition, and quoting a South Carolina slaveholder as stating that no amount of moral appeal could “prevail on us to give up a thousand millions of dollars in the value of our slaves, and a thousand millions of dollars more in the depreciation of our lands, in consequence of want of laborers to cultivate them”).

132. See THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW: 1619–1860 (2004) (describing laws governing slavery and enslaved people from a wide variety of sources, and examining both the text of those laws and the realities of their implementation).

133. See Mary Prince, *The History of Mary Prince, a West Indian Slave, Related by Herself*, in CIVITAS ANTHOLOGY, *supra* note 118, at 27, 39 (“When we were ill, let our complaint be what it might, the only medicine given to us was a great bowl of hot salt water, with salt mixed with it, which made us very sick. If we could not keep up with the rest of the gang of slaves, we were put in the stocks, and severely flogged the next morning.”).

134. FRANCES SMITH FOSTER, WITNESSING SLAVERY: THE DEVELOPMENT OF ANTE-BELLUM SLAVE NARRATIVES 101–07 (Greenwood Press 1979) [hereinafter FOSTER] (recounting the descriptions in slave narratives of the inhumane working conditions accompanied by “brutal punishments and physical atrocities”).

135. *Id.* at 100 (describing the attention paid in slave narratives to the inadequacy and poor quality of the food provided to the enslaved people, and noting that authors of slave narratives often drew connections between “the diet of slaves and that of domestic animals”).

Assaults, rapes, violence, and deprivation were a lived reality as well as an omnipresent threat to enslaved people.¹³⁶

The realities of slavery were often invisible to or minimized by those who did not live in the areas where it was established and who did not participate in the enslavement industry in some way.¹³⁷ This was true for a variety of reasons: not only were the majority of enslaved people in rural areas where their movements were tightly controlled, but also, many enslaved people were restricted—often through forced illiteracy—in their ability to communicate with each other or the larger world.¹³⁸ Further, slavery, with its attendant limitations, deprivations, and cruelties, was justified by a cultural narrative in which Black people were destined for enslavement by virtue of their own moral and physical inferiority, and had to be punished and controlled because of their innate unreliability and dangerousness.¹³⁹ According to this narrative, both slaves and society benefited from slavery.¹⁴⁰

Some of the features of slavery endure in our modern jails and prisons. While the Thirteenth Amendment abolished slavery and involuntary servitude, it provided an exception for “a punishment for crime whereof the party shall have been duly convicted.”¹⁴¹ This “punishment loophole” permits prisons to engage prisoners in unpaid or very low paid labor (sometimes for as low as 23 cents per hour¹⁴²), often on behalf of a variety of for-profit industries, during the course of

136. JAMES, *supra* note 125, at xxiii (“The antebellum plantation ethos of dehumanization was marked by master-slave relations revolving about sexual terror and domination, beatings, regimentation of bodies, exploited labor, denial of religious and cultural practices, substandard food, health care, and housing, forced migration, isolation in ‘lockdown’ for punishment and control, denial of birth family and kin. That ethos is routinely practiced and reinscribed in contemporary penal sites.”)

137. See John Sekora, *Black Message/White Envelope: Genre, Authenticity, and Authority in the Antebellum Slave Narrative*, 32 CALLALOO 482, 494 (1987) (writing that abolitionist societies prior to the Civil War were focused on “defining the inner meaning of slavery to a tepid and confused northern white audience”).

138. See Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. PUB. INT. L.J. 185, 202 n.97 (1998) (discussing motivations for the forced illiteracy of enslaved people).

139. See Lynn A. Casmier-Paz, *Slave Narratives and the Rhetoric of Author Portraiture*, NEW LITERARY HISTORY, Winter 2003, at 96 (reviewing the history of white characterizations of African people as uncivilized and inhuman; “the emergent discourse of natural science had philosophized and rationalized the bondage of Africans by locating them on the bottom of the evolutionary scale”).

140. Malkani, *supra* note 125, at 9 (noting that supporters of slavery had “argued that slavery was both necessary to protect society from inherently dangerous black people, and was beneficial to black people who were biologically incapable of looking after themselves”).

141. U.S. CONST. amend. XIII, § 1, 2 (“Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction Section 2. Congress shall have power to enforce this article by appropriate legislation.”)

142. Emily Jane Fox, *Factory Owners: Federal Prisoners Stealing Our Business*, CNN MONEY (Aug. 14, 2012), <http://money.cnn.com/2012/08/14/smallbusiness/federal-prison->

their incarceration.¹⁴³ Further, just as slave-holding regions were significantly dependent on slavery, today many regions of the United States, along with corporations involved in the prison industry, rely deeply on prisons.¹⁴⁴ The economic importance of the prison industry provides an incentive to keep prisons open and operating, which requires a steady rate of incarceration.¹⁴⁵ Critics have argued that both prison labor and the growth of private prisons, which derive profits from incarcerating human beings, are evocative of enslavement.¹⁴⁶

Prisons and jails share similarities with the conditions of enslavement beyond the commonality of economic influence and conscripted labor. Correctional institutions are places where acts of dominance, control, and even violence are performed on people—disproportionately people of color—who are largely without social or political power. Incarcerated people are frequently removed from their communities and placed in incarceration settings far from home and in

business/index.html [https://perma.cc/45HJ-ADWD] (reporting on the economic advantages enjoyed by Unicolor, a government-run business that employs more than 13,000 prisoners, without benefits and for an hourly wage between 23 cents and \$1.15).

143. See, e.g., Erik Markowitz, *Making Profits on the Captive Prison Market*, THE NEW YORKER (Sept. 4, 2016), <https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market> (describing industries, from phones to health care, that profit from association with private prisons); *Prison Labour is a Billion-Dollar Industry, with Uncertain Returns for Inmates*, THE ECONOMIST (Mar. 16, 2017), <https://www.economist.com/news/united-states/21718897-idaho-prisoners-roast-potatoes-kentucky-they-sell-cattle-prison-labour> (“[T]hose who attack the new prison-industrial complex might be surprised to learn that America’s publicly run prisons have been providing labour for private companies since 1979. More than 5,000 inmates take part in the scheme, known as ‘Prison Industry Enhancement.’”); Chandra Bozelko, *Giving Working Prisoners Dignity—and Decent Wages*, NAT’L REVIEW (Jan. 11, 2017), <http://www.nationalreview.com/article/443747/prison-labor-laws-wages> [https://perma.cc/VN8X-CTUR] (discussing the laws and practices governing prisoner labor for government and for-profit entities).

144. See Gopnik, *supra* note 129, at 74 (quoting the 2005 annual report of the private Corrections Corporation of America as stating, “Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. . . . The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.”); JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* (2017) (exploring the economic and social implications of the construction of prisons in rural towns in the United States).

