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ARTICLES

A SECOND LOOK AT SECOND LOOK: PROMOTING EPISTEMIC JUSTICE IN RESENTENCING

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Despite an increasing number of critiques from many commentators—abolitionists, social scientists, and fiscal conservatives among them—mass incarceration remains an ongoing crisis. Dealing with the wreckage of carceral overreach requires not just changing policies about what gets criminalized and how offenses are punished prospectively, but also unwinding the long sentences imposed during the past half-century and still being served. Among the mechanisms for decarcerating are second look acts, which a growing number of jurisdictions have passed or are considering.

Often these resentencing tools depend heavily on decisionmakers' exercise of discretion. In rare instances, however, that discretion is constrained. Comparing two recent New York sentencing reforms, the Domestic Violence Survivors Justice Act and the 2004–2009 Drug Law Reform Acts—the former highly discretionary and the latter with a strong presumption in favor of resentencing—this Article notes the relative success rates of each statutory scheme, finding the less discretionary regime apparently more decarceratory. Critically, the exercise of discretion imposes a

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significant dignitary harm on applicants, who are required to prove their believability and moral worthiness to judges deciding whether to free them. As epistemic justice theory shows, those who are incarcerated and disproportionately members of marginalized identity groups face untenably difficult odds of doing so, as they are systematically discredited. In the process of inviting a judge to exercise discretion in their favor, these petitioners are often disbelieved, and the knowledge system is subsequently impoverished by discounting of petitioners' experiences. Thus, if resentencings are going to begin to decarcerate at the rates necessary to bring the United States into line with comparable countries, and do minimal damage in the process, resentencing reforms should be categorical or presumptive rather than discretionary.

Introduction

I watched as Curtis[1] unwrapped his burger, purchased from a vending machine and heated in the prison visiting room's microwave. He squirted ketchup and mustard onto the ashen patty, rubbing them into a bright orange slick that flashed against the drab surroundings. "What do you think my chances are of going home?" he asked.

We were taking a lunch break after spending hours in grueling preparation for our meeting with the District Attorney's Office, where Curtis would plead his case for resentencing under the Domestic Violence Survivors Justice Act (DVSJA),[2] a 2019 New York law that, ostensibly, permitted domestic violence survivors whose acts were criminalized to receive reduced sentences. We had applied for Curtis, and a judge had ordered a hearing to determine if he should be resentenced.

To me, Curtis's claim to resentencing was clear-cut. He had stabbed his boyfriend Richard minutes after a surveillance camera captured Richard choking Curtis until he passed out. After regaining consciousness, full of adrenaline, Curtis had made a fateful decision that came to be a defining shame: He had retrieved a knife and attacked Richard, who later died.[3]

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[1] All names, and some identifying details, have been changed to protect confidentiality, and Curtis has authorized telling his story. This case exemplifies those I litigated as a public defender in New York City, where I worked for fourteen years with individuals convicted of crimes on appeals and other postconviction matters, including resentencing proceedings.

[2] The DVSJA is codified at N.Y. Crim. Proc. Law § 440.47 (McKinney 2023) and N.Y. Penal Law § 60.12 (McKinney 2024), allowing for resentencing and prospective sentencing, respectively.

[3] By its nature as a mitigation reform rather than a full defense, the DVSJA does not require proof of justification. *See* Penal Law § 60.12 ("A court may determine that such

Domestic violence often occurs out of view,[4] but here there was a videotape. Moreover, evidence showed the relationship had been abusive for some time. It had been characterized by Richard's violence since the two had rekindled their romance months earlier, and there were hospital records from an incident years before when Richard had beaten Curtis until partially blinding him.

Given the exceptional amount of proof and clear narrative, we approached the District Attorney's Office for consent, hoping to avoid a hearing that would be drawn out and retraumatizing for Curtis and Richard's family. The assigned prosecutors expressed some interest in reaching a resolution, but there was a sticking point: Hadn't Curtis initially claimed a *different* boyfriend had blinded him? And hadn't he told the police right after the stabbing that Richard was *not* previously abusive? They wanted to meet with Curtis to see for themselves whether they believed him, given these inconsistencies. Even then, however, their consent was not guaranteed.

So, I and other defense team members found ourselves in the prison visiting room, pressing Curtis to explain why his narrative had shifted between early statements to the police and the present day. "I wish I could say what the outcome will be," I responded, biting into a candy bar. "I think it will turn on whether these DAs believe you."

Years earlier, I appeared in court for a proceeding under New York's 2009 Drug Law Reform Act (DLRA).[5] In the 2000s, a series of statutes, including the 2009 DLRA, had rolled back New York's infamous Rockefeller drug laws, which imposed years-long and often life-capped sentences for drug felony convictions.[6] This was one of my first cases as an attorney, and I had little courtroom experience. Luckily, I did not need much; the clerk called my client Linda's case, and the result was swift and favorable: resentencing granted, with a minimum term proposed. After I made a brief oral argument, the prosecutor

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abuse constitutes a significant contributing factor . . . [to the crime] regardless of whether the defendant raised a defense pursuant to article thirty-five, article forty, or subdivision one of section 125.25 of this chapter.").

[4] *See, e.g.*, Jennifer L. Truman & Rachel E. Morgan, Bureau of Just. Stats., U.S. Dep't of Just., NCJ 244697, Nonfatal Domestic Violence, 2003–2012, at 9–10 (2014), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/ndv0312.pdf [https://perma.cc/29A3-QZJK] (noting about half of domestic violence goes unreported and seventy-seven percent occurs at or near the victim's home).

[5] N.Y. Crim. Proc. Law § 440.46 (McKinney 2023); 2004 N.Y. Laws 3907, 3918–19.

[6] *See* N.Y. Penal Law § 70.00 (McKinney 1998) (amended 2004) (describing the old Rockefeller Drug Laws). Starting with 2004 N.Y. Laws 3907, 3918–19, New York began enacting retrospective and prospective sentencing reforms to replace these long indeterminate ranges with (generally) shorter determinate terms. *See* N.Y. Penal Law §§ 70.70–70.71 (McKinney 2021).

presented the case as a serious one, contending my client's role in the crime was significant, and citing her long, albeit remote, criminal history plus disciplinary infractions in prison involving violent conduct. Nonetheless, the judge agreed to resentence her. At a proceeding two weeks later, with little fanfare, she received the reduced sentence and went home.

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One might ask why the procedural experiences of these clients differed from each other. After all, both had invoked ameliorative statutes passed to realign punishment with evolving societal views and advances in science.[7] Both laws, which contain several provisions that mirror each other,[8] invite judges to consider a broad, nonexhaustive list of mitigating and aggravating circumstances, such as the nature of the crime, the applicant's record in prison, or reentry plans. Yet, while Linda moved through the process quickly and with minimal friction, Curtis had his every move picked apart during a years-long process. While in the end both prevailed through decisionmakers exercising discretion, that discretion was applied through two distinct standards,

[7] Senator Roxanne Persaud noted when celebrating the DVSJA's passage that inviting judges to consider domestic violence in sentencing would prevent "wrongful[] incarcerat[ion]" of those who needed healing, not punishment. Roxanne J. Persaud, *Governor Cuomo Signs the Domestic Violence Survivors Justice Act, Longtime Bill Sponsored by Senator Persaud*, N.Y. State Senate (May 5, 2019), https://www.nysenate.gov/newsroom/press-releases/2019/roxanne-j-persaud/governor-cuomo-signs-domestic-violence-survivors [https://perma.cc/YVS5-NBW7]. *See generally* Bessel A. van der Kolk, The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma 51–104 (2014) (detailing effects of trauma on behavior). Lawmakers also lauded the DLRA's reframing of drug abuse as a health, not criminal, matter. *See* Sheldon Silver, Speaker, N.Y. State Assembly, Rockefeller Drug Law Press Conference, *in* N.Y. State Assembly (Apr. 24, 2009), https://nyassembly.gov/Press/20090424a [https://perma.cc/33UZ-AY9S] ("[D]rug addiction is a disease for which there are better, more humane, more effective and less costly alternatives than prison."). While there has been some renewed debate about whether addiction is properly classified as a "disease" that follows a traditional model of disease process, current scientific consensus categorizes it as such. *See, e.g.*, Markus Heilig, James MacKillop, Diana Martinez, Jürgen Rehm, Lorenzo Leggio & Louk J.M.J. Vanderschuren, *Addiction as a Brain Disease Revised: Why it Still Matters, and the Need for Consilience*, 46 Neuropsychopharmacology 1715, 1715–23 (2021). The disease model calls into question notions of criminal responsibility that undergirded many long sentences handed out during the War on Drugs.

[8] For instance, each contains eligibility criteria and judicial equities-weighing, invites courts to consider program participation but warns that inability to participate may not count against an applicant, and provides for a right to counsel and appeal. *Compare* N.Y. Crim. Proc. Law § 440.47 (McKinney 2023) (DVSJA), *with* N.Y. Crim. Proc. Law § 440.46 (McKinney 2023); 2004 N.Y. Laws 3907, 3918–19 (DLRA). Their eligibility criteria vary, but the laws contain several parallel structures. *Id.*

one unfettered and one constrained, leading to procedural experiences that varied significantly.

More fundamentally, these cases present the question: Who deserves belief? And should that be an axis on which decarceration turns? In recent years, mainstream discourse has converged around the need to shrink the bloated carceral apparatus that exploded in the final third of the twentieth century.[9] Further, a now-massive body of research has shown recidivism risks for many groups are overblown.[10] Among

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[9] *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 21, 60–61 (10th anniversary ed. 2020) (detailing the growth in incarceration, particularly via the War on Drugs, as a means of enforcing a "racial caste system" following the civil rights movement of the 1950s and 1960s that targeted *de jure* segregation); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20 (2003) (inviting readers to imagine that prisons, instruments of racial oppression and social control, are unnecessary, and advancing a goal of "bring[ing] as many imprisoned women and men as possible back"); LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM 171–78 (2023) (discussing the limits of reform in addressing how criminalized survivors of gender-based violence are punished, and calling for abolition); ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 82 (2019) (discussing the rise of the "punishment bureaucracy" and the cultural change—rather than tweaks around the edges—necessary to end it); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 7 (2020) ("[A]round 2010, ... [e]nough evidence amassed to produce a liberal consensus that US mass incarceration is one of the great human rights tragedies of our time.").

[10] For example, people age out of crime. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 131, 143–45 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter Travis] (noting sharp declines in crime-committing after teenage years); MATTHEW R. DUROSE & LEONARDO ANTENANGELI, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 255947, RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012–2017), at 9 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf [https://perma.cc/LVW7-XBCD] (documenting diminishing recidivism rates with age); MARTA NELSON, SAMUEL FEINEH & MARIS MAPOLSKI, VERA INST. OF JUST., A NEW PARADIGM FOR SENTENCING IN THE UNITED STATES 26–27, 29 (2023), https://vera-institute.files.svdcdn.com/production/downloads/publications/Vera-Sentencing-Report-2023.pdf [https://perma.cc/RRT5-KNS5] (discussing the well-documented fact that young people stop committing crimes, and in particular *violent* crimes, by their late teens to early twenties, making long-term incapacitation unnecessary); Graham v. Florida, 560 U.S. 48, 68 (2010) (relying on medical-expert amici to note brain development continues into "late adolescence" such that children are less morally culpable and more capable of change than adults). This applies to sexual offenses too; contrary to popular misconception, research shows low reoffense rates for people who commit such offenses. *See* KRISTEN M. BUDD, THE SENT'G PROJECT, RESPONDING TO CRIMES OF A SEXUAL NATURE: WHAT WE REALLY WANT IS NO MORE VICTIMS 2–3 (2024), https://www.sentencingproject.org/app/uploads/2024/01/Crimes-of-a-Sexual-Nature.pdf [https://perma.cc/6U8X-P7KG]. People who receive education, especially post-secondary, have low recidivism rates. *See* LOIS M. DAVIS, RAND CORP., HIGHER EDUCATION PROGRAMS IN PRISON: WHAT WE KNOW NOW AND WHAT WE SHOULD FOCUS ON GOING FORWARD 4 (2019), https://www.rand.org/content/dam/rand/pubs/perspectives/PE300/PE342/RAND_PE342.pdf [https://perma.cc/V95J-JWPC] (reviewing meta-analyses of studies of education's effect on recidivism, and finding lower rates correlated with educational attainment, with post-secondary education completion reducing recidivism further). And

the mechanisms for reversing mass incarceration is resentencing, with various types of second look statutes emerging in the twenty-first century as one tool.[11]

Resentencing laws—whether judge-created or statutory—take many forms, with varying degrees of built-in discretion.[12] Taking stock of these laws is important, as they have been on the books for some years but have not yet gained ubiquity. Examining the implementation of a couple of these laws reveals a theme: the more discretionary a resentencing law, the more individuals are asked to throw themselves on the mercy of decisionmakers (courts and prosecutors who might consent) who often, because of structural and psychological reasons, are disinclined to credit the life experiences of defendants that might have led to their entry to the criminal legal system in the first place. Beyond the practical effect of denying early release to people serving long

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women who commit homicide have vanishingly low reoffense rates. *See* Memorandum in Support of Legislation, S. 203-1077, 2019–2020 Reg. Sess. (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/S1077 [https://perma.cc/9FDR-FWWM] ("[O]f the 38 women convicted of murder and released between 1985 and 2003 [in New York State], not a single one returned to prison for a new crime within a 36-month period of release—a 0% recidivism rate."). Generally, studies have shown incarceration has little criminogenic effect, except to the extent it "diminishes job stability and disrupts family relationships" such that people reentering the community might continue their involvement in crime. Travis, *supra,* at 152.

[11] By "second look," I mean any reform that allows courts to revisit previously imposed sentences. They need not necessarily turn on a reassessment of applicants based on information unknown at the time of the original proceeding. Other mechanisms to reduce incarceration, whose discussion is beyond the scope of this Article, include time credits earned in prison, and front-end sentence reductions. *See* Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. Tol. L. Rev. 859, 860 (2011) (cataloguing early responses to mass incarceration).

[12] *See, e.g.*, D.C. Code § 24-403.03 (2021) (allowing those who were under twenty-five at the relevant crime's commission to seek resentencing after serving fifteen years); Or. Rev. Stat. § 137.218 (2021) (effective Jan. 1, 2024) (allowing joint petitions by an incarcerated person and a prosecutor for certain felony sentences); 18 U.S.C. § 3582(c)(1) (allowing, under the First Step Act, federal courts to reduce a sentence where "extraordinary and compelling circumstances warrant"); Cal. Penal Code § 1170(d) (West 2024) (authorizing de novo sentencing proceedings for a person who was under eighteen on the relevant crime's commission date and has served at least fifteen years of a life-without-parole sentence, provided they meet at least one enumerated threshold criterion); Montgomery v. Louisiana, 577 U.S. 190, 212–13 (2016) (giving retroactive effect to the rule announced in Miller v. Alabama, 567 U.S. 460 (2012), that youths may not be sentenced to mandatory life without parole, thus permitting potential resentencings of class members); Commonwealth v. Mattis, 224 N.E.3d 410, 415 n.1, 428 (Mass. 2024) (extending *Miller* to "emerging adults," defined as individuals eighteen, nineteen, and twenty years old). For an overview of reforms as of mid-2024, see Becky Feldman, The Sent'g Project, The Second Look Movement: A Review of the Nation's Sentence Review Laws (2024), https://www.sentencingproject.org/app/uploads/2024/05/Second-Look-Movement.pdf [https://perma.cc/D8AW-MPYZ].

sentences,[13] this imposes a significant harm: an "epistemic injustice," whereby a resentencing applicant is "wrongfully undermined in [their] capacity as a knower"[14]—that is, not permitted to be an expert on their own experience. Coined by feminist philosopher Miranda Fricker, "[e]pistemic injustice" refers to "how knowledge production is damaged by excluding or discrediting the speech of certain social groups,"[15] which happens through an implicit bias-like process.

This paper suggests that this dignitary harm provides an additional compelling reason, beyond the moral and empirical, to make resentencing to reduced terms automatic or at least presumptive for those who meet baseline criteria. Recent legal scholarship has incorporated Fricker's twin concepts of testimonial and hermeneutical injustice[16] to catalog the harms that can attend discounting someone's credibility because of their identity.[17] Here, I apply that lens to understanding the experience

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[13] For instance, the American Law Institute, in its commentary to the second look provision of the 2017 Model Penal Code revision, notes: "[P]redictable political risks will be visited upon any judicial authority vested with sentence-modification powers. Decisions to release prisoners short of their maximum available confinement terms are often unpopular, and even one instance of serious reoffending by a releasee can focus overwhelming negative attention upon the releasing authority." MODEL PENAL CODE § 305.6 cmt. a (AM. L. INST., Proposed Final Draft 2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/mpcs_proposed_final_draft.pdf [https://perma.cc/J52N-BLXT]. Because, moreover, "the case mix under [the proposed provision] will be unique, with a heavy tilt toward the most serious offenses and victimizations," institutional pressures on discretion-wielding actors will be at their height, favoring maintaining the status quo rather than modifying sentences. *See id.*

[14] MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 17, 20 (2007).

[15] M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1214 (2020) [hereinafter Hanan, *Invisible Prisons*].

[16] FRICKER, *supra* note 14, at 1. Fricker defines testimonial injustice as occurring when a listener's prejudice against a speaker prevents the listener from seeing the speaker as someone with something to say and thus learning from them. *Id.* at 17. Hermeneutical injustice is what results from the experiences of the marginalized being left out of the collective knowledge pool such that those experiences become hidden from common view. *Id.* at 158.

[17] *See, e.g.*, S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1107, 1109 (2022) (arguing that "the family regulation system facilitates damaged knowledge production by requiring false and inauthentic victimhood narratives and excluding alternate knowledge[,]" especially that of poor women of color); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1, 3, 57 (2017) (noting that "'credibility discounting' is the dominant feature of our legal response to rape," with the failure to credit stemming from prejudice, and positing that "[t]heorizing credibility discounts as epistemically unjust" enables seeing the full scope of harm when complainants are disbelieved); Hanan, *Invisible Prisons*, *supra* note 15, at 1191 (observing that "[p]risoners, as an excluded and often reviled group, are not viewed as having trustworthy and relevant information," contributing to a "thin understanding of what prison is like" such that prison conditions become "irrelevant" to sentencing decisions; and positing that epistemic injustice provides a helpful frame for understanding and rectifying these knowledge gaps).

of and effects on those convicted of crimes and seeking resentencing and release from prison, a topic not yet fully explored in the literature.[18]

In Part I, after providing context for the problem—the now-conventional idea that the United States cannot continue caging huge numbers of its inhabitants, many of them people of color and from communities experiencing economic hardship—and reviewing the pitfalls of judicial discretion in sentencing, this Article describes the epistemic harm that occurs by making applicants prostrate themselves during the resentencing process. This damage is two-fold. First, at the individual level, it leads to "exclusion and silencing; invisibility and inaudibility . . . ; having one's meanings or contributions systematically distorted, misheard, or misrepresented; having diminished status or standing in communicative practices; . . . being unfairly distrusted; [and] receiving no or minimal uptake . . . ."[19] At resentencing, people who, by status, have convictions—a group typically and legally[20] deemed *incredible*—are asked to make their case to an arbiter disinclined to believe them, setting them up for failure *and* for having their realities discounted. Further, because of the way the criminal legal system has disproportionately affected people of color,[21] poor people, transgender and gender nonconforming individuals, and, increasingly, women[22]—all historically marginalized[23]—the "identity prejudice[s]"[24] that those in power hold can lead to compounding discrediting when people with one or more of these identities seek resentencing.

Second, discretionary resentencing impoverishes the universe of knowledge, as fewer narratives are credited and thereby incorporated into common understanding. This "hermeneutical injustice" means there

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[18] Elizabeth Langston Isaacs similarly examines identity-based credibility discounts for DVSJA applicants, arguing that women, people of color, and the incarcerated suffer disbelief because of epistemic injustice, and are subject to unfair gatekeeping by the DVSJA's corroboration requirement—however, her contributions propose fixes to the DVSJA that place less onus on survivors and critique their initial criminalization. *See* Elizabeth Langston Issacs, *The Mythology of the Three Liars and the Criminalization of Survival*, 42 Yale L. & Pol'y Rev. 427, 448–49, 505–21 (2024).

[19] Ian James Kidd, José Medina & Gaile Pohlhaus, Jr., *Introduction to the Routledge Handbook of Epistemic Injustice*, *in* The Routledge Handbook of Epistemic Injustice 1 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017).

[20] *See, e.g.*, Fed. R. Evid. 609 (permitting witness impeachment with evidence of prior convictions).

[21] *See generally* Alexander, *supra* note 9, at 8.

[22] Goodmark, *supra* note 9, at 11–12.