145. Because prisons can be a significant source of employment in the rural areas where many prisons are located, prison closures can have a significant and negative impact on those communities. See, e.g., Jennifer Brown & Kirk Mitchell, *Kit Carson Prison in Burlington to Close; 142 Jobs Lost*, THE DENVER POST (June 30, 2016, 12:32 PM), <http://www.denverpost.com/2016/06/30/kit-carson-burlington-prison-closing/> [https://perma.cc/V9KR-R6JJ].

146. Critics have also associated prison labor with slavery and reconstruction-era convict leasing. See, e.g., Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015) <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [https://perma.cc/5MJA-ZEPJ] (reporting on conditions in Angola Prison and arguing that “Angola’s farm operations and other similar prison industries have ancestral roots in the black chattel slavery of the South”).

predominately white areas.¹⁴⁷ Because the surrounding communities are disproportionately white, correctional staff are often predominantly white, in contrast to the prison population.¹⁴⁸ Like sites of enslavement, prisons and jails are institutions that completely control the lives of the incarcerated, including their food, clothing, daily schedule, and the punishment imposed for rule-breaking. Violence and sexual assault in prisons, poor or nonexistent medical and mental health care, preventable deaths and injuries, and a host of other ills are unfortunately endemic to systems of incarceration in the United States.¹⁴⁹ The extent of these systemic issues, like the injustices of enslavement, are often hidden from or denied by the public at large.

Prison and jail conditions are unknown or ignored for many reasons. Because prisons are often located in rural areas,¹⁵⁰ have limited public access,¹⁵¹

147. Peter Wagner & Daniel Koff, *The Racial Geography of Mass Incarceration*, PRISON POLICY INITIATIVE (2015), <http://www.prisonpolicy.org/racialgeography/report.html> [https://perma.cc/5SCM-9AQB] (using “data from the 2010 Census to compare the race and ethnicity of incarcerated people to that of the people in the surrounding county, [and] finding that, for many counties, the racial and ethnic make-up of these populations is very different,” such that, for example, “[h]undreds of counties have a 10-to-1 ‘ratio of over-representation’ between incarcerated Blacks and Blacks in the surrounding county — meaning that the portion of the prison that is Black is at least 10 times larger than the portion of the surrounding county that is Black.”); *Separation By Bars and Miles: Visitation in State Prisons*, PRISON POLICY INITIATIVE (Oct. 20, 2015), <http://www.prisonpolicy.org/reports/prisonvisits.html> [https://perma.cc/3V5X-AEBA] (reporting that “less than a third of people in state prisons receive a visit from a loved one in a typical month,” and discussing the variations in visitation policies and the impact of increased distance on visitation rates).

148. Rachel Grandy, *In Prisons, Blacks and Latinos Do the Time While Whites Get the Jobs*, PRISON POLICY INITIATIVE (July 10, 2015), http://www.prisonpolicy.org/blog/2015/07/10/staff_disparities/ [https://perma.cc/RSP2-HF2H] (providing data on the “[s]tark racial and ethnic differences between incarcerated people and staff members” in many parts of the United States).

149. *Cf.* THE COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 11 (June 2006) (stating that “jail and prison administrators everywhere must confront prisoner rape, gang violence, the use of excessive force by officers, contagious diseases, a lack of reliable data, and a host of other problems”). These issues may occur at even higher rates in private prisons. *See* OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS i (Aug. 2016), https://oig.justice.gov/reports/2016/e1606.pdf?wpmm=1&wpisrc=nl_fed [https://perma.cc/ZMW6-9VZH] (finding that private prisons with government contracts “incurred more safety and security incidents per capita than comparable BOP institutions and that the BOP needs to improve how it monitors contract prisons in several areas”).

150. RYAN KING, MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, BIG PRISONS, SMALL TOWNS: PRISON ECONOMICS IN RURAL AMERICA (Feb. 2003), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Big-Prisons-Small-Towns-Prison-Economics-in-Rural-America.pdf> [https://perma.cc/XE8M-KPBK].

151. David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010) (“Prisons are closed environments, largely hidden from public view. For obvious reasons, the public and press cannot be allowed the same degree of access to prisons as they are allowed to other government facilities, and security concerns require some monitoring and control of contacts between prisoners and the outside world.”).

and very little formal oversight,¹⁵² what happens within them is largely observed only by the people who manage the institution and who benefit from its existence. Prisoners themselves cannot easily speak out about their experiences, as their mail and visits can be monitored,¹⁵³ phone calls are often prohibitively expensive and similarly monitored, and prisoners generally do not have access to tools such as social media.¹⁵⁴

While there are constitutional and statutory mandates regarding the treatment of the incarcerated, it is extremely difficult for prisoners to enforce their legal rights, which contributes to the secrecy of conditions in jails and prisons. Laws such as the Prisoner Litigation Reform Act (PLRA) have established multiple barriers to bringing lawsuits in federal court.¹⁵⁵ State laws have created similar hurdles. Because few lawyers represent prisoners, in part because the PLRA set limits on legal fees in prisoners' rights cases, prisoners have difficulty finding attorneys to represent them and must proceed *pro se*.¹⁵⁶ Even when prisoners are able to access the courts and acquire counsel, it is difficult to meet the burdens required to prove their legal claims. The law sets high bars for establishing that prison officials have violated an inmate's rights, and courts are highly

152. For further information regarding the limitations on prisoner access to the courts, see Allen E. Honick, *It's 'Exhausting': Reconciling a Prisoner's Right to Meaningful Remedies for Constitutional Violations with the Need for Agency Autonomy*, 45 U. BALT. L. REV. 155, 155 (2015) ("Behind the new 'iron curtain' exists a hidden world in which conditions are abhorrent, basic human rights are unprotected, and meaningful opportunities for redress are almost non-existent."); Fathi, *supra* note 151 (discussing the decline in federal-court oversight of U.S. prisons and jails, the lack of non-judicial oversight mechanisms, and oversight problems posed by private prisons).

153. Corey Frost, *Protecting Written Family Communication in Jails: A 50-State Survey*, PRISON POLICY INITIATIVE (May 19, 2016), <https://www.prisonpolicy.org/postcards/50states.html> [<https://perma.cc/W26C-XMQP>] (reviewing mail policies in jails in each state); Michael B. Mushlin, *Rights of Prisoners*, § 14:4 (4th ed. 2016) (discussing case law regarding prison staff reading prisoner mail); Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149 (2013).

154. Ann E. Marimow, *FCC Made a Case for Limiting Cost of Prison Phone Calls. Not Anymore.*, WASH. POST (Feb. 5, 2017), https://www.washingtonpost.com/local/public-safety/fcc-made-a-case-for-limiting-cost-of-prison-phone-calls-not-anymore/2017/02/04/9306fbf8-e97c-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.19daef98ec63 [<https://perma.cc/5JQP-D5TP>]; Timothy Williams, *The High Cost of Calling the Imprisoned*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html> [<https://nyti.ms/2k89dnT>]; Ben Branstetter, *The Case for Internet Access in Prisons*, WASH. POST: THE INTERSECT (Feb. 9, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/02/09/the-case-for-internet-access-in-prisons/?utm_term=.b87c25b2de41 [<https://perma.cc/QE8Q-AN3R>].

155. *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH (June 16, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states> [<https://perma.cc/4TJQ-L8LD>] (evaluating restrictions on prisoner lawsuits contained in the PLRA and concluding that "the PLRA subjects lawsuits brought by prisoners in the federal courts to a host of burdens and restrictions that apply to no other persons").

156. *Id.*

deferential to prisons in a variety of legal contexts.¹⁵⁷ The likelihood of legal success in prisoners' rights lawsuits is slim.¹⁵⁸ Due to all these factors, many people in the United States, including decision-makers in the criminal justice system, have little understanding of the conditions of confinement in our prisons and jails.

Although there are many ways in which comparisons between slavery and incarceration falter, the two institutions share overarching features. In the United States today, we know that our criminal justice system disproportionately incarcerates people of color. As the system of mass incarceration has grown, the conditions in those prisons remain largely hidden and unmonitored and legal and other barriers prevent prisoners from communicating and limit their opportunities to redress violations of their constitutional and statutory rights. All this has been justified by a cultural narrative that people of color are somehow destined for, and perhaps even improved by, incarceration, and that incarcerated people must be controlled and punished because they are inherently untrustworthy and dangerous.¹⁵⁹ This narrative is undeniably similar to the narrative justifying the centuries of enslavement in the United States. Lawyers seeking to abolish that system should thus consider the applicability of one of the tools of abolition to the modern age.

2. *Slave Narratives as Instruments of Abolitionism*

Slavery was first legalized in what is now the United States in 1641,¹⁶⁰ and abolished by the 13th Amendment in 1865.¹⁶¹ Millions of African and African American people were enslaved over the course of that time; in 1860 alone, four million enslaved people lived in the United States.¹⁶² Formerly enslaved people

157. Sharon Dolovich, *Forms of Deference in Prison Law*, FED. SENTENCING REPORTER, Apr. 2012, at 245, 245 (writing that the “imperative of restraint—aka deference—has emerged as the strongest theme of the [Supreme] Court’s prisoners’ rights jurisprudence”).

158. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1664 (2003) (studying inmate lawsuits before and after the enactment of the PLRA and finding that the PLRA has “both placed affirmative roadblocks . . . in the way of high-quality cases and added a very high exhaustion hurdle for successful litigation of any constitutionally meritorious cases”).

159. See discussion *infra* Section III.B.

160. William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1743–44 (1996) (“In 1641, . . . the Puritan settlers of Massachusetts-Bay adopted their first comprehensive code, the Body of Liberties” in which “three origins of enslavement were recognized as legitimate”).

161. U.S. CONST. amend. XIII, § 1.

162. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 14 (1976) <https://www.census.gov/history/pdf/histstats-colonial-1970.pdf> [<https://perma.cc/PZ5A-8R86>] (The 1860 census counted 31,443,321 people; 3,953,760 of those people were enslaved). For interactive maps that document the number of enslaved people in the United States and the ways in which slavery migrated throughout the country, see Lincoln Mullen, *The Spread of U.S. Slavery, 1790–1860*, <http://lincolnmullen.com/projects/slavery/> [<https://perma.cc/Z43K-LQA4?type=image>] (last visited Oct. 15, 2017).

began to publish accounts of their experiences in slavery as early as the 1700s, and these accounts, which came to be known as slave narratives, continued to be published after the Civil War and into the twentieth century.¹⁶³ These narratives took a variety of different forms, including pamphlets, letters published in newspapers, essays, and books,¹⁶⁴ over the many decades in which they were produced.¹⁶⁵ They played different roles in different eras; before the 1800s, such narratives were often published as tales of adventure or Christian allegories¹⁶⁶—there even existed a body of confessional tales told by enslaved people who had committed crimes.¹⁶⁷

Beginning in the 1830s, however, members of the abolitionist movement in the United States encouraged formerly enslaved people to write about their experiences with the explicit goal of bringing an end to slavery.¹⁶⁸ For the approximately eighty abolitionist groups active in that time period, “first-hand, eyewitness accounts by former slaves constitute[d] the most damning indictment of slavery,”¹⁶⁹ and they actively sought to make these accounts available to as wide an audience as possible. The 400 such narratives published between 1830 and 1863¹⁷⁰ form a specific genre of American literature which, while diverse and complex, share commonalities of form and a shared abolitionist objective.¹⁷¹

163. Sekora, *supra* note 137, at 483.

164. CIVITAS ANTHOLOGY, *supra* note 118, at 1 (“The personal witness of slaves has appeared on broadsides, in newspaper interviews, magazines, pamphlets, government reports, gift books, biographies, histories, and in autobiographies of various lengths, some as long as five hundred pages.”).

165. Sekora, *supra* note 137, at 483 (describing post-war narratives such as *Up From Slavery*, written by Booker T. Washington and published in 1901, and “the largest body of narratives ever assembled,” 2,194 interviews conducted by workers with the Works Progress Administration in the 1930s and published as a collection in 1972).

166. See FOSTER, *supra* note 134, at 4 (drawing connections between slave narratives and the genre of personal narratives of the same period; noting, among other similarities, that slave narratives “tell of geographical explorations, oceanic adventures, and encounters with Indians. They, too, place a great emphasis on the religious implications of the narrator’s experiences. Like other personal narratives, the slave narratives chronicle incidents in an individual’s experience, and they provide the reader with insights into an individual’s mind as well as into the structure and working of that individual’s society”).

167. *Id.* at 486–89 (detailing the development of slave narratives and describing those slaves whose narratives recounted crimes as “double outlaw[s]”).

168. CIVITAS ANTHOLOGY, *supra* note 118, at 2.

169. Sekora, *supra* note 137, at 493.

170. *Id.* at 483.

171. FOSTER, *supra* note 134, at 5 (“Although they were, in the beginning, simply a variation of the personal narrative tradition in American literature, slave narratives soon emerged as a distinct genre recognizable by its form, content, and relation to the cultural matrix.”); see also TESTAMENTS OF COURAGE: SELECTIONS FROM MEN’S SLAVE NARRATIVES 6 (Mary Young & Gerald Horne, eds., Franklin Watts 1995) [hereinafter TESTAMENTS OF COURAGE] (“Slave narratives followed a similar form, describing the author’s suffering on the plantation, the terrible conditions the slaves endured, and the author’s successful escape North.”).