[23] Fricker, *supra* note 14, at 32 ("Many of the stereotypes of historically powerless groups such as women, black people, or working-class people variously involve an association with some attribute inversely related to competence or sincerity or both: over-emotionality, illogicality, inferior intelligence, evolutionary inferiority, . . . lack of moral fibre, being on the make, etc.").

[24] *Id.* at 27–28 (defining "identity prejudice" as bias "relating to social identity").

are gaps in the collective understanding of human experience.[25] Because of this skewing, "the powerful tend to have appropriate understandings of their experiences ready to draw on as they make sense of their social experiences," whereas the marginalized have "at best ill-fitting meanings to draw on in the effort to render the[ir experiences] intelligible."[26]

Taking seriously the idea that mass incarceration has been a cataclysm means dramatically reducing incarceration—by some estimates, up to 80% to bring numbers proportionally into line with comparable nations.[27] Accordingly, Part II describes a key decarceration mechanism: resentencing many already incarcerated so they can return home. As these reforms proliferate,[28] understanding what works best becomes critical. I argue that the ideal form of resentencing is near-ministerial or at least with a strong presumption the prosecution has the burden to rebut. This regime is most likely to mitigate the "credibility discount"[29] given to convicted persons whose experiences might not be cognizable to decisionmakers, many of whom come from different backgrounds than those paraded before them daily for judgment.

To illustrate why categorical resentencing is optimal, I examine two statutes that approximate, respectively, the highly discretionary and the presumptive, showing how the former has had limited success while harming applicants, while the latter has freed many without inflicting the same dignitary harms. The first is the DVSJA, the law under which Curtis sought resentencing. It requires a court to analyze eligibility and then determine whether a traditional-range sentence would be "unduly harsh" such that it will impose a reduced sentence.[30] In exercising discretion, it may consider any factor.[31] While there have been some resentencings under this law, progress has been slow. And, critically, those who have been through the process describe it as gut-wrenching.[32]

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[25] *Id.* at 154.

[26] *Id.* at 148.

[27] *See* KARAKATSANIS, *supra* note 9, at 87 (citing Bruce Western & Becky Pettit, *Mass Imprisonment*, *in* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 11, 14–15 (2006)). The Vera Institute estimates that reducing incarceration by nearly eighty percent is possible through several reforms, and will better promote both safety and justice. NELSON ET AL., *supra* note 10, at 7.

[28] *See generally* FELDMAN, *supra* note 12, at 11–24 (cataloguing existing reforms).

[29] *See* Tuerkheimer, *supra* note 17, at 3 (defining "credibility discounting" as "an unwarranted failure to credit an assertion where this failure stems from prejudice").

[30] N.Y. PENAL LAW § 60.12(1) (McKinney 2024).

[31] *Id.*; N.Y. CRIM. PROC. LAW § 440.47(2)(e) (McKinney 2023).

[32] *See, e.g.*, Tamara Kamis & Emma Rose, *The Domestic Violence Survivors Justice Act Gets a Slow Start*, N.Y. FOCUS (May 7, 2021), https://nysfocus.com/2021/05/07/domestic-violence-survivors-justice-act-gets-a-slow-start [https://perma.cc/46XJ-MDWZ] (describing how even successful applicant Maresa Chapman found the process "humiliating"); Kathy Boudin, Judith Clark, Michelle Fine, Elizabeth Isaacs, Michelle Daniel Jones, Melissa

Because of the number of identity prejudices it implicates, the potential for epistemic injustice is high.

By contrast, between 2004 and 2009, New York passed several reforms meant to ease the harshest excesses of the Rockefeller-era laws. Colloquially known as the "Drug Law Reform Acts," these laws contain threshold eligibility criteria, but also a strong presumption in favor of resentencing: "[U]nless substantial justice dictates" otherwise, an applicant should be resentenced.[33] While courts still may deny resentencing, this presumption constrains their discretion. The DLRAs have resulted in greater success rates than the DVSJA,[34] and have not

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Mahabir, Kate Mogulescu, Anisah Sabur-Mumin, Patrice Smith, Monica Szlekovics, María Elena Torre, Sharon White-Harrigan & Cheryl Wilkins, *Movement-Based Participatory Inquiry: The Multi-Voiced Story of the Survivors Justice Project*, 11 Soc. Sci. 129 (2022) ("We hear, often, how grueling it is to relive the moment and what came before, and to be scrutinized again, by the same judge and prosecutor.").

[33] 2004 N.Y. Laws 3907, 3919. This appears to be a unique provision in resentencing law and, for that reason, provides an interesting comparison to other second look statutes, which typically invite wide exercises of discretion. *See supra* note 12. *See also* People v. Suya, 924 N.Y.S.2d 242, 245 (Sup. Ct. 2011).

[34] As of February 2023, forty survivors had been resentenced. Liz Komar, Alexandra Bailey, Clarissa Gonzalez, Elizabeth Isaacs, Kate Mogulescu & Monica Szlekovics, The Sent'g Project & Survivors Just. Project, Sentencing Reform for Criminalized Survivors: Learning from New York's Domestic Violence Survivors Justice Act 11 (2023), https://www.sentencingproject.org/app/uploads/2024/02/Sentencing-Reform-for-Criminalized-Survivors.pdf [https://perma.cc/MW59-MK3T] (noting important successes but flagging that at least thirty-two petitions had been denied in that same period). To address the limited success, the authors recommend, among other amendments, creating a presumption of relief for eligible candidates to constrain judicial discretion. *Id.* at 19. It is also worth noting that the data does not necessarily capture all denials, as applications can be rejected at earlier points in the process. *See* Jean Lee, *Abuse Survivors Can Get Shorter Sentences in 2 States, but Courts Are Saying No*, The 19th (July 12, 2021), https://19thnews.org/2021/07/domestic-violence-survivors-reduced-sentences-in-2-states [https://perma.cc/XM27-3DR8]. By October 2024, the number resentenced had risen to sixty-eight, with seventy-six denied. *See* E-mail from Kate Mogulescu, Professor of Clinical L., Brooklyn L. Sch., & Dir., Survivors Just. Project, to author (Oct. 24, 2024, 12:46 PM) (on file with author). By contrast, one year into the initial round of DLRA resentencings, which affected those convicted of class A-I drug felonies, 270 of 473 eligible applicants had been resentenced (a subset of whom were released if they had served all time on their newly imposed determinate term), and only a small number of applications denied; outstanding results at that point were largely attributable to delay in case processing, not to denials. *See* William Gibney, The Legal Aid Soc'y, One Year Later: New York's Experience with Drug Law Reform 7 & n.18 (2005), https://www.csdp.org/research/DLRA_2005_Report.pdf [https://perma.cc/5PC2-V8Q4]. By late 2009, 279 A-I petitioners had been *released*, and 297 of about 550 A-II petitioners, subjects of the second round of reform, had also been resentenced and released. *See* William Gibney & Terence Davidson, The Legal Aid Soc'y, Drug Law Resentencing: Saving Tax Dollars with Minimal Community Risk 2, 5–6 (2010), https://core.ac.uk/download/pdf/34718928.pdf [https://perma.cc/F8A8-CZY5]. For the final round, around 1,100 were initially estimated to be eligible. N.Y. State, Div. Crim. Just. Servs., 2009 Drug Law Reform Update 17 (June 2011) (on file with author). By 2015, 823 had been resentenced. N.Y. State Div. of Crim. Just. Servs., Monthly Resentencing Summary (Jan. 2015) (on file with author). January 2015 was the most recent monthly report provided upon

subjected applicants to the same dignitary harms as the DVSJA. While there are some important distinctions between these statutes (which I consider in this Part), principally that the former applies to drug crimes, including those of the highest grade, and the latter to a wide range of serious felony offenses, what the comparison reveals is that discretion is often what provides the space for harm to creep in.

Part III considers implications of adopting this proposed reform, including that by making resentencing automatic or presumptive when certain minimal criteria are met, "collective interpretive resources"[35] might remain impoverished, as decisionmakers will not get to hear the full range of human experiences, leaving their stereotypes unchallenged. However, I argue that given the mass incarceration crisis, in the short term we must prioritize reducing *testimonial* injustice and efficiently decarcerating. I also respond to potential objections to limiting discretion and add a cautionary note for jurisdictions considering a second look regime.

Finally, I situate resentencing reforms in the wider debate about how best to address the ills of mass incarceration, querying whether such reforms are sufficient, or whether instead we should be calling for abolition. I contend that only by acknowledging epistemic injustice can we begin to undercut some of the dehumanizing force of the criminal legal system, removing its raison d'être and beginning to make the necessary cultural shift toward decarceration and reinvestment in true, meaningful safety measures—as the abolitionist movement counsels.

I
Discretionary Resentencing Harms Applicants

A. The Growing Call for Decarceration

Understanding some of the harms that unwinding mass incarceration causes requires examining how we arrived here. Beginning in the early 1970s, incarceration rates rose, peaking in 2009.[36] Though rates have decreased since then,[37] progress has been slow, and the United States

Freedom of Information Law request to the Division of Criminal Justice Services, which kept these data. While the denominator—the group of eligible individuals—changed over time due to court decisions, these changes generally expanded the pool. *See, e.g.*, People v. Brown, 32 N.E.3d 935, 936–37 (N.Y. 2015) (interpreting law to apply to those released to parole, not just incarcerated).

35 This is Fricker's term for the universe of shared experiences that helps with meaning-making. *See* Fricker, *supra* note 14, at 1.

36 Travis, *supra* note 10, at 13, 33.

37 *Id.*

still incarcerates at levels unseen in other democracies,[38] let alone elsewhere in the world.[39]

These datapoints have become familiar, and those on the left and the right have criticized the explosion in incarceration,[40] calling to reduce the number of people behind bars. The rationales for these appeals are myriad, including abolitionist arguments against human caging;[41] the fundamental unfairness of a system not only rife with racial disparities but predicated on racial subjugation;[42] the lack of

[38] *Id.* at 13 n.1 (noting that, as of 2013, the U.S. had an incarceration rate five to ten times greater than "Western European and other liberal democracies"); NELSON ET AL., *supra* note 10, at 14 (analyzing comparative data and finding the U.S. incarcerates at a rate more than six times that of similar countries, and estimating that to bring U.S. rates into line, it would need to reduce its prison and jail population from nearly two million to below three hundred fifty thousand).

[39] *See* HELEN FAIR & ROY WALMSLEY, WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST 2, 11 (13th ed. 2021) https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf [https://perma.cc/RHZ9-YD7Z] (citing statistics showing the U.S. has both the greatest total number of incarcerated persons *and* the greatest incarceration rate; China is the only potential exception given the unknown number of pretrial and political detainees).

[40] Travis, *supra* note 10, at 16. In 2018, for example, Congress passed the bipartisan First Step Act, which allowed for sentence reductions for certain imprisoned persons. 18 U.S.C. § 3582(c)(1).

[41] *See, e.g.*, DAVIS, *supra* note 9, at 10 ("Are we willing to relegate ever larger numbers of people from racially oppressed communities to an isolated existence marked by authoritarian regimes, violence, disease, and technologies of seclusion that produce severe mental instability?"); GOODMARK, *supra* note 9, at xi ("[A]bolition is the only solution to the revictimization of survivors [of gender-based violence] by the criminal legal system."); KARAKATSANIS, *supra* note 9, at 148 (criticizing system actors for permitting "the legal system to view caging a person as more acceptable than other physical and psychological punishments," and subsequently permitting "those cages to degenerate into places in which people will contract life-threatening illness, endure the torture of solitary confinement, be raped and physically assaulted, be deprived of sunlight and fresh air, and experience a variety of other horrors"); NELSON ET AL., *supra* note 10, at 9 ("Our runaway yet routine use of incarceration wastes human potential, prevents people from contributing to our families and communities, and targets already marginalized neighborhoods. We have lost millions of lives—both literally and metaphorically—to mass incarceration.").

[42] *See, e.g.*, ALEXANDER, *supra* note 9, at 20–22 (noting the persistence of racist social control, with mass incarceration the latest iteration); NELSON ET AL., *supra* note 10, at 14 ("Black and Latino people make up 58 percent of the U.S. prison population, but just 31 percent of the overall population."). Black men are incarcerated at a rate six times that of white men, and the "Hispanic rate" was more than two-and-a-half times the white. Travis, *supra* note 10, at 93. In particular, an explosion in drug arrests, which since the 1970s have been higher for Black people than for white people, contributed to the growth in incarceration. *See id.* at 50; ALEXANDER, *supra* note 9, at 60. And the punishments levied on people of color are harsher than on white people. Travis, *supra* note 10, at 97–98.

empirical proof that mass incarceration improves public safety;[43] and fiscal responsibility.[44]

In part, this continued bloat of the prison population derives from the long sentences imposed during the late-twentieth-century war on crime, during which incarceration, especially long periods of confinement, was "the preferred response to crime, even when crime rates were falling."[45] Several policy changes contributed to increasing sentence lengths as a response to perceived increases in offending: mandatory minimums, "truth-in-sentencing" regimes popularized in the 1990s that involved harsher and more certain punishments, recidivist (or three-strikes) laws, and life-without-parole sentences.[46] According to a

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[43] *E.g.*, Nelson et al., *supra* note 10, at 9–10 (noting that removing people from their communities can destabilize both the removed and the families left behind and observing that evidence does not support the idea that traditional rationales for incarceration deliver greater safety); Karakatsanis, *supra* note 9, at 147 (critiquing the "undertheorization of the amount of harm actually caused by what we popularly call 'crime' and because of an underdeveloped account of whether caging humans leads to less 'crime'"); Ram Subramanian & Alison Shames, Vera Inst. of Just., Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States 17 (2013) ("The evidence is overwhelming that incarceration has a negative impact on long-term individual risk and community health . . . . [M]any of the European practices—socialization, cognitive-behavioral interventions, education, life skills, and treatment of mental illness—are far more successful."); Travis, *supra* note 10, at 83, 102 (noting mandatory minimums, life-without-parole terms, and three-strikes laws have "little to no effect on crime rates"). In 2023, Vera reviewed seminal National Research Council and Brennan Center studies, finding that while increased incarceration rates modestly decreased property crimes, they did not affect the dropping violent crime rates during the 1990s and 2000s. Nelson et al., *supra* note 10, at 24.

[44] Mass incarceration costs over $182 billion per year. Peter Wagner & Bernadette Rabuy, Prison Pol'y Initiative, Following the Money of Mass Incarceration (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/SK58-VHDM]. In addition to the high costs of maintaining the carceral system, the collective diminished job prospects resulting from criminal records can impede individual and collective economic growth. *See* Scott Lincicome & Ilana Blumsack, *Empowering the New American Worker: Criminal Justice*, Cato Inst. (Dec. 15, 2022), https://www.cato.org/publications/facilitating-personal-improvement-criminal-justice [https://perma.cc/Y4FC-ETGS].

[45] Travis, *supra* note 10, at 18, 34, 69, 70. Despite some reduction in the incarceration rate, crime has continued to drop, with pandemic-era upticks a blip in an otherwise downward trend. *See* German Lopez, *Crime on the Decline*, N.Y. Times (Jan. 11, 2024), https://www.nytimes.com/2024/01/11/briefing/us-crime-rate.html [https://perma.cc/2SS5-G4GA]. How "crime" is defined is a subjective question, reflecting policy choices rather than a neutral moral assessment. *See* Karakatsanis, *supra* note 9, at 21 ("The criminal law is not an inviolate repository of right and wrong, but . . . a tool related to cultural, racial, and economic features of our society."); Travis, *supra* note 10, at 20 ("Crime and punishment are social and legal constructs."). Similarly, laws are enforced unevenly. For example, while "[w]e have laws against murder, assault, and stealing but also against financial fraud . . . [t]here has been almost no criminal prosecution of bankers stemming from fraudulent loans or financial misreporting antecedent to the 2008 economic collapse." Michael Sullivan, *Epistemic Justice and the Law*, *in* The Routledge Handbook of Epistemic Injustice, *supra* note 19, at 293.

[46] Travis, *supra* note 10, at 44, 70, 78. In New York, for example, between 1995 and 1998, the Legislature moved from a system of indeterminate sentences—or ranges with parole

Vera Institute estimate, "[a]s of 2019, 57% of the U.S. prison population was serving sentences of ten or more years," and "as of 2020, one in seven people in U.S. prisons was serving a life sentence."[47]

B. The Problems of Discretion

Debates about how much discretion to give sentencing courts are longstanding, ping-ponging over the decades between preferences for unlimited versus constrained, and occurring alongside the growth in mass incarceration[48] and current discussions about if and how to unwind it. Allowing judges to make individualized determinations occasionally can lead to more merciful dispositions and humanization.[49] It can also promote leniency when there is a widespread view among judges that the legislature's ranges are too harsh. For example, during

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eligibility occurring once the minimum term is served, predicated on the theory that those who could show rehabilitation would be released before their maximum—to one that largely consisted of determinate, or fixed, terms for most violent felonies, plus mandatory periods of postrelease supervision. *See* 1995 N.Y. Laws 128 (amending N.Y. Penal Law §§ 70.00, 70.02 to include determinate sentences for violent felonies). These sentences were generally longer for equivalent crimes than had been imposed previously. In 1995, the Legislature also introduced the death penalty and life without parole sentencing for first-degree murder. 1995 N.Y. Laws 1 (amending N.Y. Penal Law § 60.06 to include these dispositions). State applicants for federal grants for prisons, under the 1994 Violent Crime Control and Law Enforcement Act, were required to show increased use of incarceration. *See* Travis, *supra* note 10, 70–71.

47 Nelson et al., *supra* note 10, at 1. Long sentences and even decisions about what to criminalize reflect policy choices. *See* Karakatsanis, *supra* note 9, at 18–72 (deconstructing the idea of what constitutes a crime). For example, Karakatsanis notes: "'Terrorists' . . . cause miniscule amounts of harm compared to . . . cigarettes, contaminated water, salty food, car accidents, poor access to health care, air pollution, and thousands of other problems that are easily fixable as a policy matter . . . ." *Id.* at 151 (citations omitted). He continues that this is so "especially if resources anywhere near the amount expended on what elites call 'public safety' or 'national security' were devoted to them. Secondhand smoke alone, for example, kills ten times as many nonsmoking people in the United States *every year* as the September 11 attacks . . . ." *Id.* (citations omitted). Similarly, drug use has been addressed as a criminal rather than as a public health issue, with "*some* drugs . . . in *some* neighborhoods" policed more thoroughly—the infamous and not-fully-remedied crack-cocaine sentencing disparity a prime example. *Id.* at 22, 27. In fact, in countries such as Germany, crimes that are considered felonies in the U.S., such as burglary, forgery, aggravated assault, and drug crimes, are classified as "minor" and punishable much less severely, and certain offenses categorized as crimes here are decriminalized elsewhere. *See* Subramanian & Shames, *supra* note 43, at 6 (citing Richard S. Frase, Max Planck Inst. for Foreign and Int'l Crim. L., Sentencing in Germany and the United States: Comparing Äpfel with Apples 5–6 (Freiburg, Germany July 2001)).

48 *See supra* Section I.A.

49 For example, in *Pepper v. United States*, 562 U.S. 476, 487–90 (2011), the Supreme Court noted that the longstanding tradition at common law and by statute has been for sentencing courts to treat defendants as individuals in crafting appropriate dispositions, and that it was appropriate for courts to consider, following vacatur of a sentence on appeal, mitigating postsentence conduct.

the Rockefeller era, advocates decried the lack of discretion vested in judges to exercise common sense instead of to impose harsh mandatory minimums.[50]

In the federal system, until the Supreme Court restored discretion in *United States v. Booker*[51] by making the Sentencing Guidelines effectively advisory, some judges had lamented the ongoing prominence of the Guidelines and their supposed "mandatoriness"[52] promulgated after the passage of the 1984 Sentencing Reform Act (SRA).[53] The SRA had been passed in an effort to rein in judicial discretion and "rationalize" sentencing.[54] Judge Marvin E. Frankel, a prominent critic, described the problematic state of sentencing in the 1970s: Not only was it "a bizarre 'nonsystem' of extravagant powers confided to variable and essentially unregulated judges, keepers, and parole officials" but it was also the site of "feckless cruelty," as American judges imposed the "harshest sentences in the world"[55] (and this was before mass incarceration even took off). While the "familiar litany" of sentencing purposes—retribution, deterrence, condemnation of behavior, rehabilitation, and incapacitation—created some theoretical guardrails, Frankel noted that those principles hardly constrained untrained judges who simply wanted to be retributive; further, sentencing statutes gave judges no guidance for how to weigh various factors.[56] Frankel therefore proposed a solution: more "law."[57] Among the specific reforms he championed was codifying the governing mitigating and aggravating factors at sentencing,

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[50] *See* Loren Siegel, Robert A. Perry & Corrine Carey, The N.Y. C.L. Union, The Rockefeller Drug Laws: Unjust, Irrational, Ineffective, A Call for a Public Health Approach to Drug Policy 5, 6 (Mar. 2009).