Like some of the most popular earlier published works by former slaves,¹⁷² these texts were widely read and often financially successful. One of the most influential of the many works authored by former slaves, *Narrative of the Life of Frederick Douglass, an American Slave*, published in 1845, sold over 30,000 copies internationally and ran through multiple printings in the United States.¹⁷³ Prominent abolitionist William Lloyd Garrison wrote that “it would be the purpose of anti-slavery societies ‘to scatter tracts, like rain-drops, over the land, on the subject of slavery.’”¹⁷⁴

Slave narratives, along with lecture tours by formerly enslaved people, were embraced and promoted by the abolitionist movement, and white members of that movement heaped praise on the works for their powerful storytelling and their power in advancing the cause of equality and the eradication of slavery.¹⁷⁵ But this admiration and promotion, as many scholars have noted, was often intertwined with a desire to shape the narrative or provide a white endorsement of black voices in order to make them more palatable for a white audience. Slave narratives typically were prefaced by introductions by white people, who sought to verify the authenticity of the account, the integrity of the narrator, and the importance of the message to an audience that likely held doubts about all three.¹⁷⁶ In the preface to *Narrative of the Life of Frederick Douglass, An American Slave*, for example, William Lloyd Garrison explained that Douglass had written the narrative himself, “and, considering how long and dark was the career he had to run as a slave,—how few have been his opportunities to improve his mind since he broke his iron fetters,—it is, in my judgment, highly creditable to his head and heart.”¹⁷⁷ L. Maria Child begins the Preface to Harriet A. Jacob’s *Incidents in the Life of a Slave Girl* by writing “[t]he author of the following autobiography is personally known to me, and her conversation and manners inspire me with confidence” and goes on to explain to possibly skeptical readers why “a

172. See TESTAMENTS OF COURAGE, *supra* note 171, at 5 (noting that one of the first slave narratives in the United States, *The Interesting Narrative of Olaudah Equiano*, sold “thousands of copies” published in multiple languages from the time of its publication in 1789 up to the time of the Civil War). See also CIVITAS ANTHOLOGY, *supra* note 118, at 1–2 (recounting that *A Narrative of the Most Remarkable Particulars in the Life of James Albert Ukawsaw Gronniosaw* was “the first slave narrative published in book form in English” and was “reprinted at least a dozen times before the end of the century”).

173. CIVITAS ANTHOLOGY, *supra* note 118, at 3. Douglass eventually published three accounts of his life: NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS (1845); MY BONDAGE AND MY FREEDOM (1855); LIFE AND TIMES OF FREDERICK DOUGLASS (1881).

174. Sekora, *supra* note 137, at 494.

175. See CIVITAS ANTHOLOGY, *supra* note 118, at 4–6 (describing comments by white abolitionists).

176. Sekora, *supra* note 137, at 497 (discussing the ways in which white abolitionists sought to lend credibility to works authored by former slaves, including the “heavy use of authenticating documents printed before and after the narrative itself,” along with a “frontispiece portrait and testimonial letters declar[ing] that the subject existed,” and possessed a sound and truthful character).

177. Frederick Douglass, *supra* note 124, at 110.

woman reared in Slavery should be able to write so well.”¹⁷⁸ The role of white abolitionists in soliciting,¹⁷⁹ shaping,¹⁸⁰ and authenticating the works written by formerly enslaved people have caused some to describe slave narratives as a “black message inside a white envelope.”¹⁸¹

There was still power in that message.¹⁸² While slave narratives written in the three decades before the Civil War retained many of the aspects of earlier works by enslaved people—including the focus on the personal experience of the author, the terrible and adventurous aspects of their lives in slavery, and questions of faith and religious meaning—they now were engaged in, and instruments of, a consciously political movement. Authors of slave narratives in the pre-Civil War era told their personal story for two primary purposes, as described by the scholars who have examined the literary, political, and social importance of slave narratives. The first was to “inform their readers of the inhuman and immoral characteristics of slavery” with the goal of eradicating the institution, mindful always that they were attempting to communicate with an overwhelmingly white audience who often feared and reviled Black people.¹⁸³ Slave narratives served, in other words, to “startle the ignorant.”¹⁸⁴ The second was an attempt by the narrators to respond to white characterizations of African Americans and Africans as inferior and subhuman and “to defend their own humanity to their readers and to themselves,”¹⁸⁵ while also recognizing that their own personal experiences served to represent the conditions endured by many.¹⁸⁶ The goal of slave narratives to expose the brutality of slavery was intertwined with the goal of humanizing the person upon whom those horrors had

178. Harriet A. Jacobs, *Incidents in the Life of a Slave Girl, Written by Herself*, in CIVITAS ANTHOLOGY, *supra* note 118, at 463, 466.

179. Sekora, *supra* note 137, at 496 (describing the work done by abolitionist groups to identify former slaves who could serve as representatives of “the victims’ side of slavery” while “embrac[ing] the rules of white antislavery decorum”).

180. *Id.* at 496–97 (describing the use of abolitionist questionnaires to identify former slaves who could speak about their experiences and the training “in techniques of speaking and organizing” provided to those people selected so that their speeches followed a specified pattern; further noting that when these oral narratives were committed to paper, “the abolitionist imprint was decisive in its predisposition for ‘facts’ and for a particular ordering of those facts”).

181. CIVITAS ANTHOLOGY, *supra* note 118, at 6 (“The great nineteenth-century slave narratives typically carry a black message inside a white envelope.”); *see also* Sekora, *supra* note 137, at 502.

182. Henry Louis Gates Jr., *Preface* to CIVITAS ANTHOLOGY, *supra* note 118, at vii, ix (“No group in the long and cruel history of human enslavement has ever written about slavery as extensively, elegantly, compassionately, and compellingly as have African American slaves.”); *But see* Nichols, *supra* note 8, at 156–60 (questioning whether slave narratives had a significant impact on American perspectives on race or slavery).

183. FOSTER, *supra* note 134, at 3–4.

184. Sekora, *supra* note 137, at 498.

185. FOSTER, *supra* note 134, at 9.

186. *See id.* at 5 (“In most cases the desire to recognize oneself and to be recognized as a unique individual had to counter the desire to be a symbol, and it created the tension that is a basic quality of slave narratives.”).

been inflicted; if the reader viewed the narrator with sympathy, then by extension his or her “suffering [was] more despicable.”¹⁸⁷

While it is difficult to pull apart these strands, it may nevertheless be helpful to address the goals of slave narratives in turn, first focusing on the attention that authors of slave narratives gave to the conditions of slavery. Texts written by formerly enslaved people devoted a great deal of attention to the hardships endemic to enslavement. In so doing, these authors endeavored to alter a popular conception of slavery as beneficial for the enslaved, who were characterized in pro-slavery works as happy and cared for by benevolent slave owners.¹⁸⁸ By discussing the miseries of slavery, authors of slave narratives also sought to appeal to the moral integrity of the white audience, with particular appeals to their Christian or patriotic ideals, in an effort to sway them toward the abolitionist viewpoint.¹⁸⁹ To these ends, as Professor Charles Nichols wrote decades ago,

The cruelties of the slave trade, the separation of families, the use of chains, manacles, handcuffs and bells, the frequency of kidnapping, the unremitting, unpaid labor of the masses of slaves, the rigorous controls of the system, the constant infliction of physical punishment, the denial of every opportunity for the Negro’s improvement—these aspects of slavery the narratives underscored.¹⁹⁰

Mary Prince, in *The History of Mary Prince, a West Indian Slave*, made explicit the connection between the recounting of the conditions of slavery and the abolitionist goals of her narrative. She wrote that she was compelled to share the terrible nature of slavery with the people of England, where she then lived, for “I have been a slave—I have felt what a slave feels, and I know what a slave knows; and I would have all the good people in England to know it too, that they make break our chains, and set us free.”¹⁹¹

The body of antebellum slave narratives is large and cannot be reviewed in totality in this context, but a few excerpts from those narratives can illustrate how the authors discussed the nature of enslavement. In *Narrative of Louis Asa-*

187. Owen Whooley, *The Political Work of Narratives: A Dialogic Analysis of Two Slave Narratives*, *NARRATIVE INQUIRY*, no. 2, 2006, at 307.

188. Norman R. Yetman, *The Background of the Slave Narrative Collection*, 19 *AMERICAN QUARTERLY* 534, 536 (1967) (describing the arguments advanced by pro-slavery advocates that slaves were protected, happy, and economically secure; the focus in slave narratives on the “sensational revelations of the realities of slave life provided a persuasive challenge to southern justifications of slavery”); Mary Prince, *supra* note 133, at 54 (“The man that says slaves be quite happy in slavery—that they don’t want to be free—that man is either ignorant or a lying person. I never heard a slave say so . . . Such people ought to be ashamed of themselves”).

189. See Malkani, *supra* note 125, at 3 (writing that slave narratives served both to humanize enslaved people and “to demonstrate to supporters of slavery that the institution was at odds with the values that they held dear, and to demonstrate that slavery damaged the wider community”).

190. Nichols, *supra* note 8, at 155.

191. Mary Prince, *supra* note 133, at 40.

Asa, A Captured African, Louis Asa-Asa described the conditions of the slave ship in which he was transported after being kidnapped from his native country,¹⁹²

The slaves we saw on board the ship were chained together by the legs below deck, so close they could not move. They were flogged very cruelly. . . . The place they were confined in below deck was so hot and nasty I could not bear to be in it. A great many of the slaves were ill, but they were not attended to.¹⁹³

Henry Brown, famous for escaping slavery by shipping himself northward in a wooden box, wrote of the retaliation he witnessed against enslaved people following the Nat Turner rebellion in his *Narrative of the Life of Henry Box Brown*,¹⁹⁴

Great numbers of the slaves were locked in the prison, and many were ‘half-hung’. . . that is, they were suspended to some limb of a tree, with a rope about their necks, so adjusted as not to quite strangle them, and then they were pelted by men and boys with rotten eggs.¹⁹⁵

Mary Prince wrote of being continually stripped and beaten by the people that owned her and, among other horrors, of watching a pregnant woman with whom she was enslaved be struck so viciously that both she and unborn baby eventually died.¹⁹⁶ William and Ellen Craft addressed the sexual victimization of enslaved women in *Running a Thousand Miles for Freedom, Or, The Escape of William and Ellen Craft From Slavery*, noting that slave owners frequently “compel [slave women] to submit to the greatest indignity.”¹⁹⁷ Harriet Jacobs also addressed this topic, writing that “the slave girl is reared in an atmosphere of licentiousness and fear. The lash and the foul talk of her master and his sons are her teachers. . . . [R]esistance is hopeless.”¹⁹⁸

192. Louis Asa-Asa, *Narrative of Louis Asa-Asa, A Captured African*, in TESTAMENTS OF COURAGE, *supra* note 171, at 9, 12.

193. *Id.* at 12–13.

194. Henry Brown, *Narrative of the Life of Henry Box Brown*, in TESTAMENTS OF COURAGE, *supra* note 171, at 55, 58.

195. *Id.* at 58.

196. Mary Prince, *supra* note 133, at 34.

197. William Craft & Ellen Craft, *Running a Thousand Miles for Freedom, Or, the Escape of William and Ellen Craft from Slavery*, in CIVITAS ANTHOLOGY, *supra* note 118, at 409.

198. Harriet A. Jacobs, *supra* note 178, at 510. *See also* Frederick Douglass, *supra* note 124, at 17, who begins his original *Narrative* by recounting the rumors that his father was the man who owned him, and noted that the laws requiring that “children of slave women shall in all cases follow condition of their mothers” were created to allow slaveholding men to sexually assault women and then enslave children born as a result of the assault, and thus “make a gratification of their wicked desires profitable as well as pleasurable.”

Slave narratives commonly addressed the inadequate medical care,¹⁹⁹ clothing,²⁰⁰ and food²⁰¹ given to enslaved people, and a great many of the texts address the powerful fear and grief associated with the routine separation of enslaved people from their families and friends.²⁰² These texts also discussed the difficulties of achieving any redress for these injustices within the system of enslavement. Frederick Douglass recounted an assault he suffered at the hands of four white apprentices at a shipyard where he was hired out to work, after which he was advised by a lawyer that “he could do nothing in the case, unless some white man would come forward and testify. . . . If I had been killed in the presence of a thousand colored people, their testimony combined would have been insufficient to have arrested one of the murderers.”²⁰³ In *Narrative of the Life and Adventures of Henry Bibb, An American Slave*, Henry Bibb recounts that “[i]t is useless for a poor helpless slave, to resist a white man in a slaveholding State. Public opinion and the law is against him; and resistance in many cases is death to the slave, while the law declares, that he shall submit or die.”²⁰⁴

In their narratives, enslaved people recounted the conditions of slavery that were cruel and dangerous as well as those that were demeaning—Henry Bibb, for example, recalls a slaveholder’s wife forcing him to fan her and scratch her feet while she napped.²⁰⁵ By doing so, authors of slave narratives appealed to the morality of white audiences by demonstrating that the conditions of enslavement were antithetical to Christian beliefs²⁰⁶ or to their patriotic²⁰⁷ or humanitarian

199. See, e.g., Mary Prince, *supra* note 133, at 39.

200. Henry Brown, *supra* note 194, at 56 (describing a group of enslaved men wearing nothing but shirts “made of coarse bagging” and “some kind of light substance for pantaloons, and no other clothing whatever”).

201. See, e.g., FOSTER, *supra* note 134, at 100.

202. See, e.g., Mary Prince, *supra* note 133, at 30–31 (“We followed my mother to the market-place, where she placed us in a row against a large house, with our backs to the wall and our arms folded across our breasts. I, as the eldest, stood first, Hannah next to me, then Dinah, and our mother stood beside, crying over us. My heart throbbed with grief and terror so violently, that I pressed my hands quite tightly across my breast, but I could not keep still. . . .”).