[51] 543 U.S. 220, 245 (2005).

[52] *See, e.g.*, Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 Ohio St. J. Crim. L. 523, 524, 530–31 (2007) (describing judicial opposition to the SRA before and after its passage, though also noting judges essentially adhered to the Guidelines, deferring to Congress and the Sentencing Commission in deciding punishments).

[53] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 28 U.S.C. §§ 991–98; 18 U.S.C. §§ 3551–626) (overhauling federal sentencing).

[54] Gertner, *supra* note 52, at 529.

[55] Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 1–2 (1972).

[56] *Id.* at 4–5, 7.

[57] *Id.* at 9. Across the country, in response to such fairness- and justice-based critiques from the left, and also in response to a growing call for harsher sentences from the right. *See, e.g.*, Off. of the Att'y Gen., U.S. Dep't of Just., Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice 7 (July 1992); *see* James Wootton, *Truth in Sentencing—Why States Should Make Violent Criminals Do Their Time*, 20 U. Dayton L. Rev. 779, 781–82 (1995), states began enacting "truth-in-sentencing" laws, which eliminated discretion of bodies like parole boards, instead turning to flat—and elevated—sentences. *E.g.*, *id.* at 781–82 (discussing efforts to enact such laws); Susan Turner, Peter W. Greenwood, Elsa Chen & Terry Fain, *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 Stan. J. L. & Pol'y 75, 75–76 (1999) (noting over half of states passed such laws, largely spurred by the Violent Crime Control and

ideally with a commission of experts studying the issue and making recommendations.[58] The SRA represented a move in that direction, though it coincided with an uptick in tough-on-crime policy enactments.[59] Eventually, the SRA was seen as untenably harsh.[60] Following *Booker*, the trend in sentencing was, overall, toward leniency.[61]

On its face, this return to more discretion shows an inclination toward some mercy. However, a closer look reveals that discretion can still result in harshness, indifference, overcaution, and unfairness. In fact, in the Rockefeller example, one part of the DLRA gave judges increased discretion to divert those accused of drug crimes to treatment, but studies showed judges did *not* use that extra authority to offer leniency.[62] Similarly, following *Miller v. Alabama*,[63] which outlawed *mandatory* life without parole sentences for children, some judges resentencing individuals whose sentences were illegal under *Miller* then exercised their *discretion* to impose life without parole.[64]

Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994), which had created incentive grants conditioned on states "impos[ing] longer and more determinate sentences").

58 Frankel, *supra* note 55, at 41, 45–47, 51. Frankel also condemned indeterminate sentences, which "uncritical[ly]" transferred discretion from judges to parole boards. *Id.* at 31–40.

59 *See, e.g.*, Michael Tonry, *Sentencing in America: 1975–2025*, 42 Crime & Just. 141, 147–50 (2013) [hereinafter Tonry, *Sentencing in America*] (discussing sentencing policies of 1970s–1990s).

60 *E.g.*, Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 81–85 (describing how judges, and even attorneys, often circumvented the Guidelines, when viewed as overly harsh, through plea deals, charging decisions, and departures).

61 *See, e.g.*, Paul J. Hofer, *Federal Sentencing After* Booker, 48 Crime & Just. 137, 140 (2019) ("Judges regularly sentence below the guideline range for mitigating circumstances that were discouraged by the guidelines and appellate courts prior to *Booker*. Guidelines applying to several crimes, such as certain drug and child pornography offenses, are widely recognized to be excessive . . . .").

62 Jim Parsons, Qing Wei, Joshua Rinaldi, Christian Henrichson, Talia Sandwick, Travis Wendel, Ernest Drucker, Michael Ostermann, Samuel DeWitt & Todd Clear, Vera Inst. of Just., End of an Era? The Impact of Drug Law Reform in New York City 13–14 (Jan. 2015). Notably, a New York Division of Criminal Justice Services study showed that before the 2009 reforms, only 38.1% of first-time offenders convicted of class B felonies—street-level sale and possession offenses—received mandatory minimum sentences; judges instead sentenced 61.9% to greater-than-minimum terms. N.Y. State Div. of Crim. Just. Servs., Profile of Felony Drug Offenders Committed to New York State Prison 2008, at 14 (Feb. 2010). Though these sentences were seen as representing the harshest excesses of the Rockefeller era, judges more often than not failed to choose the most lenient option available. *See* Parsons et al., *supra*.

63 567 U.S. 460 (2012).

64 *See* Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 Cornell L. Rev. 1319, 1320–21, 1324 (2022) (discussing the regime of maximal discretion in recent youth life without parole cases and its dangers). For example, Mr. Miller (the petitioner in *Miller*) himself was resentenced to life without parole upon resentencing. *See* Kent Faulk, *Evan Miller, Youngest Person Ever Sentenced to Life Without Parole in Alabama, Must Remain in Prison*, AL.com

And, in the federal system, one surprising finding of the pre-*Booker* era was that judges largely followed the Sentencing Guidelines.[65] Further, post-*Booker*, disparities and arbitrariness remained, with "the length of a defendant's sentence increasingly depend[ing] on which judge in the courthouse" receives the case.[66]

As researchers have documented, sentences are imposed disparately on Black and Latino/a people, on one hand, and on whites, on the other; likely to no one's surprise given American history, the former groups receive harsher terms on average.[67] One explanation is the pervasiveness of racist stereotyping about Black criminality,[68]

(Apr. 27, 2021), https://www.al.com/news/2021/04/evan-miller-youngest-child-ever-sentenced-to-life-without-parole-in-alabama-must-remain-in-prison.html [https://perma.cc/3Q43-2DG3]. And, as Professor Kathryn Miller argues, broad discretion is likely to be exercised in ways that "lead to the same arbitrary and racially discriminatory outcomes that have occurred in the capital context." Miller, *supra*, at 1324, 1348–52. In fact, the disparate post-*Miller* regimes adopted by Mississippi and Pennsylvania showed, respectively, that Mississippi's broader discretion resulted in life without parole being reimposed in twenty-five percent of cases, whereas Pennsylvania's constrained discretion resulted in just two percent of candidates getting life without parole. *See* Jones v. Mississippi, 593 U.S. 98, 138–40 (2021) (Sotomayor, J., dissenting). Ironically, as then-Justice Rehnquist lamented in *Lockett v. Ohio*, "[b]y encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion, but will totally unleash it." 438 U.S. 586, 631 (1978) (Rehnquist, J., dissenting).

65 Gertner, *supra* note 52, at 524.

66 U.S. Sentencing Comm'n, Intra-City Differences in Federal Sentencing Practices: Federal District Judges in 30 Cities, 2005–2017, at 7 (Jan. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190108_Intra-City-Report.pdf [https://perma.cc/6LFX-4K4J].

67 *See* Travis, *supra* note 10, at 98 (noting Blacks and Hispanics are "somewhat more likely than whites to be sentenced to incarceration, . . . to receive somewhat longer sentences[,] . . . [and] to receive sentences at the top rather than at the bottom of the guideline ranges" (internal citations omitted)). Post-*Booker*, the Sentencing Commission found Black men were less likely than white men to receive "non-government sponsored downward departure[s]" from guidelines, and, even when they did receive a departure, it was less generous than for white men. U.S. Sentencing Comm'n, Demographic Differences in Sentencing: An Update to the 2012 Booker Report 20 (Nov. 2017).

68 *See* Travis, *supra* note 10, at 99–100 (collecting citations); Bennett Capers, *Evidence Without Rules*, 94 Notre Dame L. Rev. 867, 869, 887, 891 (2019) (noting that race matters in criminal cases so much so that a defendant's race "itself is evidence," and citing research showing dark skin is associated with criminality and, conversely, whiteness is associated with "truth telling and innocence" (internal citations omitted)); M. Eve Hanan, *Remorse Bias*, 83 Mo. L. Rev. 301, 334–37 (2018) [hereinafter Hanan, *Remorse Bias*] (reviewing literature on system actors' tendency to resolve ambiguity toward associating "African Americans and criminality"); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psych. 876, 876 (2004) (noting social scientists have documented a stereotype of Black Americans as "violent and criminal" for decades). Notably, this association was intentionally bolstered under the guise of science: "Although specially designed race-conscious laws, discriminatory punishments, and new forms of everyday racial surveillance had been institutionalized by the 1890s [when crime statistics had begun to be collected more systematically] as a way to

and overt racism's close cousin, implicit bias, a negative attitude one holds toward a social group without being aware of or intending to hold that prejudice.[69] That there is "robust" and "pervasive" favoritism toward the "ingroup" and toward "socially privileged groups" is well-documented.[70] Accordingly, these biases can operate to produce unfair outcomes in the courtroom for those with at least one marginalized identity characteristic. For example, even where system actors report "warm feelings towards African Americans," researchers have documented less favorable outcomes for members of this group.[71] More frequent guilty findings at trial are one potential reflection of implicit associations of Blackness and guilt, impacting a carceral system input.[72] In addition, when members of this racial group are (re)sentenced, they might be more likely seen as displaying insufficient remorse,[73]

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suppress black freedom, white social scientists presented the new crime data as objective, color-blind, and incontrovertible." Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America 4 (2010). There was "ideological currency" to "black criminality" as America transitioned from slavery to more insidious systems of racial oppression. *Id.* at 3. This is no problem of the past alone. Recently, a conviction of a Black man whom the judge said at sentencing "looks like a criminal" was overturned. Chang Che, *Conviction Reversed Over Judge's Remark That Black Man 'Looks Like a Criminal'*, N.Y. Times (Aug. 4, 2023), https://www.nytimes.com/2023/08/04/us/judge-sentence-overturned-black-criminal-detroit.html [https://perma.cc/NDF3-YEG3].

[69] *Implicit Bias*, Am. Psych. Ass'n, https://www.apa.org/topics/implicit-bias [https://perma.cc/T9V7-J5AU] (defining term).

[70] Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 Ann. Rev. L. & Soc. Sci. 427, 433 (2007). Given these biases, the documented lack of diversity on the bench is likely to impact judicial perceptions and case outcomes. *See* Amanda Powers & Alicia Bannon, *State Supreme Court Diversity—May 2022 Update*, Brennan Ctr. for Just. (May 20, 2022), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update [https://perma.cc/W2PD-GSQX] (noting just eighteen percent of state supreme court justices identify as people of color, whereas people of color constitute forty percent of the U.S. population, and men are overrepresented on state supreme courts relative to their population rate); N.Y. State Unified Ct. Sys., Self-Reported Statewide Judicial Demographics Report, https://ww2.nycourts.gov/court-research/srjd-report.shtml [https://perma.cc/6N2B-KMGN] (showing, in 2023, 61% of reporting judges self-identified as white, 2% as having a disability, 3% as being a veteran, 46% as male, and 78% as heterosexual).

[71] Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187, 205 (2010) (finding correlation between self-report of positive feelings toward and implicit guilty bias against Black people).

[72] *Id.* at 204 (detailing how when researchers adapted the Implicit Association Test, which measures implicit bias, to test their hypothesis that people held the implicit bias that "Black" was associated with "Guilty," they found their hypothesis held).

[73] *See* Hanan, *Remorse Bias*, *supra* note 68, at 304, 326, 332, 340, 342; *see also* Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1 (2000) (reviewing literature on cognitive biases that affect cross-racial assessments of credibility and positing this leads to a "demeanor gap" in the courtroom when a juror and witness are of different races from each other); *see also* Susan A. Bandes, *Remorse and Judging*, *in* Remorse and Criminal Justice: Multi-Disciplinary Perspectives 30–33 (Steven Tudor,

an oft-cited sentencing criterion,[74] increasing the overall number of years they must serve and perpetuating the racialized system of mass incarceration.

The problems with discretion at each step in the criminal legal process are well-summarized by what Leigh Goodmark has highlighted for gender-based violence:

> Discretion enables police, prosecutors, courts, and executives to rely on stereotypes to dismiss the victimization claims of imperfect victims [that is, those who are both survivors and perpetrators of violence]. Discretion allows law enforcement to blame victims who do not turn to the criminal legal system for assistance. Discretion creates space for judgments that the failure to leave or call police or assist with prosecution means that a victim's story of violence is not credible. Discretion can mask implicit bias and outright racism in how police, prosecutorial, and executive power is exercised.[75]

C. The Framework of Epistemic Injustice

1. Testimonial Injustice: Undermining the Marginalized as Knowers

A framework for understanding why discretion can be dangerous, especially to those historically marginalized, is "epistemic injustice."[76] The first variant of this harm that Miranda Fricker describes is testimonial injustice, which occurs when there is a "dysfunction" in the process of knowledge production such that a "hearer's prejudice" against a speaker causes the hearer to "miss[] out on a piece of knowledge."[77] This dysfunction "is caused by prejudice in the economy of credibility,"[78] which determines whose narratives are believed, and occurs when people rely on heuristics to make credibility judgments.[79] Moreover, the struggle to be credited and understood is two-fold: first, to "articulate what cannot necessarily be told in conventional terms"—that is, those notions legible to dominant group members who have not

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Richard Weisman, Michael Proeve & Kate Rossmanith eds. 2022) (noting judges vary widely in their ability to evaluate remorse, and are susceptible to class- and race-based biases about what an adequate display looks like, which is troubling because "no empirical support" exists that one *can* evaluate remorse through "demeanor and body language").

74 *See* Hanan, *Remorse Bias*, *supra* note 68, at 310–16 (reviewing the question of remorse's relevance to sentence length but noting that it is an undeniable part of many judges' calculations).

75 Goodmark, *supra* note 9, at 181.

76 *See generally* Fricker, *supra* note 14.

77 *Id.* at 17.

78 *Id.* at 1.

79 *Id.* at 36.

had their knowledge base shaped by experiences of oppression—and, second, to "be heard without being (mis)translated into normative logics that occlude the meanings at hand."[80] Though "testimony" in this context means any speech, "testimonial injustice" has particular resonance in the law, as "[g]etting at the truth of contested facts is at the heart of our court system."[81] Who is believed is inseparable from who has been historically marginalized. As Catharine MacKinnon has described it: "Having power means . . . that when someone says, 'This is how it is,' it is taken as being that way. When this happens in law, such a person is accorded what is called credibility . . . . Speaking socially, the beliefs of the powerful become proof . . . ."[82] By contrast, "[p]owerlessness means that when you say, 'This is how it is,' it is *not* taken as being that way."[83] Especially relevant to an analysis of how this operates in the criminal legal system is race, which has always been inextricably bound up with who gets ensnared in that system.[84] Historically, members of certain racial groups were legally deemed incredible.[85] Even though the laws have now changed, "we have not yet untethered ourselves from history,"[86] with race remaining salient in who is perceived as credible.[87] A prime example Fricker weaves throughout her book to illustrate testimonial injustice is Tom Robinson, the Black man falsely accused of rape in *To Kill a Mockingbird*.[88] Though fictional, Robinson's plight is

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[80] Nancy Tuana, *Feminist Epistemology*, *in* The Routledge Handbook of Epistemic Injustice, *supra* note 19, at 127–28 (quoting Vivian M. May, *"Speaking into the Void?" Intersectionality Critiques and Epistemic Backlash*, 29 Hypatia 94 (2014)) (discussing the role of "oppositional consciousness" in combatting epistemic injustice).

[81] Sullivan, *supra* note 45, at 294.

[82] Catherine A. MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* Feminism Unmodified: Discourses on Life and Law 163, 164 (1987). In support, MacKinnon cites Justice Potter Stewart in *Jacobellis v. Ohio*, giving his test for obscenity: "I know it when I see it"—a famous example of a powerful person's conceptualization of what something is, defined purely self-referentially. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[83] MacKinnon, *supra* note 82, at 164.

[84] *See generally* Alexander, *supra* note 9 (detailing history of racialization of systems of social control such as slavery, Jim Crow, and mass incarceration).

[85] *See* Capers, *supra* note 68, at 889 (recounting history of American laws that prohibited testimony by people of color against whites, then later involved special instructions for witnesses of color to tell the truth and special warnings about the unreliability of testimony from members of certain racial groups); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 Mich. J. Race & L. 261, 267–68 (1996) (surveying antebellum law imposing competency restrictions based on race or whether the witness was enslaved).

[86] Capers, *supra* note 68, at 890.

[87] *See, e.g.*, Chet K.W. Pager, *Blind Justice, Colored Truths, and the Veil of Ignorance*, 41 Willamette L. Rev. 373, 394–400, 413 (2005) (describing intersection of race and juror evaluation of credibility, and discussing how prosecutors "activat[e]" racial stereotypes to invite jurors to discredit Black defendants).

[88] Fricker, *supra* note 14, at 23–28, 44–45, 90, 94–95, 136–37.

depressingly illustrative of how members of marginalized groups have been systematically discounted as givers of testimony. There, Robinson's behavior following an attempted kiss from a white woman, which he tries recounting to jurors deciding his fate, is illegible to them, with his flight from the scene viewed as exhibiting consciousness of guilt, not attempting to avoid a thicket of "social meanings" shaped by the deeply unjust setting in which they live.[89] He is convicted,[90] revealing that "racial identity power" has operated to deny Robinson his freedom *and* his role as a credible knowledge-giver.[91]

Women, too, have been systematically undermined as knowers. As Fricker notes: "Gender is one arena of identity power" that can be exercised to silence women, who are not seen as "rational" or factual but rather dismissed as "intuitive" or "emotional."[92] Given that women are a fast-growing group of incarcerated persons,[93] they are of particular concern here.

Criminal defendants compose a group against whom there is longstanding prejudice. Just as people of color were historically barred by law from testifying, so were those accused of crimes.[94] Today, while not prohibited, they are easily disincentivized: Evidentiary rules allow in "prior bad acts" expressly to impeach a witness, including a defendant-as-witness.[95] And, empirical studies show jurors have read evidence of prior convictions as signaling criminal propensity and untruthfulness generally rather than that reading turning on whether the prior crime is one of dishonesty.[96] Once convicted, their credibility suffers an additional hit, for example, with litigation by incarcerated persons systematically dismissed.[97]

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89 *Id.* at 23.

90 Harper Lee, To Kill a Mockingbird 223–24 (1960).

91 Fricker, *supra* note 14, at 28.

92 *Id.* at 14–15, 160–61; *see also* Tuana, *supra* note 80, at 126–27 (noting that historically, men were associated with reason, and women as "more fitted for emotional or manual labor"); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399, 436 (2019) (observing the "tendency to discredit women *because they are women*" is entrenched in legal and broader culture).

93 *See infra* note 146.

94 *See* McGautha v. California, 402 U.S. 183, 214 (1971) (noting at the founding and afterwards accused persons were not permitted to testify on their own behalf), *superseded by statute*, Fed. R. Evid. 609(a) (laying out rules that apply to attacking a witness's character for truthfulness by evidence of a criminal conviction), *as recognized in* United States v. Oakes, 565 F.2d 170, 172–73, 173 n.11 (1st Cir. 1977).

95 *E.g.*, Fed. R. Evid. 609 (witness impeachment); People v. Sandoval, 314 N.E.2d 413, 417 (N.Y. 1974) (defendant impeachment).

96 *See* Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395, 403–04 (2018).

97 *See, e.g.*, Hanan, *Invisible Prisons*, *supra* note 15, at 1215–16 (discussing assorted codifications of prejudices against incarcerated persons); Kim Shayo Buchanan, *Impunity:*

Finally, as will be relevant in Section II.A, domestic violence survivors experience credibility deficits. Survivors, often women, are viewed as having ulterior motives, such as jealousy motivating revenge against a partner through a false accusation.[98] Men who report abuse might face disbelief.[99] Of particular importance here, when these survivors are accused and convicted of crimes, they experience compounding disbelief and the view that "[c]onviction negates victimization."[100] An infamous case discussed in Section II.A is that of Nicole Addimando. After a trial and an extensive hearing at which Ms. Addimando presented not only her own testimony about extensive abuse from her boyfriend, whom she killed, but also physical evidence and the testimony of observing and outcry witnesses, the court found itself unable to determine definitively whether Ms. Addimando had been abused.[101] This case exemplifies the unfairly heightened credibility standards to which survivor-defendants are held.

Thus, anyone who possesses one of these identity characteristics is likely to face an unduly skeptical audience in settings where they are seeking belief. And, where one possesses *more than one* trait, as many in prison do, that prejudice is compounded.[102]

That there is very little validated consensus around who is "credible"—an inherently "reflected capacity" in that it "exists entirely in relation to the person who will determine if the speaker

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Sexual Abuse in Women's Prisons, 42 Harv. C.R.-C.L. L. Rev. 45, 65–66 (2007) (detailing how incarcerated persons attempting to grieve or litigate conditions issues are subject to a "presumption of incredibility" and, often, corroboration requirements (citation omitted)).