203. Frederick Douglass, *supra* note 124, at 175.

204. Henry Bibb, *Narrative of the Life and Adventures of Henry Bibb, An American Slave*, in CIVITAS ANTHOLOGY, *supra* note 118, at 303.

205. *Id.* at 303.

206. *Id.* at 401 (“Is this Christianity? Is it honest or right? It is doing as we would be done by? Is it in accordance with the principles of humanity or justice?”).

207. CIVITAS ANTHOLOGY, *supra* note 118, at 7 (“Usually the antebellum slave narrator portrays slavery as a condition of extreme physical, intellectual, emotional, and spiritual deprivation. . . . Impelled by faith in God and a commitment to liberty and human dignity comparable, to that of the Founding Fathers of the United States, the slave undertakes an arduous quest for freedom. . . .”); see also Moses Roper, *A Narrative of Moses Roper’s Adventures and Escape from American Slavery*, in TESTAMENTS OF COURAGE, *supra* note 171, at 18–19 (“It is far from my wish to attempt to degrade America. . . . I love her institutions in the free states, her zeal for Christ, . . . may the period come when God shall wipe off this deep stain from her constitution, and may America soon be indeed the land of the free.”).

values. They also appealed to white people's self-interest, by focusing on the distorting impact that slavery had on the enslavers. Frederick Douglass described the transformation of a woman who was once humane—"[h]er face was made of heavenly smiles, and her voice of tranquil music"—but who turned cruel as a result of "the fatal poison of irresponsible power" inherent to owning slaves.²⁰⁸ Harriet Jacobs, recounting the brutal sexual exploitation of enslaved women, and some enslaved men, wrote, "I can testify, from my own experience and observation, that slavery is a curse to the whites and well as the blacks. It makes the white fathers cruel and sensual; the son violent and licentious; it contaminates the daughters, and makes the wives wretched."²⁰⁹

By recounting the conditions of slavery, slave narratives attempted to reveal to white audiences the truths to which they may have been ignorant or apathetic: that slavery was not a benevolent institution that benefited Black people, but rather an institution of cruelty and deprivation at odds with the American values of liberty and humanitarianism.²¹⁰ Slavery harmed everyone associated with it. The stories of former slaves thus served as tools of abolitionism, for, in the words of a Boston newspaper, "[a]rgument provokes argument, reason is met by sophistry; but narratives of slaves go right to the heart of men."²¹¹

Authors of slave narratives also advanced the goals of abolitionism and the assertion of their own human dignity by the ways in which they depicted themselves in the accounts of their experiences in, and escape from, slavery. The authors defied depictions of African American people as lazy, immoral, and dangerous, by recounting instances in which they were heroic, intelligent, and wise. The protagonists of the slave narratives outsmarted slave owners, stood up to those who would harm them, and undertook great personal risks and hardships to seek freedom and a stable and productive life.²¹² When forced to perform acts that might be viewed by their white audiences as immoral or unethical—such as

208. Frederick Douglass, *supra* note 124, at 136.

209. Harriet A. Jacobs, *supra* note 178, at 511.

210. Malkani, *supra* note 125, at 18 ("A key tactic of the narratives was to highlight the inconsistencies between the values that Americans held dear, and the institution of slavery.")

211. CIVITAS ANTHOLOGY, *supra* note 118, at 4, (quoting BOSTON CHRONOTYPE (1849)).

212. Johnson, *supra* note 124, at 80 (noting that authors of slave narratives sought to draw parallels between themselves and their white audiences by highlighting their shared values, "their attempts while in slavery to get independent work, to get an education, to join a church, to insure family stability and, once in the North, to take part in a freer society on its own terms"). For examples of the risks and dangers involved in escaping from slavery, see Richard Grant, *Deep in the Swamps, Archaeologists Are Finding How Fugitive Slaves Kept Their Freedom*, SMITHSONIAN MAGAZINE (Sept. 2016), <http://www.smithsonianmag.com/history/deep-swamps-archaeologists-fugitive-slaves-kept-freedom-180960122/#8VqSkAfsDDivp6mz.99> [<https://perma.cc/CF93-RJX3>] (describing the living conditions of persons who escaped from slavery to live in the 'dismal swamp' of Virginia and North Carolina); see generally Frederick Douglass, *supra* note 124, at 105–94; Henry Brown, *supra* note 194, at 55–62; William Craft & Ellen Craft, *supra* note 197, at 403–62.

stealing²¹³ or having a child out of wedlock with a white man²¹⁴—the authors worked to contextualize those acts within the violence and powerlessness of enslavement. From the pictures chosen for the covers of these narratives,²¹⁵ to the emphasis in the titles of many texts that the work was written by the former slave him- or herself,²¹⁶ to the incidents recounted in the tales themselves, the authors (and publishers) of slave narratives sought to break down the racist stereotypes that caused many to believe that blacks were “predestined to occupy their peculiar station in the scheme of things.”²¹⁷

Scholars of slave narratives have emphasized that in many ways the authors of those narratives did not have control over their own stories or self-depictions. As noted above, these stories were shaped by the edits and coaching of white abolitionists, who focused on the interests and values of the white audience, and who viewed the narratives as more useful to the abolitionist movement if they served as symbolic representations of all enslaved people.²¹⁸ Slave narratives were thus transformed into “generic evidence of *any slave*—they are finally stories of an institution, not lives.”²¹⁹ Within these controlled narratives, the depictions of enslaved people were nevertheless disruptive to the rhetoric of “slave apologists,”²²⁰ who drew upon philosophical and pseudo-scientific rationales to justify the enslavement of African people.²²¹ When Frederick Douglass recounted learning to read by befriending white children and asking them to teach him, a little at a time;²²² when Henry Brown developed a plan to ship himself to freedom;²²³ when William and Ellen Craft recounted the many ways in which they, with Ellen Craft disguised as a white man and William Craft as her slave, outwitted all those they encountered on their escape journey,²²⁴ these authors demon-

213. Henry Bibb, *supra* note 204, at 376–80.

214. Harriet A. Jacobs, *supra* note 178, at 512–16.

215. Casmier-Paz, *supra* note 139 (discussing the racial and social messages of the portraits and photographs of authors appearing on the frontispiece of slave narratives).

216. CIVITAS ANTHOLOGY, *supra* note 118, at 8 (writing that “the presence of the subtitle *Written by Himself . . .* and *Written by Herself . . .* testified to the African American author’s dedication to literary self-determination”).

217. CIVITAS ANTHOLOGY, *supra* note 118, at 11; *cf.* Casmier-Paz, *supra* note 139, at 97 (explaining that portraits of the authors of slave narratives, including those in which the author is holding a book, were symbolic of “the visible sign of Reason,” thus counteracting the social construct of people of African descent as “savage”) (citations omitted).

218. Sekora, *supra* note 137, at 497 (“The facticity sought in abolitionist writing was, by definition, not that of individualized Afro-American life, but rather the concrete detail of lives spent under slavery” and portrayed “an undifferentiated sameness of existence.”).

219. Casmier-Paz, *supra* note 139, at 113.

220. *Id.* at 99.

221. *Id.* at 96–102 (describing the multiple ways that scientific discourse was used to rationalize white supremacy).

222. Frederick Douglass, *supra* note 124, at 139.

223. Henry Brown, *supra* note 194, at 59–60.

224. William & Ellen Craft, *supra* note 197.

strated wit, tenacity, and creativity in defiance of the racist cultural characterizations of people of African descent.²²⁵ The contrast between the humanity of the enslaved person and the depravities to which they were subjected was part of the power of slave narratives as tools of abolition.

3. *Sentencing Advocacy as an Abolitionist Act*

Slave narratives, tools of abolitionism in the antebellum years, carry lessons for criminal defense lawyers preparing sentencing arguments in an age of mass incarceration. Slave narratives demonstrate that storytelling that reveals both the humanity of an individual and the inhumanity of an institution to which that individual will be subjected can be an instrument of social change. Criminal defense lawyers have long been engaged in developing sentencing narratives designed to provide context for the criminal act at issue and to demonstrate the fullness of their clients' lives, positive character, and future potential. In this way, sentencing advocacy on behalf of people of color already serves, like the positive portrayal of the protagonists of slave narratives, to disrupt cultural narratives that associate African American and Latino people with criminality and dangerousness. But slave narratives also help reveal what sentencing arguments often lack—the advocacy and abolitionist power of addressing the conditions of confinement to which the convicted person will be exposed if incarcerated. For criminal defense lawyers, standing with African American or Latino clients before an overwhelmingly white judiciary²²⁶ and attempting to make a case against incarceration, the history and structure of slave narratives may help provide a new perspective on storytelling and sentencing.

While slave narratives focused on the harsh conditions of enslavement as a conscious abolitionist act, talking about conditions of confinement at sentencing is not necessarily, or at least explicitly, a conversation about race or mass incarceration. Defense lawyers may choose to address conditions of confinement, as discussed above, as an advocacy tool without explicit race or abolitionist objectives. Asking a court to consider the lack of mental health care in a jail when sentencing a mentally ill client, for example, may carry no obvious racial implications, nor might an argument that informed the court about a convicted person's diabetes and contrasted his medical needs with the lack of adequate medical staffing in the state's prison system. Information on the conditions of confinement may simply, for some lawyers, be a helpful tool in their goal to avoid or minimize a prison sentence for their client. Defense attorneys seeking

225. At the same, these authors may have had to take care not to alienate their white audiences. See FOSTER, *supra* note 134, at 3–4 (“The narrators sought to inform their readers of the inhuman and immoral characteristics of slavery . . . without raising suspicions that they were advocating social equality or seriously challenging theories of racial superiority.”).

226. *The Gavel Gap: Who Sits in Judgment on State Courts?*, AMERICAN CONSTITUTION SOCIETY (2016), <http://gavelgap.org/> [<https://perma.cc/5U5S-6T4G>] (stating that state court judges hear 90% of all cases but are over 80% white and two-thirds male).

these results on behalf of their clients are acting as zealous advocates, and possibly reducing prison populations, even if they have no broader social reform goal.

But modern defense lawyers are advocating for clients at sentencing in the context of mass incarceration. Because people of color are so disproportionately represented in the criminal justice system, including the populations of our prisons and jails, the narrative choices that defense lawyers make often have racial implications whether they are acknowledged or not. For lawyers who view sentencing as a moment of individual client advocacy and as an opportunity to address mass incarceration and its racial implications, slave narratives are a useful resource. From studying those narratives, defense lawyers can consider the persuasive power of juxtaposing the humanity of their clients with the poor or even dire conditions of confinement in our jails and prisons—not only to influence the court’s decision about the client’s sentence, but to impact the court’s view of our systems of incarceration. From slave narratives, defense attorneys can consider how discussions of the prison conditions might be augmented by appeals to our society’s core values of patriotism, humanitarianism, and even freedom, both to influence the sentence imposed and to highlight the ways in which our systems of incarceration distort those values and therefore harm us all. From slave narratives, defense lawyers can consider the power of revealing, to the court, the prosecutor, and the public, the hidden aspects of institutions that disproportionately impact people of color, and for which there is often no redress. In so doing, defense lawyers, taking a page from the work of formerly enslaved authors, can address and upset the cultural understanding of imprisonment as socially and individually beneficial, necessary, and deserved. These efforts may help achieve individual advocacy goals for the client, but they also may have an abolitionist agenda.

By raising conditions of confinement at sentencing, defense lawyers are asking courts to confront who we expose to severe conditions in our nation’s prisons and jails and why. Not only why this particular person—with his or her particular background, strengths, and unique needs—should be punished in this way, but also implicitly the larger question of why our system has grown to assume that African American and Latino people in particular are more deserving of incarceration and whatever hardships imprisonment entails. Raising conditions of confinement in a courtroom—the risk of violence, lack of educational opportunities, time in solitary confinement, high suicide rates, inadequate medical and mental health care—contributes to a larger understanding of the institutions into which our system of justice has sent so many. Like the descriptions of enslavement in slave narratives, discussions of conditions and confinement can serve to shock and inform participants in the justice system who have failed to formally consider prison conditions even as they participated in the growth of mass incarceration.

C. *Challenges to Raising Conditions of Confinement at Sentencing*

Even when raising conditions of confinement at sentencing advances advocacy and abolitionist goals, this decision nevertheless has complexities and possible drawbacks. Defense lawyers should, for example, consider the racial implications of storytelling on behalf of their clients. While convicted people have the right to speak on their own behalf at sentencing,²²⁷ defense attorneys often undertake the bulk of the advocacy. Particularly when, as is often the case, the defense lawyer is white and the client a person of color,²²⁸ attorneys must be mindful of the racial implications of crafting their client's story. A study of slave narratives provides cautionary lessons about the significance of narrative control. Even if a lawyer is sincere and client-centered, is he or she the modern day equivalent of the white abolitionists framing slave narratives with assurances that the author was trustworthy, respectable, and dignified? Is the white defense lawyer, like the white abolitionists of the antebellum period, assuming that racial problems are best solved by, in the phrase of Professor John Sekora, "white people talking to white people"?²²⁹ It is important not to ignore that white abolitionists' control of the structure and contents of slave narratives made many slave narratives crafted symbols rather than full expressions of enslaved people's lived experiences.