98 *E.g.*, Goodmark, *supra* note 9, at 7 (detailing an example of a prosecutor arguing as much in a case of a woman who had killed her boyfriend).

99 *See* Venus Tsui, Monit Cheung & Patrick Leung, *Help-Seeking Among Male Victims of Partner Abuse: Men's Hard Times*, 38 J. of Cmty. Psych. 769, 774 (2010) (noting "stigmatization" of abused men, especially by the police, who men believe do not "view[] them as victims").

100 Goodmark, *supra* note 9, at 23.

101 People v. Addimando, 120 N.Y.S.3d 596, 602–05, 621 (Dutchess Cnty. Ct. 2020). This decision was subsequently reversed, with the appellate court finding Ms. Addimando *had* "established, through her lengthy testimony, photographs," including one of a "visible bruise on her breast," and "other evidence" that her partner had physically and sexually abused her. People v. Addimando, 152 N.Y.S.3d 33, 41 (App. Div. 2021).

102 As Kimberlé Crenshaw noted in her seminal article, "[b]ecause the intersectional experience [for Black women] is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated." Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 140. Ignoring the unique ways in which discrimination functions for those experiencing it along multiple axes—in Crenshaw's discussion, sex and race—"erases Black women in the conceptualization, identification, and remediation of race and sex discrimination." *Id.* That is, their particular experience is left out of understandings *and* potential solutions because courts are "[u]nable to grasp" Black women's experiences. *Id.* at 150.

is believable"[103]—as a matter of science or even jurisprudence only amplifies this problem. "Credible" finds a handful of definitions in the law: (1) persuasive, (2) worthy of belief, (3) honest, or (4) as a measure of one's propensity to lie.[104] Julia Simon-Kerr highlights how such conceptualization "creates and reinforces social norms," for credibility determinations made by decisionmakers "inevitably turn our gaze . . . to answering one question alone, which is whether a witness is conforming with social expectations"—that is, does the "story resonate with the life experience of the judge?"[105] Accordingly, credibility "become[s] a site of fixed racial bias within the system," and a product of the credibility "assessor's subjective lived experience, beliefs, or positions in the world."[106] This is permitted to happen despite the many studies showing that demeanor and inconsistent testimony are not good indicators of whether someone is telling the truth.[107] Perception and memory, too, can be affected by numerous factors, trauma among them.[108]

2. Hermeneutical Injustice: Damage to Collective Knowledge

The other variant of epistemic injustice that Fricker discusses—hermeneutical—flows from the idea that society's "powerful have [had] an unfair advantage in structuring collective social understandings."[109] This injustice occurs when one has "some significant area of one's social experience obscured from collective understanding" because of social marginalization.[110] That is, because of structural inequalities, certain experiences of marginalized groups are rendered illegible to the dominant group. While this might occur because marginal voices are

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103 Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179, 198 (2023).

104 *Id.* at 183.

105 *Id.* at 184.

106 *Id.* at 184, 199.

107 *Id.* at 189; *see also* Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1340–45 (2015) (reviewing cognitive science on memory, including that psychologists and neuroscientists have "no unified framework" for "the various ways in which memory sometimes leads us astray" despite much research (internal citation omitted)). Trauma can also affect demeanor, with post-traumatic stress disorder manifesting as numbing or hyperarousal, emotional states that affect one's appearance in court. Epstein & Goodman, *supra* note 92, at 421–22.

108 *See* VAN DER KOLK, *supra* note 7, at 51–104, 173–85 (detailing trauma's effect on the brain and body, and discussing memory and trauma); *see also* Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL'Y REV. 269, 283–97 (2015) (reviewing the neuroscience implicated in traumatic event recall). Of relevance to questions of credibility in court, Hamilton notes that trauma survivors' accounts of their reactions to trauma often change over time, "with stories potentially conflicting with each other." *Id.* at 294.

109 FRICKER, *supra* note 14, at 147.

110 *Id.* at 158.

missing from the project of developing common understandings, it also can arise from dominant group members' active "arrogance, laziness, [or] close-mindedness."[111] Further, this type of injustice is compounded by testimonial injustice in that those attempting to articulate the marginalized position are typically operating from a perceived credibility deficit owing to identity prejudice—and are thus ignored.[112] Intertwined, these two concepts demonstrate how the experiences of negatively stereotyped groups are excluded from mainstream discourse and, as relevant here, decisionmakers' purviews. And, in a cruel catch twenty-two, "[e]xclusion of incarcerated people's voices removes them from the hermeneutical project of defining collective meanings of punishment, including understanding the severity of punishment."[113]

The way out of this injustice includes "virtuous listening," or "knowing when to shut up, knowing when to suspend one's own judgment about intelligibility, calling critical attention to one's limited expressive habits and interpretive expectations, listening for silences, checking with others who are differently situated, [or] letting others set the tone and the dynamics of a communicative exchange . . . ."[114] It might require what José Medina has termed "hermeneutical resistance," or "exerting epistemic friction against the normative expectations of established interpretive frameworks and aiding dissonant voices in the formation of alternative meanings, interpretations, and expressive styles."[115] Of course, justice requires willing participants among the unoppressed.

3. The Harms of Epistemic Injustice

Epistemic injustice not only results in impoverished knowledge creation but also actively causes harm. Specifically, when a listener deflates the importance of a truthful speaker's utterances, the listener "wrongfully undermine[s]" the speaker "in her capacity as a knower,"[116] undercutting credibility and causing individual dignitary damage. That psychological damage is two-fold: First, the dehumanization the speaker experiences through exclusion from popular discourse and, second, the social meaning—humiliation—attendant to the poor treatment.[117] As a result, the speaker might "lose confidence" in the belief such that they "cease[] to satisfy the conditions for knowledge,"

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111 Sullivan, *supra* note 45, at 295.

112 Fricker, *supra* note 14, at 159.

113 Hanan, *Invisible Prisons*, *supra* note 15, at 1217.

114 José Medina, *Varieties of Hermeneutical Injustice*, *in* The Routledge Handbook of Epistemic Injustice, *supra* note 19, at 48.

115 *Id.*

116 Fricker, *supra* note 14, at 17.

117 *Id.* at 44.

or might come to doubt their "general intellectual abilities" to the point that their personal development is hindered and they might lack the "intellectual courage" to stick to their beliefs once challenged.[118] If testimonial injustice is "[p]ersistent," it can "inhibit the very formation of self"[119] and can preemptively exclude those with knowledge from "the community of informants" in that they are not even asked to share what they know.[120] When this happens, people are prevented from being experts on their own experience.

For example, one resentencing applicant under an Illinois law that allows for retroactive consideration of domestic violence as a mitigating factor,[121] Willette Benford, reported that at the time of her trial, she was told to hide her abusive, same-sex relationship with the decedent.[122] Her attorney believed the jury knowing about the relationship would prejudice it against her, "[b]eing Black, being in a same-sex relationship with violence involved."[123] Her lawyer had likely made that calculation to protect Benford, an "imperfect victim,"[124] but she was convicted anyway, then sentenced to fifty years' incarceration.[125] After the statute was amended in 2016, Benford petitioned and was resentenced to time served, getting out after twenty-three.[126] Though Benford was ultimately able to present her full self to the court, by following her initial attorney's advice, she missed out on the chance to be an expert

118 *Id.* at 47–49.

119 *Id.* at 55.

120 *Id.* at 130.

121 730 Ill. Comp. Stat. 5/5-5-3.1(a)(15) (2024).

122 Jean Lee, *Abuse Survivors Can Get Shorter Sentences in 2 States, but Courts Are Saying No*, 19th (July 12, 2021, 1:48 PM), https://19thnews.org/2021/07/domestic-violence-survivors-reduced-sentences-in-2-states [https://perma.cc/XM27-3DR8] (covering Benford's story and the rarity of courts granting resentencing petitions for domestic violence survivors).

123 *Id.*

124 Goodmark, *supra* note 9, at 2 (terming "imperfect victims" those who are both victims of gender-based violence and subject to punishment by the criminal legal system for that violence). Goodmark details how these individuals often possess at least one marginalized identity characteristic, such as being Black, female (and often nonconforming with female stereotypes of passivity or demureness), lesbian, transgender, a sex worker, or a combination of those characteristics. *Id.* at 3, 9 (internal citations omitted). Research supports the salience of race for whether someone who perceives themselves a victim is treated as one by law enforcement. *See* Lisa J. Long, *The Ideal Victim: A Critical Race Theory (CRT) Approach*, 27 Int'l Rev. of Victimology 344 (2021) ("When Black people report being a victim of crime they are often treated as suspect. This is manifest in the failure of the police to take the complaint seriously, particularly when the offender is White and, most significantly, when the perpetrator is a White female.").

125 Lee, *supra* note 122.

126 *Id.* Yet, the expanded knowledge base that allowed Benford to successfully petition for her freedom has only gone so far; as of 2021, she was one of just two Illinois applicants who succeeded in replacing a sentence with a lower one that accounted for domestic violence. *Id.*

on her own experience, instead getting locked into the trauma and shock she recalled feeling at the time of the trial.[127]

There is also practical harm: Defendants who are disbelieved are convicted.[128] They then often go to jail or prison,[129] inherently brutal places[130] where people experience physical and sexual assaults from other incarcerated persons and staff,[131] deficient medical care,[132] torture,[133]

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127 *See id.*

128 *See* Fricker, *supra* note 14, at 46.

129 Subramanian & Shames, *supra* note 43, at 36 (noting seventy percent of convicted persons in the U.S. receive a prison term).

130 Hanan, *Invisible Prisons*, *supra* note 15, at 1192 ("Prison is defined by its experienced cruelties . . . .").

131 *See* Angela Y. Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 New Eng. J. Crim. & Civ. Confinement 339, 350 (1998) ("[S]exual abuse . . . has become an institutionalized component of punishment behind prison walls."); Goodmark, *supra* note 9, at 111–17 (detailing the harassment, sexual assault, physical assault, sanctioned sexual abuse and humiliation through strip searches that cisgender and transgender women encounter in prison); Allen J. Beck, Marcus Berzofsky, Rachel Caspar & Christopher Krebs, Bureau of Just. Stats., U.S. Dep't of Just., Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12, at 6–7 (May 2013) (reporting on rates of sexual victimization of incarcerated persons and detailing elevated rates for those with mental illness or who identified as lesbian, gay, or bisexual); Allen J. Beck, Bureau of Just. Stats., U.S. Dep't of Just., Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates 2–3 (Dec. 2014) (showing even greater rates of sexual assault of transgender individuals).

132 *E.g.*, Jill Curran, Brandon Saloner, Tyler N.A. Winkelman & G. Caleb Alexander, *Estimated Use of Prescription Medications Among Individuals Incarcerated in Jails and Prisons in the US*, JAMA Health F., Apr. 14, 2023, at 4–5 (noting that although incarcerated people have higher rates of chronic and mental illness than the general population, they receive fewer pharmaceutical resources to treat these problems, suggesting inadequate health care that affects health outcomes upon release); Brown v. Plata, 563 U.S. 493, 501 (2011) ("For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result."); Leah Wang, *Chronic Punishment: The Unmet Health Needs of People in State Prisons*, Prison Pol'y Initiative (June 2022), https://www.prisonpolicy.org/reports/chronicpunishment.html [https://perma.cc/S3JJ-9QY9] (reviewing 2016 Bureau of Justice Statistics data on prison healthcare and concluding it does not meet the special needs of populations—including disproportionate rates of chronic health issues, substance abuse, and mental illness—who enter the system, causing lasting damage).

133 The United Nations has called solitary confinement, for instance, torture, *see, e.g.*, United Nations Office of the High Commissioner for Human Rights, *UN Special Rapporteur on Torture Calls for the Prohibition of Solitary Confinement* (Oct. 18, 2011) [hereinafter *Special Rapporteur*], https://www.ohchr.org/en/press-releases/2011/10/un-special-rapporteur-torture-calls-prohibition-solitary-confinement [https://perma.cc/W9BN-72NP], and has adopted, through its Office on Drugs and Crime, rules limiting use of solitary by banning its use for more than fifteen consecutive days or for vulnerable groups, such as Rules 37(d), 43(1)(a), 43(1)(b), 44, and 45. *See* U.N. Off. on Drugs and Crime, The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) 12–14, https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf [https://perma.cc/MGE3-94K6]. While being in isolation

and premature death.[134] Even among those convicted, "it is often hard to explain disparities in sentencing among offenders even within the same jurisdiction," with the likeliest explanation being "issues of social power and epistemic authority."[135]

Moreover, "prejudice can prevent speakers from successfully putting knowledge into the public domain," impoverishing overall knowledge production.[136] The social-level harm of "damaged knowledge" can "reproduce[] and exacerbate[] socioeconomic disadvantage by excluding those who are disproportionately impacted from sharing their concerns and contributing to solutions—all while uplifting the concerns of those least affected."[137] S. Lisa Washington offers an example of how this operates in the family regulation system. When the state becomes involved in a child protection case arising from a parent experiencing domestic violence, the only narrative that gains purchase in court and thus might lead to the parent remaining with the kids is "insight"—that is, willingness to leave an abusive relationship.[138] But, what the system

for more than twenty-two hours per day can be harmful for even short periods, anything greater than fifteen consecutive days can cause lasting mental damage. *Special Rapporteur*, *supra*; Lauren Brinkley-Rubinstein, Josie Sivaraman, David L. Rosen, David H. Cloud, Gary Junker, Scott Proescholdbell, Megan E. Shanahan & Sabbar I. Ranapurwala, *Association of Restrictive Housing During Incarceration with Mortality After Release*, JAMA Network, Oct. 4, 2019, at 9 (concluding any time spent in solitary, and especially periods greater than fourteen days, correlates with a heightened risk of premature death); Keramit Reiter, Joseph Ventura, David Lovell, Dallas Augustine, Melissa Barragan, Thomas Blair, Kelsie Chestnut, Pasha Dashtgard, Gabriela Gonzalez, Natalie Pifer & Justin Strong, *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018*, 110 Am. J. Pub. Health S56, S56–57, S60–61 (2020) (reviewing literature on the correlation between mental illness and solitary confinement and documenting high prevalence of psychiatric distress among those in solitary). Yet, all states continue using it in some form, with only Washington banning it in private facilities. Wash. Rev. Code § 70.395.060(2)(e) (2023). In other examples of extreme cruelty, Alec Karakatsanis tells of a jailed client who was "strapped to a chair and shocked repeatedly with electric current until she stopped crying and shouting," resulting in "open wounds all over her body," and reports seeing children shackled so that they could not move their limbs. Karakatsanis, *supra* note 9, at 7.

134 For example, dangerous conditions resulting in dozens of annual deaths have plagued Rikers Island to such a degree that a federal judge found the New York City Department of Correction in contempt and paved the way for federal receivership. *See* Hurubie Meko & Jan Ransom, *Judge Finds New York in Contempt, Clearing the Way for Rikers Takeover*, N.Y. Times (Nov. 27, 2024), https://www.nytimes.com/2024/11/27/nyregion/rikers-contempt-receivership.html [https://perma.cc/38N2-AU52]. Separately, during COVID, correctional facilities experienced skyrocketing deaths because of the inability to social distance, inadequate medical care, and aging, vulnerable populations. *E.g.*, Jennifer Valentino-DeVries & Allie Pitchon, *As the Pandemic Swept America, Deaths in Prisons Rose Nearly 50 Percent*, N.Y. Times (Feb. 19, 2023), https://www.nytimes.com/2023/02/19/us/covid-prison-deaths.html [https://perma.cc/5HX7-7X3N].

135 Sullivan, *supra* note 45, at 293.

136 Fricker, *supra* note 14, at 43.

137 Washington, *supra* note 17, at 1140.

138 *Id.* at 1158–59.

misses is that the survivor-parent might not share that view of what would ensure their family's safety.[139] As Washington puts it, "[Child Protective Services] and courts equate a survivor's unwillingness to cooperate with the family regulation or criminal legal systems with a 'lack of insight' into their circumstances and the impact of domestic violence on their children," but that view ignores "a survivor's belief that the carceral state will not keep her or her family safe."[140] Instead of the mandatory arrest of a partner or a protective order, "safety may mean housing or financial stability."[141] Ultimately, that standard but incomplete narratives go unchallenged means "hegemonic power structures" endure.[142]

Indeed, the most fundamental way in which these power structures are allowed to continue is that "certain lives, indeed entire populations are conceived of as less valuable."[143] When that dehumanization occurs, systems like mass incarceration take hold. A vicious cycle ensues, as those trapped within them feel devalued and unable to contribute to collective meaning-making, and the system responds by continuing to ignore and not synthesize the experiences of those passing through it. Accordingly, oppression persists.

D. Epistemic Injustice's Harmful Impact on Resentencing Applicants

As discussed in Section I.C, applicants for relief from harsh sentences are, necessarily, members of at least one "disfavored" group whose experiences are vulnerable to discounting. By definition, they are incarcerated persons, who are seen as "untrustworthy."[144] People of color[145] and, increasingly, women[146] are overrepresented among

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139 *Id.* at 1159.

140 *Id.*

141 *Id.*; *see also* Gruber, *supra* note 9, at 46 (recounting how when asked, "Well, if not criminalization and punishment, what are we supposed to do about violence against women?" Gruber responded, "Give women money.").

142 Washington, *supra* note 17, at 1108.

143 Tuana, *supra* note 80, at 129.

144 *See* Hanan, *Invisible Prisons*, *supra* note 15, at 1215–16 (describing how prison-conditions litigation is seen as frivolous, with laws such as the Prison Litigation Reform Act intended to curb civil rights complaints through restrictive pleading requirements). Rules of evidence, too, permit impeachment of witnesses, *see, e.g.*, Fed. R. Evid. 609, and criminal defendants, *see, e.g.*, People v. Sandoval, 314 N.E.2d 413, 417 (N.Y. 1974), with prior convictions evidence.

145 *See supra* notes 67–68 (describing racial disparities in the criminal legal system).

146 *See, e.g.*, Kristen M. Budd, The Sent'g Project, Incarcerated Women and Girls 1 (2024), https://www.sentencingproject.org/app/uploads/2024/07/Incarcerated-Women-and-Girls-1.pdf [https://perma.cc/WDD6-L29C] (noting that between 1980 and 2022, the number of incarcerated women rose by over 585%); Nazish Dholakia, *Women's Incarceration Rates Are Skyrocketing. These Advocates Are Trying to Change That*, Vera Inst. Just.

the incarcerated, and both are groups that face substantial credibility discounts. Accordingly, resentencing petitioners are primed to experience epistemic harm along multiple axes.

Defendants are typically asked if they would like to speak at (re)sentencing, though they are not legally required to do so. But, given the credibility gaps members of these disfavored groups experience, the "invitation to allocute" is often "a trap."[147] Their demeanor will be policed, with judges disinclined to believe even sincere expressions of remorse because of how a number of extrinsic factors unrelated to contrition but deeply related to gender, race, and skin tone operate on an unconscious level.[148] In fact, as researchers have shown, remorse is not amenable to interpretation through demeanor, and, in epistemic injustice terms, "[t]he more divergent the cultural or ethnic background of the viewer and speaker, the less likely the viewer is to accurately read the emotional content of the speaker's communication."[149] Accordingly, defendants will be shoehorned into boxes that align with prejudices.

For example, as the Reverend Sharon White-Harrigan, a formerly incarcerated activist with a Doctorate in Ministry, discussing women in prison, put it:

> [W]e're so underacknowledged, underrepresented, overlooked, . . . and it just doesn't seem to matter when you stand before that court, . . . that judge, that jury, that DA. . . . [E]ven for some . . . defense lawyers, . . . it doesn't matter what a person's been through. They only look at that moment . . . when something happened, but they don't look at . . . the history that led up to that one horrible moment.[150]

(May 17, 2021), https://www.vera.org/news/womens-incarceration-rates-are-skyrocketing [https://perma.cc/9LUT-7CK5] ("Women have become the fastest-growing segment of the incarcerated population."); Goodmark, *supra* note 9, at 11–12 (detailing growth in women's incarceration since 1978, "attributable not to increases in women's criminality but to how the criminal legal system treats women").

147 Hanan, *Remorse Bias*, *supra* note 68, at 323.

148 *See id.* at 304, 307.

149 *Id.* at 321 (citing research).

150 Sharon White-Harrigan, Presentation at the College of Staten Island School of Education, Survivors Just. Project, at 39:53–40:28, https://drive.google.com/file/d/1MZYH16eoqxYBCaHteU9SPRnTmVc_MT0C/view [https://perma.cc/2UZF-S9MK]. As sociologist Matthew Clair explained, "defendants' expertise may not be legible to professionals, whose expertise is shaped by the professionalized norms of the law schools where they studied and the expectations of the courtrooms where they practice." Matthew Clair, Privilege and Punishment: How Race and Class Matter in Criminal Court 77 (2020). This inherent disconnect has implications for those being judged by system actors, with the road "bumpier" for those seeking to "insert" their expertise or experience into the legal process. *Id.* at 101.

In the DVSJA context, for instance, a recurring theme in discounting the experiences of survivors is that jealousy of romantic rivals—rather than traumatic pasts—motivates women who commit harms.[151] What this shows is that individual humanity gets flattened, and experience illegible to decisionmakers is ignored. Counterintuitive behaviors, such as guardedness, are not just misunderstood but weaponized against the defendant, whose impassivity might be read as cold-bloodedness. But these assumptions ignore that criminalized survivors have already faced "disbelief and unrelenting scrutiny, exacerbated by processes that are not trauma informed," such as when asked to recount their narratives to untrained police "in an environment devoid of emotional support."[152] That experience of disbelief might cause them to clam up even more, having ripple effects when they later face (re)sentencing and are presumed unfeeling.[153]

Curtis experienced many of these harms.[154] One sticking point for the prosecutors was that Curtis had not immediately told the police of the long history of Richard's abuse. The prosecutors expressed incredulity that Curtis would not jump at the chance to share anything potentially exonerating early (to law enforcement) and often (to his attorneys or the court). What our conversations made clear was that a complex web of life experiences impacted Curtis's actions. First, as a young man of color, he had grown up with the message not to trust the police, so he felt disinclined to share the full story upon his arrest. Second, he experienced

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151 *See, e.g.*, People v. Carla S., No. 70007-15/001, slip op. at 6 (N.Y. Cnty. Ct. Mar. 29, 2023) (on file with author) (denying relief in part because "[d]efendant has a well documented history of violence toward female rivals she feels as being competitors for her love interests' affections").

152 Komar et al., *supra* note 34, at 7–8.

153 *See id.*

154 Worth acknowledging is that Curtis's story is being told through me, not directly. This is an irony of applying epistemic justice theory in legal scholarship—if not legal practice generally—and one that theorists are increasingly attempting to address. The burgeoning practice of Participatory Law Scholarship (PLS) recognizes that those without legal training but with lived experience are ideally situated to develop legal theory and propose emancipatory solutions. *See* Rachel López, *Participatory Law Scholarship*, 123 Colum. L. Rev. 1795, 1798, 1809–17 (2023); Terrell Carter & Rachel López, *If Lived Experience Could Speak: A Method for Repairing Epistemic Violence in Law & the Legal Academy*, 109 Minn. L. Rev. 1, 6 (2024). PLS involves intentional collaborations between "academically trained legal scholars" and "organic jurists," the latter of whom "generate knowledge and liberatory theory through critical reflection on their lived experience." López, *supra*, at 1801–03 (quoting Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, 90 Fordham L. Rev. 2089, 2092 (2022)). While I have aimed to share Curtis's story on his terms to the extent possible, this Article originated with me, not him. I hope that putting this information into the world will broaden popular awareness of the range of human experience, but I recognize that by acting as his translator and proposing normative solutions based in part on his case, I risk further harm to his individual agency.

deep shame and guilt about hurting someone he cared about and did not want to over-vilify Richard. Many domestic violence survivors experience complex feelings of anger and love, but these emotions do not make intuitive sense to those who imagine they would want to extricate themselves from similarly dangerous situations as soon as possible.[155] That Curtis's experience did not ring true to decisionmakers meant not only that he struggled to be believed, but also that he *came to doubt himself*. Many times, he told us he doubted his own mind, questioning whether he remembered accurately and had important knowledge to share.[156] This loss in "self-trust" was damage that would not have occurred had his experiences been understood from the outset.[157] Ironically, it was only by seeking to be heard and to pursue a fair sentence that hermeneutical injustice came to light: Curtis's condition "erupt[ed] in injustice only when" he made an "actual attempt at intelligibility" and was thwarted by the inability of decisionmakers to understand his experience.[158]

E. Why These Harms Matter

One question might be: Why do we care? There are several reasons these epistemic harms are critically important to the discussion around optimal resentencing regimes. Highly discretionary proceedings threaten to undermine longstanding norms in American and international law that privilege dignity, and defendant-protective constitutional and statutory construction principles; and they limit the courts as spaces of collective meaning-making.

1. Dignity Matters

Protecting the individual's dignity and sense of self has long been a prominent feature of American and international law.[159] In *Furman v.*

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155 *See, e.g.*, People v. Addimando, 152 N.Y.S.3d 33, 42 (App. Div. 2021) (criticizing trial court for "antiquated impressions of how domestic violence survivors should behave").

156 This experience of "gaslighting," or psychological manipulation over time "so that the victim questions the validity of their own thoughts, perception of reality, or memories and experiences confusion, loss of confidence and self-esteem, and doubts concerning their own emotional or mental stability," *Gaslight*, Merriam-Webster, https://www.merriam-webster.com/dictionary/gaslight [https://perma.cc/DBA2-U85D], is common among intimate partner violence survivors, who are doubly victimized by their abuser and a system that "discredit[s] both the plausibility of a survivor's story and [their] trustworthiness," and made to "doubt . . . the veracity of their own experiences." Epstein & Goodman, *supra* note 92, at 446–47.

157 Such "self-trust" is a key component of epistemic justice for marginalized groups. *See* Karen Frost-Arnold, *Imposters, Tricksters, and Trustworthiness as an Epistemic Virtue*, 29 Hypatia 790, 793 (2014).

158 Fricker, *supra* note 14, at 159.

159 *See* Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 J. Const. L. 669, 677–86 (2005) (reviewing role of dignity in American jurisprudence).

Georgia, for example, where the Court considered whether the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment, Justice Brennan emphasized in concurrence that the Amendment was grounded in whether punishments "comport[ed] with human dignity."[160] International human rights law instruments have also "featured prominently" the importance of dignity.[161] One harm to a person's dignity occurs through "treat[ment] as if they do not possess the capacities characteristic of human beings. One such capacity is autonomy," which may be "characterized by the ideals of self-rule and authorship over one's life."[162] Punishments should not include this sort of degradation.[163] Because requiring a resentencing petitioner to ask for belief often leads a decisionmaker to question the petitioner's "authorship," the epistemic injustice petitioners experience threatens to violate basic conceptualizations of acceptable punishment.

Without judges recognizing the humanity of people who make up the polity, more oppression results. Khalil Gibran Muhammad recounts how an early-twentieth century sociologist, Thorsten Sellin, was able to "expose[] the 'unreliability' of racial crime statistics" that linked "blackness and criminality," and thereby "shaped racial identity and racial oppression in modern America."[164] The effect, Sellin said, was that "individuality is in a sense submerged" and the entire race of an accused Black person "is made to suffer for his sins."[165] By contrast, where there is dignity at the "communal level," there is "universal and undifferentiated respect" that "inheres to every member of the community."[166]

2. *The Inconsistency of Heightened Scrutiny of Defendant Credibility with Constitutional Principles and Principles of Statutory Construction*

Also prevalent in our criminal law and constitutional order is that when the individual is pitted against the State, individual rights protections—namely those in the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution—attach. Perhaps most basic is the presumption of innocence, which puts on the State the burden to prove

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160 408 U.S. 238, 257, 270 (1972) (Brennan, J., concurring).

161 John Vorhaus, *Bringing People Down: Degrading Treatment and Punishment*, 24 New Crim. L. Rev. 433, 441 (2021) (recounting foundational international-law documents that include protection for human dignity).

162 *Id.* at 449.

163 *Id.* at 463–64.

164 Muhammad, *supra* note 68, at 2.

165 *Id.* (quoting Thorsten Sellin, *The Negro Criminal: A Statistical Note*, 140 Annals Am. Acad. Pol. & Soc. Sci. 52, 52 (1928)).

166 Bracey, *supra* note 159, at 680.

otherwise beyond a reasonable doubt.[167] For statutory interpretation, resentencing laws are generally remedial, which means liberal construction; inferences should be drawn in the applicant's favor.[168] And even the rule of lenity—which dictates that where a penal statute is ambiguous, it should be construed in favor of the defendant[169]—can apply following conviction.[170] Effectively, therefore, constitutional and statutory interpretation principles counsel that the defense should get the benefit of the doubt. Yet, systematic discrediting of defendants undercuts that presumption.

To be sure, once someone has been convicted, burdens can be different than at trial. At resentencing, the defense might have to prove facts by a preponderance of the evidence.[171] But, discretionary resentencing, especially where an applicant's worthiness as an informant is in issue, threatens to undermine basic constitutional and statutory principles. In *People v. Eveth R.*, for instance, a court reviewing a DVSJA case stated: "While it is not possible to determine whether many of the defendant's uncorroborated claims of abuse are *true*, I nonetheless conclude that the defendant has met her burden of proof . . . ."[172] Though the court grudgingly agreed the applicant had met her burden of showing eligibility through independent proof in the form of police reports, child protective services reports, and eyewitness testimony documenting abuse by her husband,[173] what is remarkable about the court's statement is the suggestion that *knowing with*

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167 *See* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (holding failure to charge jury on presumption of innocence violates due process); *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

168 *See, e.g.*, People v. Sosa, 963 N.E.2d 1235, 1236 (N.Y. 2012) (noting DLRA is a remedial statute); People v. Dehoyos, 412 P.3d 368, 373 (Cal. 2018) (noting the same for California's Proposition 47, which allowed certain people convicted of felonies to seek resentencing); People v. Brown, 32 N.E.3d 935, 939 (N.Y. 2015) ("Generally, remedial statutes [such as the DLRA] are liberally construed to carry out the reforms intended and to promote justice." (quoting N.Y. STAT. LAW § 321 (McKinney 2024))).

169 *E.g.*, United States v. Santos, 553 U.S. 507, 514 (2008) ("Under a long line of our decisions, the tie must go to the defendant.").

170 *E.g.*, Payseno v. Kitsap Cnty., 346 P.3d 784, 787 (Wash. Ct. App. 2015).

171 *E.g.*, People v. Burns, 172 N.Y.S.3d 90, 92 (App. Div. 2022) (noting DVSJA petitioners must meet preponderance standard).

172 No. 530/99, slip op. at 10 (N.Y. Sup. Ct. Feb. 23, 2023) (on file with author) (emphasis added).

173 *Id.* at 11–13. The court ultimately exercised its discretion to deny resentencing. *Id.* at 19.

certainty is expected in these cases, and that each assertion the applicant makes requires corroboration. This is not even a requirement for the prosecution seeking to prove *guilt*, which requires only proof beyond a *reasonable* doubt.[174]

3. Exclusion from the Universe of Knowable Experience

A second component of Fricker's theory is hermeneutical injustice, or the interpretive injustice that "prevents a person from making sense of her experience and protesting it in comprehensible form."[175] That is, someone structurally marginalized being unable to participate in constructing meaning inhibits collective knowledge development.[176] For truth-seeking bodies like courts, this is critically important, as they are not exposed to whole potential realms of relevant information when certain voices are excluded or discounted. For instance, a judge who has grown up thinking the police exist to protect them might not be able to understand why a domestic violence survivor who does harm would not disclose prior abuse. Nor will the survivor testifying to the experience of fearing police know how to make their nondisclosure legible to that judge. Adjudicators' decisions thus continue to reflect dominant narratives and not the perspectives of those their decisions most affect.[177]

The implications of this exclusion are stark. At the individual level, judges will continue to remain unexposed to alternative narratives that might make them more careful and empathic factfinders, and individual defendants will encounter audiences ill-equipped to listen to their stories. At the systemic level, incarceration inputs and off-ramps will remain unchanged, as the system will continue to struggle to incorporate any new information that may be gleaned from broadening the universe of experiences it considers credible and worthy of inclusion.

II
Resentencing Laws, Designed Correctly, Provide a Mechanism for Addressing Mass Incarceration While Mitigating Harm

Resentencing laws are one way to unwind the long sentences imposed during the late-twentieth century, as seen in Section I.A. These

174 *See In re* Winship, 397 U.S. 358, 364 (1970).
175 Tuerkheimer, *supra* note 17, at 7.
176 *See id.* at 46–49.
177 *See, e.g.*, Carter & López, *supra* note 154 (manuscript at 32–33).

laws have taken several forms.[178] However, as the next section will illustrate, a picture emerges from comparing a highly discretionary law and a presumptive one. For the former, discretion provides the space for implicit biases and negative stereotyping to creep into resentencing decisions,[179] and for applicants to experience the harms of epistemic injustice while trying to convince judges to free them. For the latter, there is greater potential for harm reduction during the resentencing process.

A. An Illustrative Comparison: Discretionary Resentencing Laws Versus Automatic or Presumptive Ones

1. The DVSJA's Regime of Maximal Discretion

a. The DVSJA's Core Provisions

In 2019, after a decade-long effort, advocates who included domestic violence survivors succeeded in securing passage of what was hailed as landmark legislation.[180] A unique reform,[181] the DVSJA held

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178 For instance, the American Bar Association has recommended that jurisdictions enact second look statutes permitting resentencing after incarcerated persons have served ten years. Wayne S. McKenzie, *Resolution 502—Report to the House of Delegates*, 2022 A.B.A. CRIM. JUST. SEC. 10 (Aug. 2022), https://secondchanceslibrary.org/wp-content/uploads/2022/08/Resolution-502.pdf [https://perma.cc/VJC5-3PN6]. The American Law Institute recommends a second look after fifteen years, coupled with other sentencing modification mechanisms such as good-time credits. MODEL PENAL CODE § 305.6 cmt. a (AM. L. INST., Proposed Final Draft 2017), https://www.thealiadviser.org/wp-content/uploads/2019/03/Modification-of-Long-Term-Prison-Sentences.pdf [https://perma.cc/AW2B-H2C2]. The Sentencing Project has catalogued second look laws in effect as of May 2024. *See* FELDMAN, *supra* note 12, at 11–24.

179 *See, e.g.*, People v. Addimando, 120 N.Y.S.3d 596, 620 (Cnty. Ct. 2020) (holding that the defendant did not warrant a lesser sentence given "the nature and circumstances of the crime," such as "the options and opportunities she had to avoid her decision to shoot [her partner], as well as her uncontroverted ability to withdraw from her apartment while armed with a deadly weapon"), *aff'd as modified*, 152 N.Y.S.3d 33 (App. Div. 2021); People v. Carla S., No. 70007-15/001, slip op. at 6 (N.Y. Cnty. Ct. Mar. 29, 2023) (on file with author) (portraying Carla as a scorned woman); People v. Marie A., No. 2595N/01, slip op. at 29–31 (N.Y. Sup. Ct. Dec. 18, 2020) (on file with author) (calling Marie deceptive and motivated by greed despite finding her to be a domestic violence victim).

180 *E.g.*, Press Release, New York City Bar, Statement on the Enactment of the Domestic Violence Survivors Justice Act (May 14, 2019), https://www.nycbar.org/press-releases/statement-on-the-enactment-of-the-domestic-violence-survivors-justice-act [https://perma.cc/HC2H-4MX6] (applauding bill for providing judges with discretion to give survivors appropriate sentences); Press Release, Andrew M. Cuomo, Governor, New York, Governor Cuomo Signs Domestic Violence Survivors Justice Act (May 14, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-domestic-violence-survivors-justice-act [https://perma.cc/3J5M-5NPV] (collecting comments praising bill).

181 Only three states have comparable provisions. Illinois permits retroactive consideration of domestic violence as mitigation. *See* 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(a)(15) (West 2021). So does California, *see* CAL. PENAL CODE § 1170(b)(6)(A) (West 2024), at least for cases

lots of promise by permitting consideration of a defendant's history of domestic violence in setting a sentence—both prospectively, and, relevant here, retrospectively—for those already incarcerated.

The law was, in many ways, written inclusively.[182] It contains two basic eligibility criteria for a person seeking to substitute a reduced-range sentence for a standard one. First, the applicant must show that "at the time of the instant offense," they were "a victim of domestic violence subjected to substantial physical, sexual[,] or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in subdivision one of section 530.11" of the New York Criminal Procedure Law.[183] For those seeking resentencing, this element requires corroboration.[184] However, the law contains no limits on the genders of the involved individuals; does not require that the victim be the abuser; and includes even crimes not committed against a person, such as grand larceny.[185] Second, the applicant must establish "such abuse was a significant contributing factor to" the crime[186]—notably, not even a contributing cause or *the* cause.

Then, discretion kicks in: The third element is whether "having regard for the nature and circumstances of the crime and the history, character and condition of the defendant," a standard-range sentence would be "unduly harsh."[187] Of note, too, the resentencing statute *requires* a court to conduct a hearing if the applicant meets the initial criteria "to aid" in its determination of whether to resentence.[188]

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pending on appeal when the law was enacted. *See, e.g.*, People v. Suazo, 313 Cal. Rptr. 3d 649, 669 (Cal. Ct. App. 2023) (noting bill amending Section 1170 to include consideration of intimate partner violence would apply to cases on direct appeal). The comparable Oklahoma law was signed on May 21, 2024. *See* Victoria Law, *Oklahoma Gives Incarcerated Survivors of Domestic Violence a New Chance at Freedom*, Bolts (May 24, 2024), https://boltsmag.org/oklahoma-survivors-act [https://perma.cc/AM6L-24TM].

182 Yet, it contains some broad offense exclusions: aggravated murder, first-degree murder, sex offender registry-eligible offenses, terrorism, and second-degree murder during a sexual offense against a child. *See* N.Y. Penal Law § 60.12(1) (McKinney 2024).

183 Penal Law § 60.12(1)(a). The criminal procedure law defines a household member expansively and excludes only "casual acquaintance[s]" and "ordinary fraternization between two individuals in business or social contexts." N.Y. Crim. Proc. Law § 530.11(1)(e) (McKinney 2024). Also, those seeking resentencing must be: (a) presently incarcerated when they request to apply, and (b) serving a sentence greater than or with a minimum above eight years. N.Y. Crim. Proc. Law § 440.47(1)(a) (McKinney 2023).

184 Crim. Proc. § 440.47(2)(c). This provision of the criminal procedure law incorporates the pleading standards of the penal law by reference. *See* Penal Law § 60.12(1)(a).

185 *See* Penal Law § 60.12(1).

186 Penal Law § 60.12(1)(b).

187 Penal Law § 60.12(1)(c).

188 Crim. Proc. Law § 440.47(e) (emphasis added).

b. The DVSJA's Fraught Implementation and the Attendant Harms

Despite what advocates hoped, the law has faced serious implementation hurdles. Some challenges have occurred around legal eligibility questions.[189] For example, in *People v. Williams*, an appeals court found that: (1) Ms. Williams was not subject to treatment that reached the level of "substantial" psychological abuse, and (2) despite a long history of *past* substantial physical and psychological harm from several abusers, Ms. Williams was not a victim "at the time of" the instant offense.[190] In *People v. B.N.*, another court held that "by using the word 'substantial,' the legislature intended to limit DVSJA's reach to those inmates who suffered the *most serious* physical, sexual, or

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189 Determining whether someone is a victim, and whether the victimization led to the crime, has entailed substantial fact-finding. And codifying a corroboration requirement has, perversely, baked in a presumption of incredibility for petitioners. *See* Isaacs, *supra* note 18, at 435, 446–47. This has undoubtedly contributed to the difficulty DVSJA applicants have had in achieving resentencing.