This is not to say that defense lawyers should say nothing at sentencing, or fail to assist their clients in crafting a statement that will be most persuasive to the judge determining the sentence; defense attorneys must do such work unless it conflicts with a client's goals or interests. Further, there may be reasons that a defense lawyer, rather than the client, should address conditions of confinement. Part of the persuasive power of slave narratives lay in the fact that they were personal accounts of the narrator's own experiences; but a convicted person recounting what has happened to him or her in prison in the past is a strong reminder to the court that the defendant has been incarcerated before. Since recidivism is a common justification for the imposition of longer incarceration sentence, this approach carries possible negative consequences for the convicted person. For this reason it may be preferable for the lawyer to speak about incarceration conditions in a generalized way rather than focusing on what hardships

227. Thomas, *Sentencing*, *supra* note 78, at 198 ("At the sentencing hearing itself, after the lawyer's presentation of evidence or argument, the defendant has the right to make a statement on his own behalf in allocution."); *see also* Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' View on Allocution in Sentencing*, 65 ALA. L. REV. 735 (2014) (reporting the results of a survey of federal judges on their perspectives on defendant allocution at sentencing); Kimberly Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2649–51 (2007) (discussing state and federal constitutional and statutory law granting defendants the right to allocute at sentencing).

228. *See* Deborah Rhode, *Law is the Least Diverse Profession in the Nation, and Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), <http://wapo.st/1LHfQWe> [<https://perma.cc/T9XC-L9WT>] (stating that 88% of lawyers are white).

229. Sekora, *supra* note 137, at 509.

her client previously experienced in prison or jail, although there may be times when it is appropriate and persuasive to focus on those conditions. Defense lawyers may be making client-centered, thoughtful choices when they speak at sentencing on behalf of their clients, whether or not the lawyer addresses conditions of confinement. The history of slave narratives nevertheless acts as a reminder that decisions about who controls and shapes a narrative are infused with racial meaning of which attorneys must be mindful.

The fundamental question of whether or not to raise conditions of confinement is complex as well. Even defense lawyers committed to advocacy and abolitionism may hesitate, for good reason, to raise conditions of confinement at sentencing. Incarceration is not meant to be pleasant, and courts are unlikely to be swayed by what they may perceive as the basic deprivations inherent to prison life. Further, some courts may dismiss information even about severe and troubling conditions as inaccurate or manipulative, or feel that a conclusion that the defendant will be exposed to them is too attenuated. Because judges and prosecutors have been routinely engaged in recommending or imposing incarceration sentences, they may react negatively if they perceive a defense lawyer's discussion of conditions of confinement to be a personal attack upon their moral judgment or as a distraction from the question of the defendant's criminal culpability. Certainly some judges will feel more allegiance to correctional staff in prisons and jails than they will to a person convicted of a crime, and thus be inclined to dismiss stories of prison hardships or mistreatment as overblown or justified by prisoner behavior. If the person being sentenced has been incarcerated before, discussing prison conditions may lead the judge or prosecutor to ask why, if the circumstances were so terrible, he or she committed an act that would lead to exposure to such conditions again. Defense lawyers may further worry that focusing on the potentially unpleasant or even terrifying aspects of imprisonment might shock or alarm their clients. Defense lawyers must weigh these competing concerns and consult with their clients before making the decision to discuss prison and jail conditions at sentencing.

A third, and significant, challenge for defense lawyers considering raising conditions of confinement is the question of how to obtain information about those conditions. The barriers to learning about what occurs inside our prisons and jails do not melt away simply because defense lawyers turn their attention to them. Fortunately, there are sources of information available. Some options that defense lawyers can consider are reports written about prisons and jails by advocacy groups, independent oversight bodies (if they exist), or accreditation agencies like the American Correctional Association. Prison and jails collect their own data about some aspects of incarceration, which may be obtained on their websites, as are the policies that govern the institution, most of which are available online. Open record act requests are a helpful resource, as are conversations

with prisoners' rights lawyers and organizations that devote significant attention to incarceration conditions.²³⁰

Legal documents, such as complaints and other briefing in prisoners' rights cases, are another public source of information, along with media reports about individual incidents or investigative journalism about systemic issues. Organizations such as those that work on behalf of people with disabilities, LGBTQ people, or juveniles, often focus on the impact of incarceration on these groups, and their work might be informative to defense lawyers as well. Former (or even current) employees of correctional institutions may be willing to speak with defense counsel. Writings by formerly incarcerated people are a resource; the accounts of those who were incarcerated but then exonerated may have particular appeal, as skeptical audiences may find reports of their experiences more credible by virtue of their factual innocence.²³¹ Finally, large organizations such as Public Defender's Offices should not forget the resource they have in their own clientele, many of whom are held in jail pending the resolution of their cases, and many of whom will remain or become incarcerated after that resolution occurs. These offices might consider surveying these former clients, or training appellate lawyers, who represent convicted persons post-sentencing, to ask questions about conditions of confinement experienced by their incarcerated clients.

Collecting this information is no small task, and accuracy is important; defense lawyers will lose credibility and thus harm their clients if they report data or recount incidents that are not verifiably true. Public Defender's Offices or defense bars might consider assigning particular lawyers or investigators to gather information about prison and jail conditions. This information could be accumulated in a searchable online database that lawyers could access in preparation for sentencing hearings or to assist in other aspects of their representation.

Defense lawyers should also consider the most effective ways to convey this information to the court; perhaps it could be incorporated in an advocacy letter submitted before the hearing, or in a report that is attached to that letter. Lawyers can consider the inclusion of photographs, video, media reports, or other data that can effectively bolster the arguments about conditions of confinement that the attorneys wish to make. Lawyers involved in bar associations or other membership organizations could consider training programs for participants in the system aimed at providing information about conditions of confinement in local prisons and jails. Defense attorneys can contemplate if and how to help their clients incorporate information about conditions of confinement into their

230. Defense lawyers and advocacy organizations seeking information about conditions of confinement can obtain resources from The American Civil Liberties Union's National Prison Project (<https://www.aclu.org/issues/prisoners-rights>), Solitary Watch (<http://solitarywatch.com/>), The Sentencing Project (<http://www.sentencingproject.org/>), Citizens United for Rehabilitation of Errants (CURE) (<http://www.curenational.org/index.php>), and the Prison Policy Initiative (<https://www.prisonpolicy.org/>).

231. See Malkani, *supra* note 125, at 2–3 (arguing that exoneree testimonial may have a “greater impact” than other tools of abolitionism).

own allocution at sentencing. These challenges are not insignificant, but, with attention, thoughtfulness, and diligence, they can be overcome.

V.

CONCLUSION

At the conclusion of her book, Mary Prince wrote, “This is slavery. I tell it, to let . . . people know the truth,” so that they might fight for a changed world in which “slavery is done for evermore.”²³² While addressing prison conditions at sentencing will not end mass incarceration, just as slave narratives did not by themselves end slavery, there is significance in revealing the hidden reality of the system of incarceration that we as a nation have created. Slave narratives demonstrate that storytelling that invokes both the personal dignity and humanity of the individual and the brutality of the conditions to which they have been exposed can be a tool for personal autonomy and social change. Defense lawyers can draw upon the lessons of slave narratives as they seek to both advocate for their clients at sentencing and to dismantle the racialized system of mass incarceration.

232. Mary Prince, *supra* note 133, at 54.