190 152 N.Y.S.3d 575, 576 (App. Div. 2021), *appeal denied* 181 N.E.3d 1113 (N.Y. 2022); *see also* People v. Fisher, 200 N.Y.S.3d 494, 496–97 (App. Div. 2023) (same, but finding this was so where there was earlier substantial abuse which had "essentially stopped" by the time the twenty-year-old defendant was a teenager); Victoria Law, *A New York Law Could Reduce Sentences for Domestic Violence Survivors. Why Are Judges Reluctant to Apply It?*, The Appeal (Feb. 24, 2020), https://theappeal.org/a-new-york-law-could-reduce-sentences-for-domestic-violence-survivors-why-are-judges-reluctant-to-apply-it [https://perma.cc/9G6S-8X46] (discussing Taylor Partlow's case, where a judge found Partlow had not established "substantial" abuse or a significant enough nexus between abuse and crime). Additionally, many trial courts applied *Williams* as precedent to find childhood or earlier trauma insufficient even if it affected the applicant, who later committed crimes. *See, e.g.*, People v. Michael W., No. 4728-2012, slip op. at 5–6 (N.Y. Sup. Ct. Nov. 9, 2021) (on file with author); People v. Aki D., No. 1191/2013, slip op. at 4 (N.Y. Sup. Ct. Sept. 12, 2022) (on file with author); People v. Shea'Honnie D., No. 2017-0406-3, slip op. at 9–10 (N.Y. Crim. Ct. Onondaga Cnty. July 1, 2022) (on file with author). These cases illustrate courts' skepticism toward applicants describing a life experience—complex or childhood trauma—that they consider not facially cognizable. Yet, research has shown that because of how trauma changes the brain, these experiences can have lifelong effects, with survivors stuck in a timeless state wherein responses can be reactivated years after the original event(s). *See* van der Kolk, *supra* note 7, at 21, 41–43, 67–70. Abuse against men is another point of disbelief for courts; despite being a documented phenomenon, it is outside common conceptualizations of domestic violence. *See, e.g.*, Aki D., slip op. at 4–5 (finding defendant ineligible using procedural default despite his not having understood his wife's behavior as psychological abuse when he applied, given he had not yet had the psychological evaluation that prompted this realization). *See generally* Kelly Scott Storey, Sue O'Donnell, Marilyn Ford-Gilboe, Colleen Varcoe, Nadine Wathen, Jeannie Malcolm & Charlene Vincent, *What About the Men? A Critical Review of Men's Experiences of Intimate Partner Violence*, 24 Trauma, Violence, & Abuse 858 (2023) (reviewing literature on intimate partner violence experienced by men). And, while rates of *reported* child abuse are slightly higher for girls than for boys, no one disputes that abuse against boys exists. *See* Child.'s Bureau, Dep't of Health & Hum. Servs., Child Maltreatment 2021, at 22, 41 (2021). Thus, epistemic injustice operates at the eligibility step, too.

psychological abuse—that which is comparable in severity to . . . rape or severe physical abuse."[191]

But the rubber has really met the road around discretion.[192] Courts have held extensive factual hearings to determine whether someone should be resentenced, with the microscope trained directly on the petitioner, magnifying their every move not only at the time of resentencing but throughout the life of the case and of the applicant. In one case where a court exercised discretion to deny resentencing after finding the applicant eligible, among the factors it cited was that "absent from her application are letters of support from her children, whom she states she desires to reconnect with, or other family members or non-incarcerated friends . . . with whom she says she plans to reside" upon release;[193] the DVSJA, however, requires no particular forms of mitigation evidence for success. Yet applicants are held to an exceptionally high standard under which their statements *and* omissions are scrutinized.[194]

In another instance, a court held the DVSJA required "objective" evidence, which, by definition in its view, could not include a statement by a defendant.[195] It reasoned this was because of "the danger of a defendant manufacturing evidence favorable to her own position"

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191 192 N.Y.S.3d 445, 458 (Sup. Ct. 2023) (emphasis added). Yet science has shown profound emotional abuse can be as damaging as physical and sexual abuse. *See* VAN DER KOLK, *supra* note 7, at 87–89.

192 *E.g.*, KOMAR ET AL., *supra* note 34, at 14 (noting that the requirement for the original sentence to have been "unduly harsh" has been a barrier to success for DVSJA petitioners).

193 People v. Eveth R., No. 530/99, slip op. at 18 (N.Y. Sup. Ct. Feb. 23, 2023) (on file with author).

194 As Catharine MacKinnon cautions, "silence does not mean nothing happened." MACKINNON, *supra* note 82, at 170. Though MacKinnon is speaking of underreporting of sexual abuse, the more general principle she is elucidating is that "if you are the tree falling in the epistemological forest, your demise doesn't make a sound if no one is listening." *Id.* at 169 (emphasis omitted). Women and violence survivors have been forced to contend with a general erasure because their experiences are illegible to those in power. *See id.* at 164.

195 People v. B.N., 192 N.Y.S.3d, 455 (Sup. Ct. 2023). Other courts have used the supposed inherent incredibility of defendants' own statements to deny petitions summarily. In *People v. John F.*, the court held: "The evidence the defendant has submitted in support of his application is based upon self-serving, inconsistent statements that do not corroborate his claims of abuse." No. 4155/2011, slip op. at 3 (N.Y. Sup. Ct. Feb. 11, 2021). This was so despite John submitting several types of proof the statute *expressly contemplated* for an applicant to get a hearing. *See id.* (noting defendant submitted a presentence report, medical records, and a report to evaluate a defendant's fitness to stand trial); N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2023) (contemplating a presentence report and medical records); N.Y. CRIM. PROC. LAW § 730.20(5) (McKinney 2023) (contemplating a report evaluating fitness to stand trial). In *People v. Charlene M.*, the court similarly held it could reject a claim at the pleading stage where the submitted corroboration—psychiatric reports indicating trauma and domestic violence—were predicated on Charlene's word. *See* No. 7367, slip op. at 3–4 (N.Y. Crim. Ct. Mar. 10, 2020).

such that her statements could not be "reliable hearsay."[196] While it found the applicant had not shown she was eligible, it continued that if it were to assume eligibility arguendo, the sentence was not unduly harsh.[197] In a striking passage, after the court found B.N. was being disingenuous by saying she intended to shoot at the decedent, not kill him, it even weaponized her *admission* that she discharged everything in the gun, a seemingly damning fact: "The chilling, inhumane nature of the defendant's tenor when she said she 'unloaded [the gun]' cannot be overstated. Her demeanor was unflinching, self-righteous, self-assured, and utterly devoid of remorse for having murdered" the victim.[198] To the court, this evinced not truthfulness about an unfavorable detail but ongoing lack of remorse, a factor it could cite to deny resentencing.

Tropes about manipulative women have also gained purchase. In *People v. Wendy B.-S.*, despite finding the petitioner had established victimization by her husband, who had also been involved in a third party's murder, the resentencing judge denied her application because the trial judge stated, "I don't believe for a moment that [your husband] controlled and manipulated you. I think you controlled and manipulated him."[199] That judge's opinion was permitted to substitute for "ample evidence" in the record that she feared and "had been abused by" her husband.[200]

Inconsistency has been invoked to find applicants incredible. For instance, the *People v. J.M.* court found evidence that J.M. had initially taken full responsibility for the crime before later stating she had been coerced proved her "attempt to manipulate the facts to engender sympathy" rather than evinced complex issues related to fear, love, and memory.[201] Yet, as trauma expert Bessel van der Kolk notes,

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196 *B.N.*, 192 N.Y.S.3d at 455 (citations omitted). "Reliable hearsay" is, rather, a term of art that means sufficiently reliable for admission without a foundation because it has been created pursuant to statutory mandate or is of a type well-known to courts. *See* People v. Mingo, 910 N.E.2d 983, 990 (N.Y. 2009). Reliable hearsay has nothing to do with how much weight to accord evidence, and, indeed, the DVSJA says nothing about precluding a defendant's own statements. But the court seemed intent on dismissing anything B.N. said as self-serving and thus incredible.

197 *B.N.*, 192 N.Y.S.3d at 469–71.

198 *Id.* at 470; Tonry, *Sentencing in America*, *supra* note 59 (describing how judges can be poor evaluators of remorse).

199 People v. Wendy B.-S., No. 00525/1989, slip op. at 3 (N.Y. Sup. Ct. Sept. 17, 2020) (alteration in original).

200 *Id.* The Appellate Division later affirmed. While it found that the lower court had relied on outdated ideas about domestic violence in finding that the abuse of Wendy's husband had contributed to the crime, it nonetheless used discretion as its off-ramp, denying resentencing because of the nature of the crime, which involved aiding the abusive husband, and drug use in prison; it ignored other accomplishments during her time upstate. *See* People v. Wendy B.-S., 215 N.Y.S.3d 806, 810–11 (App. Div. 2024).

201 211 N.Y.S.3d 762, 771 (Sup. Ct. 2024).

"[t]raumatized people simultaneously remember too little and too much," with the "imprints" of these experiences organized "not as coherent logical narratives but in fragmented sensory and emotional traces."[202]

And in another example, two of five judges hearing an appeal revealed their skepticism of applicant Brenda WW.'s credibility, finding in dissent that her "ever-changing story" about the incident, the amount of alcohol she had consumed on the night in question, and her apparent lack of remorse because she had said at her original sentencing she did not mean to hurt her partner were among the reasons they would affirm her petition's denial.[203] The dissent found she was eligible, but would have denied the petition as a matter of discretion.[204] The majority, taking a different view, found that the defendant's "repeated[] victimiz[ation] by various individuals over the course of her life" explained "much of her conduct," and criticized the sentencing judge, whose evaluation of the applicant's credibility the dissent relied on, for its outdated understanding of how domestic violence functions.[205] Though the petitioner ultimately prevailed, the debate between the majority and dissent reveals that these cases are fought on the terrain of the defendant's believability, and significant discrediting occurs *even when an applicant is successful*. That is, testimonial injustice occurs even when the outcome is favorable.

Even where the judge does not directly impugn an applicant's credibility, inability to fully understand the choices a person operating under coercion and violence makes can pervade the case. In one instance, a judge found that an applicant who had participated in a murder at her abuser's behest, who then fled the state with her children and abuser, was eligible but did not deserve relief because she had "multiple opportunities to" help the victim "when she was alone and away from" her abuser, but did not, despite not "feel[ing] safe" to do so.[206] The court was quick to note it did "not suggest[] that [the] defendant could have removed herself from the situation, or any other pre-conceived notion of how a domestic violence victim should act"[207]—though it did just that in faulting her for not acting as the court believed would be intuitive to act in that scenario.

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202 VAN DER KOLK, *supra* note 7, at 176, 179.

203 People v. Brenda WW., 203 N.Y.S.3d 211, 219–20, 222–23 (App. Div. 2023) (Pritzker, J., dissenting).

204 *Id.* at 219.

205 *Id.* at 218 n.3, 219.

206 People v. Maria R., No. 01091-2007, slip op. at 15 (N.Y. Sup. Ct. Aug. 12, 2021) (on file with author).

207 *Id.*

Even before a hearing, courts have invoked discretion to question an applicant's credibility. In one example, a court exercised its "wide discretion" to require a petitioner to submit to a psychiatric examination by the prosecution's expert witness[208]—despite the DVSJA being an ameliorative statute[209] rather than a trial in which the prosecution must prove guilt beyond a reasonable doubt. In fact, in a requirement unique at sentencing, the DVSJA requires corroboration.[210] This requirement has the practical effect of setting a high threshold for relief or even a hearing, and, by suggesting that someone cannot sustain their burden on their word alone, the DVSJA paradoxically reinforces the notion that applicants are inherently incredible.

Perhaps the following observation best encapsulates the challenge for these applicants facing intersecting potential identity prejudices:

> An applicant must . . . convince the judge that they have experienced substantial abuse that was a significant contributing factor to their crime, and that a sentence ignoring this would be unduly harsh. Because the judge has complete discretion over whether a case meets these requirements, the outcome of each case is highly dependent on the judge's understanding of the psychological impact that trauma can have on survivors' behavior.[211]

In other words, whether someone succeeds turns on whether a judge can *comprehend* their experience. In some cases, judges might, but in others, they will not. In *People v. Marie A.*, for example, the court bolstered its finding that the applicant was not credible with a discussion about an earlier incident in which she had called the police on her partner, whom she later helped kill:

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208 People v. N.P., 183 N.Y.S.3d 725, 726 (Sup. Ct. 2023).

209 *See, e.g.*, People v. Liz L., 201 N.Y.S.3d 514, 518 (App. Div. 2023) (noting DVSJA is ameliorative).

210 Komar et al., *supra* note 34, at 13 (describing the challenges posed by the atypical corroboration requirement); Isaacs, *supra* note 18, at 506 (critiquing the corroboration requirement). *See also* People v. Charlene M., No. 7367, slip op. at 4–5 (N.Y. Sup. Ct. Mar. 10, 2020) (finding no corroboration and declining to order a hearing where the applicant submitted one psychiatric report with allusions to trauma and another with evidence of domestic abuse because the court found the former too untethered to domestic abuse and the latter predicated on Charlene's self-report; and discounting additional evidence of abuse from a former defense attorney as conjectural) (on file with author); People v. John F., No. 4155/11, slip op. at 3 (N.Y. Sup. Ct. Feb. 11, 2021) (criticizing the applicant's proffered evidence as inconsistent and therefore insufficient for a hearing) (on file with author); People v. Myeshia H.-T., No. 0511-16, slip op. at 13 (N.Y. Sup. Ct. Dec. 7, 2020) (finding a psychological report and the victim's affidavit did not corroborate that applicant experienced "substantial" psychological abuse from the victim, even if she had endured decades of prior serious abuse before then) (on file with author).

211 Kamis & Rose, *supra* note 32, at 5.

> The defendant testified that th[e] officer not only refused to arrest [the decedent], but instead threatened to arrest the defendant. Here again, her testimony is illogical and unlikely to be true. It is difficult to accept that any police officer would have refused to take action when presented with evidence of physical injury in a domestic violence situation especially since "mandatory arrest" laws have been in effect in New York since 1995.[212]

The court continued that the officer's trial testimony had been otherwise.[213] Yet, as is well-established, "arrest rates increased . . . after jurisdictions adopted [mandatory arrest] policies, . . . for women . . . ."[214] One reason women's arrest rates during domestic violence calls have gone up is that they are seen as "'overly emotional' when they talk to police and are therefore considered not credible."[215] Yet, the *Marie A.* court could do nothing but find it "illogical" that a police officer would not have followed the law or would have found Marie to be not credible. Flash forward a few decades, and the resentencing court found the same, even in the face of an expert psychologist saying she deemed Marie a domestic violence victim where Marie had been the main informant and upon having ruled out malingering.[216]

Whether the judge can understand the defendant's situation is arbitrary and often tracks their own life experience, even to the point that they might dismiss expert psychological testimony as "junk science."[217]

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212 People v. Marie A., No. 2595N/01, slip op. at 29 (N.Y. Sup. Ct. Dec. 18, 2020) (citations omitted).

213 *Id.*

214 Goodmark, *supra* note 9, at 51; Gruber, *supra* note 9, at 88 (noting mandatory arrest policies "increased arrest of men but *multiplied* arrests of women," because "[w]hen police arrive at a DV scene, often both parties admit to or complain of conduct that meets the legal definition of assault").

215 Goodmark, *supra* note 9, at 51.

216 *Marie A.*, slip op. at 29. Similarly, in *People v. Angela B.*, the court held that because it found the "[d]efendant's testimony . . . incredible, irrelevant, evasive, self-serving, non-responsive, or equivocal," and because the forensic psychological evaluator "relied almost exclusively upon [the d]efendant as the source material," it would accord the evaluation "little to no weight." No. 70007-14/001, slip op. at 3 (N.Y. Cnty. Ct. Oct. 31, 2022) (on file with author). Despite having no apparent psychological training, the judge opined that his having presided over domestic violence and family courts for years made him "well versed in the nuances of domestic violence" such that he was qualified to find the applicant not a victim and indeed "more likely" the main perpetrator. *Id.* This was so despite a witness testifying to seeing an instance of violence between Angela B. and the victim. *Id.*

217 *See* Kamis & Rose, *supra* note 32, at 5. One intervention to address this arbitrariness might be judicial training on domestic violence and trauma. *Id.* at 6. For the DVSJA, little occurred. This contrasted with training that occurred for the DLRA, the reform discussed *infra* Section II.A.2, through which judges were educated on "new insights in neuroscience and sociology" related to addiction and drug use. *Id.* at 7.

The split in *Brenda WW.*[218] effectively illustrates how worldview variations among even one appellate panel can impact an outcome. Until there is enough "change in the culture," justice will remain out of reach for many applicants.[219]

Interestingly, a few appellate courts have reversed denials, notwithstanding typical appellate deference, because the facts were so egregious. In *Brenda WW.*, the resentencing court declined to believe the abuse was "substantial" when the petitioner testified to her abuser having thrown a plate at her temple, causing a laceration, and having beaten her so badly that she sustained a broken nose and black eyes.[220] That she had been "burned with cigarettes, pushed down a set of stairs, [and] ha[d] her teeth chipped, neck stomped and nose broken" was corroborated by medical records, other witnesses' accounts, and a psychologist's report.[221] Yet, the court found her unworthy of resentencing because it found "mutua[l] abus[e]" and the applicant abused alcohol[222]—that is, because she was an "imperfect victim."[223] The appellate court reversed.[224]

Addimando was another such case.[225] There, Nicole Addimando testified at trial to "brutal physical and sexual abuse at the hands of" her intimate partner "for many years," then produced additional evidence of abuse—including photographs—at her sentencing hearing.[226] Yet, the court found the abuse "undetermined" and Ms. Addimando "inconsistent" such that she should not receive a DVSJA sentence.[227] The appeals court felt compelled to check the "unfettered judgment" of the sentencing court,[228] which had set the credibility bar impossibly high.[229]

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218 People v. Brenda WW., 203 N.Y.S.3d 211 (App. Div. 2023).

219 Law, *supra* note 190 (internal quotation omitted).

220 *Brenda WW.*, 203 N.Y.S.3d at 215.

221 *Id.* at 215–16.

222 *Id.* at 215.

223 *See generally* Goodmark, *supra* note 9.

224 *Brenda WW.*, 203 N.Y.S.3d at 218–19.

225 People v. Addimando, 152 N.Y.S.3d 33 (Sup. Ct. 2021); *see also* People v. T.P., 188 N.Y.S.3d 842, 844–45 (App. Div. 2023) (substituting DVSJA sentence on appeal). *Addimando* involved a sentencing rather than a resentencing, but the same problem of a convicted female domestic violence victim being seen as less credible holds true.

226 *Addimando*, 152 N.Y.S.3d at 37.

227 *Id.* at 40.

228 *Id.; see* N.Y. Crim. Proc. Law § 470.15(6)(b) (McKinney 2024) (stating that New York's Appellate Divisions possess jurisdiction to review sentences de novo and substitute their own judgment if they deem a sentence "unduly harsh or severe").

229 While there are some isolated examples of appellate reversals, the many denials at the trial level without subsequent reversals suggest most applicants are not getting relief on appeal or are opting out of appealing. *See* E-mail from Kate Mogulescu, *supra* note 34 (documenting denial of seventy-six resentencing applications at the trial level). The number

These cases collectively illustrate epistemic harm to resentencing applicants. They are required to put forth substantial evidence, often in the form of their own testimony, only to be disbelieved or held to an impossible standard of proof—even in the face of corroboration. For this statute, plumbing highly traumatic memories becomes part of the process, which is itself retraumatizing.[230] It is no surprise, then, that even those who were successful in having their sentences reduced described the process itself as punishing and dehumanizing. As applicant Maresa Chapman stated, "It was just so embarrassing to be villainized, all over again."[231] She felt she was "made a spectacle" of, in ways that were not relevant to the issue at hand, with the only purpose "dirtying" her "character."[232]

2. The Drug Law Reform Acts' Presumptive Regime

a. The Three-Part Reform of the Rockefeller Drug Laws

In 2004, New York State began rolling back the infamous "Rockefeller drug laws" of the 1970s, which are nearly synonymous with draconian sentencing. In the first round ("DLRA 1"), the Legislature removed mandatory life-capped sentences for class A-I drug felonies, and created a mechanism to revisit existing sentences retroactively.[233] This was followed in 2005 by "DLRA 2," which expanded the same treatment to A-II drug felonies.[234] While lauded for sanding down the harshest edges of the Rockefeller era, these reforms left many people incarcerated for class B drug felonies, which were not life-capped

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of requests for prospective DVSJA sentencing is unknowable unless and until the New York State Office of Court Administration starts keeping such records. As of November 21, 2024, a Westlaw search reveals only the following reversals and modifications of unfavorable trial court decisions on appeal: People v. Burns, 172 N.Y.S.3d 90 (App. Div. 2022); People v. Liz L., 201 N.Y.S.3d 514 (App. Div. 2023); *Brenda WW.*, 203 N.Y.S.3d 211; *Addimando*, 152 N.Y.S.3d 33; *T.P.*, 188 N.Y.S.3d 842.

230 Komar et al., *supra* note 34, at 17 (recommending supports during application and hearing process given the likelihood of retraumatization).

231 Kamis & Rose, *supra* note 32, at 9.

232 *Id.*

233 2004 N.Y. Laws 3907, 3918–19 (enacting procedural and substantive changes for A-I drug felony sentences). This was expected to affect 473 eligible individuals. *See* Gibney & Davidson, *supra* note 34, at 2. As of the end of 2009, those resentenced and released under DLRA 1 totaled 279. *Id.* at 4. *See also* People v. Suya, 924 N.Y.S.2d 242, 245 (Sup. Ct. 2011).

234 2005 N.Y. Laws 3435, 3435–36. The statute provided the minimum term had to be greater than three years' incarceration, and the applicant had to be no more than twelve months from release to be eligible. *Id.* Around 550 were expected to qualify. *See* Gibney & Davidson, *supra* note 34, at 2. As of early 2010, 297 had been released. *Id.* at 4. *See also Suya*, 924 N.Y.S.2d at 245.

but still punished excessively,[235] and often affected those struggling with addiction.[236] Thus, in 2009, the Legislature passed the final round, "DLRA 3," which prospectively and retroactively changed the sentencing ranges for B through E drug felonies.[237]

The DLRAs did not mandate resentencing; they still invited judges to exercise discretion by considering "any facts or circumstances relevant to the imposition of a new sentence which are submitted by" the applicant, including the "institutional record of confinement."[238] However, critically, these statutes provided that upon finding facts, the "*court shall, unless substantial justice dictates that the application should be denied*," offer the applicant a DLRA-range sentence.[239] Within a few years, courts had made clear this was a strong presumption, and an ameliorative statute, so, assuming the applicant was eligible (and eligibility provisions themselves should be construed liberally), they should be resentenced.[240]

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235 For example, possession of any quantity of narcotic with intent to sell could yield a sentence up to an indeterminate term of eight-and-one-third to twenty-five years for a first felony conviction. *See* N.Y. Penal Law § 70.00(2) (McKinney 2008) (still applying 1995 New York Sentencing Reform Act, 1995 N.Y. Laws 126, ranges to class B drug felonies); N.Y. Penal Law § 220.16(1) (McKinney 2024) (criminalizing possession with intent to sell).

236 According to the New York State Department of Corrections and Community Supervision, in 2008, the year before non-A drug offenders could petition for relief under the DLRA 3, 82.6% of those incarcerated reported or were found to suffer from substance abuse, and 21.4% of the prison population was committed for drug offenses—nearly half of those for mere possession. N.Y. Dep't of Corr. Servs., Hub System: Profile of Inmate Population Under Custody on January 1, 2008, at 27, 54 (2008), https://doccs.ny.gov/system/files/documents/2019/09/Hub_Report_2008.pdf [https://perma.cc/ZNY3-LQME]. Initially, DLRA 3 was expected to reach around 1,100 people. N.Y. State Div. of Crim. Just. Servs., 2009 Drug Law Reform Update 17 (2009). By 2015, 823 had been resentenced. N.Y. State Div. of Crim. Just. Servs., Monthly Resentencing Summary (Jan. 2015) (on file with author).

237 2009 N.Y. Laws 128, 225; *see* N.Y. Crim. Proc. Law § 440.46 (McKinney 2009) (enabling petitions for those sentenced pre-effective date of the reforms). *See also Suya*, 924 N.Y.S.2d at 245.

238 2004 N.Y. Laws 3907, 3918–19; 2005 N.Y. Laws 3435, 3435–36; N.Y. Crim. Proc. Law § 440.46(3) (incorporating DLRA 1 procedures by reference and adding the overlay that "the court's consideration of the institutional record . . . shall include . . . such person's participation in . . . treatment . . . . [T]hat a person may have been unable to participate . . . shall not be considered a negative factor in determining a [resentencing] motion . . . .").

239 2004 N.Y. Laws 3907, 3919 (emphasis added); 2005 N.Y. Laws 3435, 3436 (emphasis added); N.Y. Crim. Proc. Law § 440.46(3) (incorporating DLRA 1 procedures).

240 *See* People v. Brown, 32 N.E.3d at 938 ("[R]emedial statutes such as the DLRA should be interpreted broadly to accomplish their goals—in this case the reform of unduly harsh sentencing imposed under pre-2005 law . . . ."); People v. Lopez, 809 N.Y.S.2d 483, 2005 WL 3304138, at *2 (Sup. Ct. Oct. 7, 2005) ("Simply put, there is a strong presumption in favor of granting a resentencing application for all eligible defendants."); People v. Pomales, 940 N.Y.S.2d 454, 458 (Sup. Ct. 2012) ("The overriding intent of the DLRA was to relieve the severity of harsh drug sentences for 'any person' who satisfies the eligibility requirements . . . ."); *see also* People v. Beasley, 850 N.Y.S.2d 140, 142 (App. Div. 2008)

b. The Relatively Smooth Implementation of the DLRAs

In contrast to how the DVSJA rollout has gone, within a few years of the first two DLRAs' passage, a large portion of individuals had their cases reviewed and, more often than not, received new sentences.[241] About five years after the 2009 law took effect, about seventy-five percent of those initially eligible had received reduced terms.[242] Many cases were decided only on the papers,[243] at which point courts would issue a decision offering a new sentence, and a brief resentencing proceeding would occur. Extensive fact-finding hearings where courts decided what evidence to admit and how to weigh it were rare.

Instead, the resentencing presumption appears to have mattered, not only to setting forth clear burdens that framed the issue and cabined discretion, but also to *how* courts reviewed factual raw material. Analyses looked like that of *People v. Figueroa*.[244] There, the resentencing court, after finding the petitioner eligible, proceeded to the substantial justice consideration. Because of the mandate that he be resentenced unless "substantial justice" dictates otherwise, the court noted factors on each side of the ledger, ultimately finding that those counseling against resentencing did not outweigh those for, especially

(reversing resentencing denial even though the applicant incurred drug felony conviction while on furlough and disciplinary infractions in prison); People v. Sosa, 963 N.E.2d 534, 538 (N.Y. 2012) (interpreting prior felony look-back period to broaden eligibility, leaving for the substantial justice determination whether someone merited resentencing). Notably, another key actor in the decisionmaking ecosystem, the prosecution, took the *opposite* position. Several New York City prosecutors suggested they would support only applications from those with minimal criminal and disciplinary records. *See* Alex Ginsberg, *Rockefeller Reform Could Backfire if Dope Fiends Are Released*, N.Y. Post (Nov. 23, 2009), https://nypost.com/2009/11/23/rockefeller-reform-could-backfire-if-dope-fiends-are-released [https://perma.cc/7EKH-WRVR] (quoting the City's special narcotics prosecutor and a Kings County District Attorney's Office official). This position shows not everyone's attitudes toward drug offenses had changed, diminishing the explanatory power of that reason for smooth DLRA implementation. It also shows discretion always has potential to open space for harshness.

241 *See* Gibney & Davidson, *supra* note 34, at 4 (showing over half of A-I and A-II petitioners were resentenced).

242 *See* Monthly Resentencing Summary, *supra* note 34; 2009 Drug Law Reform Update, *supra* note 34, at 17 (noting 823 of 1,100 DLRA 3 petitioners were resentenced by January 2015).

243 The procedural statute provides only for an *opportunity* for a hearing, or for the court to determine disputed facts at one. 2004 N.Y. Laws 3907, 3918–19; *see* People v. Carson, 801 N.Y.S.2d 779 n.6 (Sup. Ct. 2005) (noting that because the prosecution did not dispute postsentencing information about applicant's prison record, life, and postrelease plans, the court accepted those facts as true). By contrast, the DVSJA *requires* a hearing if the applicant meets threshold proof requirements. *See* N.Y. Crim. Proc. Law § 440.47(2)(e) (McKinney 2009).

244 894 N.Y.S.2d 724 (Sup. Ct. 2010).

given the law's ameliorative overlay and strong presumption.[245] This was so despite several factors the prosecution had argued were aggravating: parole violations, a disciplinary incident in prison involving violence, and the large amount of drugs Mr. Figueroa sold.[246] While there was discussion of whether he deserved resentencing, the court did not express moral disapprobation over, for instance, the parole violations, which the court made a point of noting would not necessarily involve "blameworthy" conduct.[247] Nor did the court parse the believability of the facts, such as Mr. Figueroa's assertion that he could financially support his wife on release.[248]

People v. Acevedo,[249] a DLRA 1 case, was even sparer in its discussion. There, the court simply found the applicant should be resentenced to the minimum for his A-I drug felony, citing the rebuttable presumption, Mr. Acevedo's young age at the commission time, and the lack of evidence of negative behavior while he was incarcerated.[250] In so finding, it took as true Mr. Acevedo's assertion that he "maintained a good prison record" and "worked diligently in prison in a variety of trades."[251] This was so despite the original sentencing judge's contemptuous pronouncement:

> You yourself have stated that you never have used drugs or abused drugs, so that means you came up here from New York to open up a business and the business is putting poison on the streets . . . so that other people can take this poison and ruin their lives . . . . In addition . . . , you have robbed people in the past forcibly. You committed crimes like that. You are an intelligent person. You could have done better, but you didn't.[252]

While the resentencing court quotes that language in explaining why it is not revisiting the original court's decision to impose a consecutive sentence for a simultaneous weapons conviction, it does

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245 *Id.* at 744–46; *see also, e.g.*, People v. Santana, 954 N.Y.S.2d 725, 731 (Sup. Ct. 2012) (weighing similar factors and granting resentencing); People v. Loftin, 907 N.Y.S.2d 439 (Sup. Ct. 2010) (same); People v. Williams, 893 N.Y.S.2d 753, 756–57 (Sup. Ct. 2010) (same).

246 *Figueroa*, 894 N.Y.S.2d at 745–46.

247 *Id.* at 741.

248 *Id.* at 726; *cf.* People v. Eveth R., No. 530/99 (Sup. Ct. Feb. 23, 2023) (in the DVSJA context, discrediting a similar assertion).

249 People v. Acevedo, 802 N.Y.S.2d 335 (Sup. Ct. 2005).

250 *Id.* at 337.

251 *Id.* Unlike with the DVSJA, where courts have parsed such details as whether admitting firing several shots is evidence of remorse or its opposite, *see supra* note 198, Mr. Acevedo's assertions about a prison record as nebulously characterized as "good" were simply taken as true.

252 *Acevedo*, 802 N.Y.S.2d at 339 (citation omitted).

not rely on it in choosing to resentence Mr. Acevedo to the minimum term for his drug conviction.

Even when denying relief, courts tend to focus on factors like criminal and prison disciplinary history rather than applicants' moral worthiness or credibility.[253] Such focus can certainly result in objectification, with the applicant reduced to a rap sheet.[254] But, overall, an applicant's value as a knower and provider of information about their own experience has not been the dominant matter in question, *even when* they are sharing information that could be subject to a credibility determination.

3. Accounting for the Difference Between These Two Implementation Stories

There are several potential explanations for the relative success rates of these statutes. For one, the DLRAs involve drug crimes, the site of profound shifts in public attitudes since the apex of the drug war, whereas the DVSJA can implicate violent felony convictions, informed though they are by the context of domestic violence and trauma in which they arose.[255] Second, there are procedural differences between the statutes: The former contemplates the applicant putting forth information relevant to mitigation (and the prosecution having the chance to rebut it with aggravating facts), while the latter expects the applicant to corroborate their claims of abuse, elevating their burden.[256] The DVSJA also contemplates a two-step process through which applicants must submit two pieces of proof showing their victimization and that the abuse contributed to the crime, followed by a merits hearing only if they cross that threshold.[257]

Nonetheless, it is hard to ignore that within five years of the final DLRA's passage, most eligible people had filed papers, made arguments, and received decisions; in between fifty-four percent and

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253 *See, e.g.*, People v. Suya, 924 N.Y.S.2d 242, 245 (Sup. Ct. 2011), *aff'd*, 929 N.Y.S.2d 738, 738–39 (App. Div. 2011); People v. Manigault, 964 N.Y.S.2d 61 (Sup. Ct. 2012), *aff'd*, 966 N.Y.S.2d 666 (App. Div. 2013).

254 *See* M. Eve Hanan, *Talking Back in Court*, 96 Wash. L. Rev. 493, 553 (2021) [hereinafter Hanan, *Talking Back*] (narrating the dehumanizing experience of having a judge learn all information about a defendant from a rap sheet).

255 As a counter to that distinction, however, DLRAs 1 and 2 covered those operating as traffickers, who have not received the same public health-based reassessment. Additionally, the DVSJA is not limited to violent crimes and, indeed, covers drug offenses.

256 The corroboration requirement undoubtedly has limited the DVSJA's success, and Elizabeth Isaacs rightly recommends abolishing it. Isaacs, *supra* note 18, at 505–09.

257 N.Y. Crim. Proc. Law § 440.47(2)(c)-(e) (McKinney 2023) (establishing procedures). There is another step, which has applicants requesting to apply and get an attorney at the outset. *Id.* § 440.47(1).

seventy-five percent of those cases, depending on the felony class, applicants were resentenced.[258] In the same number of years, only a small number (sixty-eight) of DVSJA candidates have been resentenced, less than fifty percent of those whose cases proceeded to decision, and this is just a drop in the bucket of the many thousands who might be eligible.[259]

The early indications of disparate success rates are notable,[260] but they are not necessarily the main point here. Instead, this statutory comparison reveals a qualitative difference in the treatment of applicants. For the DVSJA, undue emphasis is placed on the applicant's credibility, especially where they belong to one or more groups that suffer identity prejudice. For the DLRA, however, the case law illustrates that the strong presumption carries substantial weight and takes the focus away from whether the applicant's experiences are legible to the decisionmaker. The epistemic harm that those subject to full discretion endure is a compelling reason to make resentencing mandatory or at least presumptive, as the next section will discuss.

B. The Optimal Regime

In his piece critiquing unfettered judicial sentencing discretion, Judge Frankel called for more "law," by which he meant more defined categories of mitigation and aggravation to help arrive at a number.[261] But given that implicit biases and negative identity prejudice persist, more law might be insufficient—"an incompetent tool for addressing racial inequality,"[262] entwined as racial injustice is with the criminal legal system.

As jurisdictions move to enact second look bills, "a critical step toward reducing the number of people currently incarcerated," they would be wise to avoid "the same political pitfalls as parole boards and other entities that exercise discretion."[263] Among these is the harm of testimonial injustice detailed above. The way to do this is to establish basic criteria for resentencing applicants; if they meet those criteria, they automatically qualify for sentencing to a reduced term.[264]

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258 *See* Gibney & Davidson, *supra* note 34, at 2, 5–6; Monthly Resentencing Summary, *supra* note 34; 2009 Drug Law Reform Update, *supra* note 34, at 17.

259 *See* Komar et al., *supra* note 34, at 11, 19; E-mail from Kate Mogulescu, *supra* note 34.

260 My aim here is not to make an apples-to-apples comparison, as the statutes have important differences. But available data show that success percentage and case pacing differences appear stark.

261 Frankel, *supra* note 55, at 9.

262 Khiara M. Bridges, Critical Race Theory: A Primer 161–62 (2019).

263 Nelson et al., *supra* note 10, at 43.

264 Minimizing or eliminating discretion also avoids the "seduction" of such reforms, which serve to "relax the public into a sense of optimism toward the gradual ending of mass incarceration while the mechanisms of terror whirl on in the background" through the

That reduced term could involve a range within which a judge has some choice, thereby preserving limited power to make individualized determinations in accordance with longstanding sentencing principles. That said, to avoid a return to the harshness of the truth-in-sentencing era, mandatory minimums should be eliminated so that courts always may exercise leniency.[265] Doing so would further the goals of unwinding mass incarceration *and* avoiding testimonial injustice.

What those criteria are could vary, but I suggest a few here.[266] Anyone who was under twenty-six years old at the crime's commission should qualify for automatic resentencing to a capped term. Those over an age at which actuarially they are unlikely to commit crimes should also qualify—this group has statistically aged out of crime[267] and, moreover, has begun to pose significant challenges to prison systems, which are poorly situated to provide quality healthcare.[268] There could be medical-related categories, or categories relating to a history of being

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"promise of individual acts of discretionary leniency" predicated on reassurance that the sovereign cannot only punish but also "bestow tenderness and mercy," and the liberal myth of "meritocracy in punishment" whereby each gets what they deserve. M. Eve Hanan, *Terror and Tenderness in Criminal Law*, 45 Cardozo L. Rev. 581, 585, 587 (2024).

265 In a 2022 proposed Model Penal Code amendment, the American Law Institute has recommended as much. Nelson et al., *supra* note 10, at 41 (citing Model Penal Code: Sent'g § 6.11 (Am. L. Inst. Proposed Final Draft 2017)).

266 Ideally, those most affected would devise these criteria. *See* Ngozi Okidegbe, *When They Hear Us: Race, Algorithms and the Practice of Criminal Law*, 29 Kan. J. L. & Pub. Pol'y 329, 331 (2020) (acknowledging a political climate where abolitionist measures are unlikely to gain traction, noting that algorithms' use in the criminal legal system is both burgeoning and racially biased in impact as a function of their design, and advocating for algorithms "designed by most impacted racially marginalized communities" to counteract those harms).

267 Katie Engelhart, Opinion, *I've Reported on Dementia for Years, and One Image of a Prisoner Keeps Haunting Me*, N.Y. Times (Aug. 11, 2023), https://www.nytimes.com/2023/08/11/opinion/dementia-prisons.html [https://perma.cc/G9DA-97J2] ("[R]esearchers have found that recidivism rates drop to nearly zero for people over 65.").

268 *See, e.g.*, Meg Anderson, *The U.S. Prison Population Is Rapidly Graying. Prisons Aren't Built for What's Coming*, NPR (Mar. 11, 2024), https://npr.org/2024/03/11/1234655082/prison-elderly-aging-geriatric-population-care [https://perma.cc/WK67-5CGY]. Profiling a prison's dementia unit, moreover, one journalist noted that it "seems to impugn the basic logic of the carceral system or at least its classic rationales." Englehart, *supra* note 267. Continuing, she described its absurdity: "[F]or some, the point of prison is chiefly to incapacitate dangerous people. The men inside the M.D.U. vary in their physical abilities, but many are very sick and confused and use wheelchairs or walkers, and they probably couldn't hurt anyone if they wanted to." *Id.* For that matter, did it serve other purposes of punishment, such as retribution, *id.* ("Proponents . . . might decide that even a just act of punishment becomes unjust if the offender no longer understands why he is being condemned. Alternatively, they might conclude that those who are ailing and weak deserve mercy. Many of the M.D.U. residents have already served several years of their sentences."), or rehabilitation? *Id.* ("[A] prisoner cannot reflect on his crimes—and then maybe regret them or feel ashamed of them or be repulsed by them or resolve to do better in the future—if he does not even remember them or feel responsible for them.").

trafficked or victimized,[269] or to difficulties flowing from military service, as some jurisdictions have enacted.[270] Several professional associations reviewing the issue have recommended capping prospective terms at between ten and fifteen years;[271] those who have served as much or some lesser amount determined by statute should be resentenced.[272] No offense types should be categorically excluded.

Notably, precedent exists for a categorical approach to relief, albeit with the authority typically vested in the executive branch. Governors and Presidents have recently experimented with blanket clemency based on a common characteristic, such as offense category (for example, marijuana) or personal characteristic (for example, surviving human trafficking); process-related concerns (for example, racial bias-infected death sentencing);[273] or limited time left to serve during a public health emergency.[274] Legislatures should adopt this approach to codify a process normally left to the absolute discretion of the executive branch.[275]

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269 *See* FELDMAN, *supra* note 12, at 18, 20, 25. Any such category should be crafted with caution, however, so as not to encode the opportunity for epistemic harm in the form of vexing proof issues. *See* Isaacs, *supra* note 18, at 505–09; Meredith B. Esser, *Who Bears the Burden When Prison Guards Rape?*, 109 IOWA L. REV. ONLINE 188, 200–05 (2024) (recommending dispensing with substantiation requirement to qualify under federal early release provisions for prison sexual assault survivors).

270 *See* FELDMAN, *supra* note 12, at 5; *see also* U.S. SENT'G GUIDELINES MANUAL § 3582(c)(1), amend. 814 (U.S. SENT'G COMM'N 2023). Existing measures involve some exercise of discretion. The point would be instead to make the category itself what determines whether someone is resentenced.

271 McKenzie, *supra* note 178, at 10; MODEL PENAL CODE § 305.6 cmt. a (AM. L. INST., Proposed Final Draft 2017), https://www.thealiadviser.org/wp-content/uploads/2019/03/Modification-of-Long-Term-Prison-Sentences.pdf [https://perma.cc/AW2B-H2C2] (capping at fifteen years). At the outside limit, twenty-year sentences may be available for the most serious crimes, with extensions possible only on an affirmative showing by the prosecution of ongoing risk. *See* NELSON ET AL., *supra* note 10, at 37–38 (noting that public safety, retribution, and incapacitation max out at that point, and at fifteen years for crimes committed by people before age twenty-five, and citing example from Norway of regime that allows for sentence extensions only upon application by the prosecution).

272 In the juvenile life without parole context, one response to *Miller* and its progeny was to outlaw that type of sentence, cabining judicial discretion by fiat; twenty-seven jurisdictions and the District of Columbia now prohibit it. JOSH ROVNER, THE SENT'G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 2 (Apr. 2023), https://www.sentencingproject.org/app/uploads/2023/04/Juvenile-Life-Without-Parole.pdf [https://perma.cc/WNZ4-WZ2G].

273 *See* LEAH SAKALA, RODERICK TAYLOR, COLETTE MARCELLIN & ANDREEA MATEI, URB. INST., HOW GOVERNORS CAN USE CATEGORICAL CLEMENCY AS A CORRECTIVE TOOL 2–7 (Nov. 2020), https://www.urban.org/sites/default/files/publication/102696/how-governors-can-use-categorical-clemency-as-a-corrective-tool_0_1.pdf [https://perma.cc/KN67-XF8H].

274 *See* Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575, 584 (2021) (citing examples).

275 Doing so could also send the policy message that a truth-in-sentencing rationale—that a sentenced person serve the entire (long) term—no longer predominates, alleviating separation-of-powers concerns. *See* Love & Klingele, *supra* note 11, at 861. One example

Anything that creates the space for racial or other identity-based biases to flourish should be avoided. One example is requiring or looking for a showing of remorse, which decisionmakers have not been adequately able to assess.[276] Another common criterion in second look considerations is lack of or minimal criminal record, yet at each stage of the criminal process, disparate treatment operates to make conviction of Black people more likely than of white people, with the former policed more heavily and detained pretrial more often—increasing the likelihood of conviction.[277] Similarly, prison disciplinary history is often considered, yet who gets disciplined and how often, too, evinces bias.[278] In short, jurisdictions should be mindful of the ways that biases become encoded in even those laws meant to reverse mass incarceration.

Alternatively, jurisdictions could enact presumption-based statutes like the DLRA, under which courts retain some discretion, but mandate that the strong presumption be in favor of resentencing, with the burden on the *prosecution* to rebut that presumption.[279] As detailed in Section II.A,

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of a mandatory legislative resentencing solution is California's provision allowing those convicted of felony murder under an accomplice theory to petition for resentencing and, if deemed guilty only of the predicate offense, to have their murder conviction vacated and receive a new sentence on the underlying offense only. CAL. PENAL CODE § 1172.6 (West 2024).

276 *See generally* Hanan, *Remorse Bias*, *supra* note 68.

277 THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 2–6 (2018), https://www.sentencingproject.org/app/uploads/2022/08/UN-Report-on-Racial-Disparities.pdf [https://perma.cc/WJG2-X5ES]; *see also* Okidegbe, *supra* note 266, at 332–34 (cataloging racial injustices baked into algorithms used in criminal legal settings).

278 An investigation revealed, for instance, that women are disciplined at higher rates than men, and for more minor infractions. Joseph Shapiro, Jessica Pupovac & Kari Lydersen, *In Prison, Discipline Comes Down Hardest on Women*, NPR (Oct. 15, 2018), https://www.npr.org/2018/10/15/647874342/in-prison-discipline-comes-down-hardest-on-women [https://perma.cc/W2CN-45TV]. The sanctions are harsher, too. *Id.* Studies have exposed racial biases and questioned the assumption that a greater rate of ticketing tracks greater rates of rule-breaking. *See* Katherine M. Becker, *Racial Bias and Prison Discipline: A Study of North Carolina State Prisons*, 43 N.C. CENT. L. REV. 1, 17–22 (2021); *see also* Eric D. Poole & Robert M. Regoli, *Race Institutional Rule-Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 L. & SOC'Y REV. 931, 940, 943–45 (1980) (finding while Black and white incarcerated persons broke rules at similar rates, the former were more likely to be reported, and also showing that a history of disciplinary action begets more discipline); Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 768–73 (2015) (discussing how implicit bias can impact prison discipline decisionmaking).

279 Justice Ketanji Brown Jackson, when serving on the district court, interpreted the First Step Act to include a presumption, finding: "[I]f the defendant presents extraordinary and compelling reasons that warrant such a reduction . . . the presumption then effectively shifts in favor of his release, and the court must determine whether any of the purposes of punishment set forth in section 3553(a) require keeping the defendant incarcerated

this could lead to more decarceration and less harm.[280] Yet another mechanism that jurisdictions could consider would be a sentence cap with an override; if the prosecution wished to extend a sentence beyond a statutory maximum of, for example, fifteen years, it would have to apply to do so and would have a burden of proving necessity beyond a reasonable doubt. Such a reform, too, might avoid setting broad policy based on marginal cases and would remove the onus from individual incarcerated persons to prove their worthiness for resentencing.

III
Implications of an Automatic Resentencing Regime

A. Does Automatic or Presumptive Resentencing Cause Hermeneutic Harm?

One response to this proposal might be that unless and until "the availability and disclosure of the kinds of information that help establish broader consensus"[281] are put before decisionmakers, existing dominant understandings will persist. As Michelle Daniel Jones noted while discussing the DVSJA, its *value* was in asking system actors to "listen to . . . and believe women, to epistemically privilege . . . their experiences."[282] Put differently, "talking back by confronting the court with one's life circumstances has the potential to displace the prejudicial assumptions made by the court."[283] But prejudices are sticky, as the implicit bias discussion in Section I.B demonstrates. Though Fricker is not pessimistic—she outlines how one can become a "virtuous" listener[284]—she nonetheless notes that "the virtue [of being a just listener] . . . is bound to be hard to achieve, owing to the psychologically

nevertheless . . . ." United States v. Greene, 516 F. Supp. 3d 1, 27 (D.D.C. 2021). Whether this presumption gains traction and does any work will merit examination as the law develops.

[280] Because "substantial justice" remains a capacious term subject to interpretation, I favor a categorical approach.

[281] Sullivan, *supra* note 45, at 295.

[282] *All-In: The Survivors Justice Project*, Survivors Justice Project, at 10:18 (Oct. 2020), https://www.sjpny.org/resources/videos (scroll to and click the second video from the top) [https://perma.cc/NL3F-NHUR].

[283] Hanan, *Talking Back*, *supra* note 254, at 553. Getting to speak might, in fact, be a person's goal. By privileging resentencing based on categorical factors to decarcerate quickly, this proposal could undermine autonomy. As Matthew Clair notes in his work on defendants' experiences in criminal court, sometimes people want to speak even if doing so is to their legal detriment; sometimes "seek[ing] redress from . . . injustices" is more important than "avoid[ing] a harsh sentence," especially for those who experience systematic marginalization. Clair, *supra* note 150, at 20, 143.

[284] Fricker, *supra* note 14, at 86–98.

stealthy and historically dynamic nature of prejudice."[285] And, even if implicit biases are named, people in privileged positions often balk at the suggestion that they hold them because of a human tendency to believe in one's own goodness; moreover, addressing these biases takes effort, and the path of least resistance—doing nothing—is appealing.[286]

To be sure, no augmentation of the hermeneutical universe can occur unless a broader range of voices can contribute to the discussion. Michael Sullivan, in his essay exploring possible ways to combat epistemic injustice in the law, discusses the example of police-citizen interaction videos.[287] An early instance was video capturing Rodney King's arrest and beating, which garnered national attention and led many to believe Mr. King had suffered a grave wrong.[288] Yet, despite the availability of powerful evidence showing excessive force, the officers were acquitted (or, in one case, acquitted of the top charge but facing retrial on the lesser) at the state trial.[289] In other words, seeing the brutality a Black man endured at the hands of the police did not move the needle of understanding for many who had not experienced that type of police interaction. However, Sullivan goes on to cite an article by James McWhorter in which McWhorter reflects on how it took until the killings of Eric Garner, Tamir Rice, and other unarmed Black people for the rest of America to internalize that the police meant something very different to Black than to non-Black individuals.[290] Through this example, Sullivan endorses that increasing the amount and range of evidence put before members of dominant groups can mitigate epistemic injustice.

But mass incarceration is an ongoing human rights catastrophe, and we cannot wait another twenty-five years—the time it took to travel from the acquittal of the officers who assaulted Rodney King to the Black Lives Matter movement reaching into the consciousness of non-Black Americans—to address it.[291] In the opening anecdote of this Article, too, video should have served to convince skeptical decisionmakers that

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285 *Id.* at 98; *accord* Hanan, *Invisible Prisons*, *supra* note 15 ("Given the barriers of implicit biases, power relationships, and empathy deficits . . . it is not clear whether responsible listening can be achieved.").

286 Sullivan, *supra* note 45, at 299.

287 *Id.* at 296.

288 *Id.*

289 *Id.*

290 *Id.* (citing John McWhorter, *What O.J. Simpson Taught Me About Being Black*, N.Y. Times (Feb. 3, 2016), https://www.nytimes.com/2016/02/04/opinion/what-oj-simpson-taught-me-about-being-black.html [https://perma.cc/C5HQ-3CJB]).

291 *See* Epstein & Goodman, *supra* note 92, at 402 (discussing #MeToo and domestic violence, pointing out that even with increasing public awareness brought about by years of activism and scholarship, survivors continue to experience incredulity).

Curtis had suffered insidious and pervasive violence from his same-sex partner rather than, as was initially suggested to the defense, had a one-off fight that did not amount to domestic violence, a requirement for DVSJA resentencing. Yet, the video was insufficient; Curtis had to expose himself to questioning about his darkest moments to ultimately convince decisionmakers that he deserved resentencing. What this illustrates is that a decisionmaker hearing from just one person about their experiences might not be enough,[292] but waiting decades for understandings to shift was not an option for Curtis.

This is not an argument for doing nothing to address implicit biases and testimonial injustice—for example, through judicial trainings or by increasing judicial diversity—and to expand the universe of knowledge. Indeed, bringing in marginalized groups to the community of knowers "serves as the wellspring of knowledge to displace oppressive practices."[293] It enables them to have agency and, in the case of criminal defendants, to counter the silence often expected of them.[294] But, in the short term, a resentencing regime that moves toward aligning U.S. jail and prison populations with those of comparable countries and premises decisions on science, not fear, is imperative. While this might come with a hermeneutical cost, importantly, on the individual level, doing so will minimize *testimonial* injustice by not subjecting those making their resentencing cases—who often possess one or more intersecting marginalized identity characteristics, not to mention by definition have criminal convictions—to persistent disbelief.

B. Pitfalls to Avoid in Establishing a Resentencing Scheme

As discussed in Section II.B, there are basic criteria that a jurisdiction could adopt that might begin decarceration while minimizing testimonial injustice. However, in doing so, it should take care not to create barriers that would be too hard for most applicants to surmount or would perpetuate structural inequalities. The eligibility side of the DVSJA illustrates a problem with obstacles: Requiring corroboration of something notorious for being underreported (domestic violence) makes eligibility unduly burdensome for petitioners who lack proof. To promote structural equality, eligibility should not be tethered to anything that has historically involved racial or gender disparities, such as disciplinary history. Otherwise, there is the risk that disproportionate impacts that existed before the reform will exist after.

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[292] *Cf.* Hanan, *Talking Back*, *supra* note 254, at 553 (contemplating views shifting upon multiple defendants testifying to an experience).

[293] Tuana, *supra* note 80, at 127.

[294] *See* Hanan, *Talking Back*, *supra* note 254, at 547–48.

Another question that might arise is why we would not want to preserve some discretion, given that it can be exercised mercifully. Setting maximum terms but not minimums terms would accomplish that and would avoid the return to truth-in-sentencing that came with the last big rollback of discretion in the 1980s and 1990s.[295] The goal is to align sentences with modern norms and thereby reduce incarceration.

In any event, lawmakers need not withdraw *all* discretion. Judges will still be able to resentence candidates to any term beneath the cap; they will simply not have discretion to decide whether to resentence at all once someone is eligible.[296] And, if they wish to preserve a safety valve, legislatures can require the prosecution to present evidence to rebut a strong presumption in favor of resentencing, as with the DLRAs. I argue, though, that having automatic resentencing upon meeting the basic criteria is the means most equitable, most efficient,[297] and least likely to epistemically harm applicants.

C. The Truly Optimal Regime: Abolition

Focusing interventions on *individual*-level prejudice and its impact on *individual* marginalized persons seeking sentence reductions risks characterizing the problem of injustice as interpersonal, not systemic.[298] And, focusing on the individual rather than the structural allows underlying conditions, such as poverty and inequality, to go unchallenged. What prison abolitionists would likely say is that reform aimed at improving individual conditions is insufficient; we need to change the paradigm entirely.

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[295] *See* KARAKATSANIS, *supra* note 9, at 73 (critiquing federal sentencing reform in the 1980s that meant to "reduce judicial bias" but instead increased penalties).

[296] Moreover, petitioners will still have to apply and subject their claims to judicial review; "automatic" resentencing does not mean automatic, immediate release from prison.

[297] Though opponents of second look legislation have critiqued the burden on courts, see Kathryn E. Miller, *A Second Look for Children Sentenced to Die in Prison*, 75 OKLA. L. REV. 141, 147–48 (2022) (discussing judicial economy critique), the DLRA example shows that in a short period, many cases can be processed; the highly discretionary DVSJA, by contrast, has resulted in drawn-out proceedings replete with multistep pleadings plus hearings with multiple fact and expert witnesses. The former is less costly than the latter and lowers taxpayer costs through reduced incarceration. *See* Jullian Harris-Calvin, Sebastian Solomon, Benjamin Heller & Bring King, *The Cost of Incarceration in New York State*, VERA INST. OF JUST. (Oct. 31, 2022), https://www.vera.org/the-cost-of-incarceration-in-new-york-state [https://perma.cc/JA8T-MSG2] (noting New York spends an average of $115,000 annually to imprison someone).

[298] *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (noting that in equal protection jurisprudence, "the existing intent requirement's assignment of individualized fault or responsibility for the existence of racial discrimination distorts our perceptions about the causes of discrimination").

This is undoubtedly true. Investing in public health, education, and other community development rather than in policing and prisons, doing cultural change work, and implementing alternative accountability mechanisms are, ultimately, what will promote meaningful justice and undo the legacy of slavery that now finds expression in our carceral system.[299]

Furthermore, many reforms to date have blunted the edges of the system but have had limited impact, which abolitionists have critiqued.[300] For instance, diversion programs, hailed as a way to keep people out of prison and connect them with services, can treat noncompliance with conditions as an infraction to be punished, not as a puzzle for solving.[301] And because diversion programs often involve exercises of discretion, they can favor more privileged groups, reproducing structural inequalities.[302] While "reforms may be well-intentioned, and . . . respond to real problems in the criminal legal system[,] . . . because they largely accept the intervention of the criminal legal system as a given, they have the potential to do serious harm and to preempt the kind of change needed . . . ."[303] At worst, they create their own legal infrastructures, pouring resources into "better" prisons rather than unwinding a system that cages people to solve social problems in the first place.[304] They "quell calls for genuine change while preserving

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299 *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1161 (2015). Abolition is not just an "eradication" of an ill but rather a "positive project" and "rejection of the moral legitimacy of confining people in cages." *Id.* at 1162, 1164. *See also generally* Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreward: Abolition Constitutionalism*, 133 Harv. L. Rev. 1 (2019). In this framework, abolitionism means employing "a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement." McLeod, *supra*, at 1161.

300 The distinctions between reform and abolition may be characterized along five axes, per McLeod. First, "an abolitionist ethic identifies more completely the dehumanization, violence, and racial degradation of incarceration and punitive policing in the basic structure and dynamics of penal practices." McLeod, *supra* note 299, at 1207. Second, abolition is "oriented toward displacing criminal law as a primary regulatory framework and replacing it with other social regulatory forms." *Id.* Third, abolition requires "intensity" in transforming how social problems are regulated. *Id.* at 1208. Fourth, it induces "discomfort and shame" in criminally punishing. *Id.* at 1210. Finally, abolition shifts the power to redress and prevent crime from corrections to the community. *Id.* at 1217.

301 *See* Goodmark, *supra* note 9, at 172.

302 *Id.* at 173.

303 *Id.* at 178; *accord* Roberts, *supra* note 299, at 114 ("Efforts to improve the fairness of carceral systems and to increase their efficiency or legitimacy only strengthen those systems and divert attention from eradicating them.").

304 *Id.* at 182–84; *accord* Davis, *supra* note 9, at 20 ("[T]he emphasis [of public discussion] is almost inevitably on generating the changes that will produce a *better* prison system. . . . As important as some reforms may be . . . frameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison.").

the architecture of mass human caging."[305] Ultimately, the problem is that reform suggests the system is broken, and just needs to be fixed with some "tweaks."[306] But, the system is working as intended, so no amount of reform will fix it.[307]

Yet, we must start somewhere, and attempting to decarcerate through resentencing and with the least harm in the process is a short-term imperative. Doing so will begin emptying out prisons, an abolitionist goal.[308] Moreover, by creating objective eligibility criteria for resentencings, the focus is taken *off* the individual-level interaction between an applicant and a decisionmaker such that the goal is not simply eliminating stereotypes but rather achieving substantive justice.[309] It also allows for more efficient case-processing, making the criminal legal system and its processes less self-justifying and self-perpetuating.[310]

Maybe, then, categorical resentencing can be seen as a "non-reformist reform," a move ultimately inadequate but with the goal of "demolishing" the carceral system "rather than fixing" it.[311] Such reforms "don't make it harder . . . to dismantle the systems we are trying to abolish"[312] by expanding the scope of the system or entrenching system actors. They do not "invest resources into surveillance, policing, and punishment systems."[313] Mandatory resentencing and early release from prison is decarceratory. It presumes that incarceration is a last

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305 Karakatsanis, *supra* note 9, at 2.

306 Goodmark, *supra* note 9, at 183–84.

307 *See* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 Freedom Ctr. J. 1, 7 (2020).

308 *See* McLeod, *supra* note 299, at 1161 ("[A]bolition may be understood . . . as a gradual project of decarceration . . . .").

309 *See* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics, and Racial Inequality*, 58 Emory L.J. 1053, 1113–14 (2009) (distinguishing between the *strategy* of eliminating racial bias in individual cases and the *goal* of "dismantl[ing] the racially oppressive system that developed in the aftermath of chattel slavery").

310 Comparing the respective resource-intensiveness of the DLRA and the DVSJA is itself illustrative, with the former proceeding efficiently through many cases in a few years, and the latter involving many more lawyer hours to investigate and litigate, resulting in a much smaller proportion of cases resolving in the same amount of time. *See* Kamis & Rose, *supra* note 32.

311 Roberts, *supra* note 299, at 114 (discussing the concept of nonreformist reforms); *accord* Amna Akbar, *Demands for a Democratic Political Economy*, 134 Harv. L. Rev. F. 90, 97, 100–01 (2020) (calling nonreformist reforms a "heuristic" for "reforms that facilitate transformational change" and describing the concept's roots in anticapitalist discourse, with philosopher André Gorz coining the term for that which disrupts existing power relations (citing André Gorz, Strategy for Labor: A Radical Proposal 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967))).

312 Mariame Kaba, We Do This 'Til We Free Us 96 (2021).

313 Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 Mich. L. Rev. 1199, 1208 (2022).

resort rather than the best or even default way to promote public safety. And, even if some legal architecture is required to implement such a law, that law disrupts power relations by withdrawing the ability of an adjudicator to rely on identity prejudice, whether implicit or explicit, to deny relief. Regardless of how this move is characterized,[314] however, perhaps with it the conversation can ultimately shift away from reform and toward a reimagined way of handling social problems.

Conclusion

In the end, Curtis was resentenced and freed. But it was a victory that left significant battle scars. Along the way, he had lost confidence in himself, nearly giving up and opting to spend another ten years in prison, the remaining time on his original sentence. His experience of growing up a poor, gay man of color who had learned that the police were not going to protect him such that he disclosed to them as little as possible was read as dishonesty, not self-protection, and he appeared to internalize decisionmakers' negative perceptions of him. My practice was filled with examples of people whose stories clashed with dominant expectations being immediately discounted. One woman who had failed to report childhood sexual violence had her credibility challenged when she argued that her attendant—and diagnosed—post-traumatic stress disorder was relevant to her criminal legal system involvement. Rather than try to understand the impact this complex trauma had on her years later, the prosecutor and judge questioned the discipline of psychology itself. In another, decisionmakers refused to see a female client who was larger in size than her boyfriend as a victim; surely, in their view, she had to be the aggressor. In yet another, a client who was among the most gentle and passive people I have ever met was labeled a criminal mastermind because of a harebrained scheme she, in a state of emotional devastation, was lured into joining; the assessment of a forensic psychologist that she was meek and manipulable, not dangerous, did not change that view. In each scenario, the clients failed to make headway with decisionmakers and suffered serious self-doubt in the process.

Perhaps this collateral damage could have been avoided had the presumption for them been incarceration as a last resort, answering

[314] Nonreformist reforms have three features: (1) they "advance a radical critique and radical imagination," (2) "draw from and create pathways for building ever-growing organized popular power," and (3) involve a "dialectic between radical ideation and power building." Akbar, *supra* note 311, at 103–06. Whether resentencing laws meet these criteria likely varies across contexts, but they do aim to shift power away from traditional brokers and to shrink the carceral state.

the key question that Angela Davis has posed: "Why do we take prison for granted?"[315] Or, to put it differently, can social problems be addressed through means other than the criminal legal system? Our collective failure of imagination has resulted in the current system, which remains deeply unjust. But, imagining a way forward that includes "demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance"[316] provides a roadmap. And a more ministerial, science-based program of resentencing that aims to do no harm in the process just might be a road.

315 Davis, *supra* note 9, at 15.
316 *Id.* at 107.