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## Engaging Students in Systemic Change: The Role of Louisiana Law School Clinics in the State's Criminal Justice Reform Movement

Robert Lancaster  
*Louisiana State University Law Center, rlancast@lsu.edu*

Maris Mattes

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# Engaging Students in Systemic Change: The Role of Louisiana Law School Clinics in the State’s Criminal Justice Reform Movement

*Robert Lancaster\**

*Katherine Maris Mattes\*\**

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\* Director of Clinical Legal Education; J. Nolan and Janice D. Singletary Professor of Professional Practice and Judge Earl E. Veron Professor of Law at the Paul M. Hebert Law Center, Louisiana State University. Special thanks to Natalie Ebolum, research assistant.

\*\* Senior Professor of the Practice; Director, Criminal Justice Clinic; Co-Director Women’s Prison Project at Tulane University School of Law. Special thanks to Alexandra House, research assistant.

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INTRODUCTION



In December 2018, Helen and Ivy posed for a photograph beside their colorfully lit Christmas tree in their small apartment in Baton Rouge, Louisiana. They had both recently been released on parole from the Louisiana Correctional Institute for Women (LCIW), where they had been serving life sentences for crimes they committed as children. Several weeks later, Michele, another woman at LCIW serving life for a crime she committed as a child, was released on parole. Trial courts originally sentenced all three of these women to mandatory life without parole for crimes they committed when they were children;<sup>1</sup> all three had spent the entirety of their adult lives in a Louisiana prison; and all three were now out thanks to the work of Louisiana law school clinic students.

Helen, Ivy, and Michele were released as a result of legislative reform made possible by the collaborative work of a number of criminal justice organizations, including the clinics.<sup>2</sup> After the new sentencing laws for juvenile lifers went into effect in Louisiana in 2017, clinic students represented all three of these women at their parole hearings: Tulane's Criminal Justice Clinic ("Tulane Clinic") represented Helen; LSU's Parole and Reentry Clinic ("LSU Clinic") represented Ivy; and Loyola's Law Clinic ("Loyola Clinic") represented Michele. Now that they are out of prison, these women will be able to rely on yet another effort to help with their re-entry into the community: the Louisiana Parole Project, Inc., a non-profit re-entry program born from the work of the LSU Clinic. At every stage necessary to transition each of these women from a life in prison to a life in her own community—whether the work required legislative advocacy, direct representation, or coordination of social services—the clinics were there.

This Article discusses the role of three Louisiana law school clinics in the state's recent criminal justice reform movement. First, to provide

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1. A "life sentence" may have different meanings depending on the jurisdiction. "Life" typically means a life sentence that provides for eligibility for parole consideration after a term of years. "Life without the possibility of parole" (LWOP) is a life sentence that carries no parole eligibility. Also, the broad term of "juvenile life without parole" (JLWOP) refers to cases in which the person received a life sentence for a crime committed when they were under the age of 18. A subset of JLWOP individuals are referred to as *Miller* lifers, who received life-without-parole sentences under a statutory scheme that imposed life without parole as a mandatory sentence.

2. This collaboration included the Louisiana Center for Children's Rights, which led coordination efforts of Louisiana's implementation of the United States Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460 (2012). The decision in *Miller* barred the application of a *mandatory* life sentence for children and is the basis for the parole relief that Helen, Ivy, and Michele obtained.

context for the recent reform efforts, Part I introduces the troubled history of the Louisiana criminal justice system. Part II describes how law school clinics—because of their academic nature and institutional influence—have been uniquely situated to participate in the reform movement. Finally, Parts III and IV discuss the unique opportunity clinics provide law students to learn how systemic change happens and how the students can have a real impact on the criminal justice system.

### I. CRIMINAL JUSTICE IN LOUISIANA: A SYSTEM IN NEED OF REFORM MEANS OPPORTUNITY FOR CLINIC STUDENTS

Louisiana's criminal justice landscape gives clinic students the chance to make a major impact by providing ample space for reform. For nearly 20 years, Louisiana led the nation in per capita incarceration. The United States has long been the global champion of locking people up, making Louisiana the incarceration capital of the world for many years.<sup>3</sup> Although 2018 saw Louisiana fall to second place in the country's incarceration rankings, the state still comes first in the percentage of its people serving life-without-parole sentences. Nationally, 3.6% of the prison population is serving life without parole, but that rate is 13.4% in Louisiana.<sup>4</sup>

The history of Louisiana's mass incarceration cannot be untangled from our nation's original sin: slavery.<sup>5</sup> The story is interwoven with our nation's history—the Civil War, Reconstruction, Jim Crow, convict-labor,<sup>6</sup>

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3. Adam Gelb & Elizabeth Compa, *Louisiana No Longer Leads Nation in Imprisonment Rate*, PEW CHARITABLE TR. (July 10, 2018), [www.pewtrusts.org/en/research-and-analysis/articles/2018/07/10/louisiana-no-longer-leads-nation-in-imprisonment-rate](http://www.pewtrusts.org/en/research-and-analysis/articles/2018/07/10/louisiana-no-longer-leads-nation-in-imprisonment-rate).

4. Figures as of 2016. *State-By-State Data*, SENT'G PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> [<https://perma.cc/6GAU-L5BK>] (last visited July 13, 2019).

5. In 1710, the first black slaves were sold in Louisiana. By 1840, Congo Square in New Orleans was the largest slave market in the United States. Although the importation of slaves was forbidden by Congress with the Act Forbidding the Importation of Slaves in 1807 (effective January 1, 1808), Louisiana's geography, with its swamps and hidden waterways, made the state an ideal smuggling portal for human slavery long beyond the prohibition. See WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* (1999).

6. The scourge of slavery did not end with the Emancipation Proclamation, the conclusion of the Civil War, or the Thirteenth Amendment. The war left the South financially devastated. Its primary economic engine—agriculture—was in ruins, and its infrastructure was shattered. Without slaves to plant the crops and fix the roads, the South needed a new source of labor to rebuild. The Thirteenth Amendment outlawed slavery and involuntary servitude, but it carved out a

peonage,<sup>7</sup> and the War on Drugs.<sup>8</sup> Mass incarceration resulted, in part, from the extra-systemic influences of financial interests and the desire to maintain social control over African Americans. These interests fueled the

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significant exclusion to the prohibition of forced labor: “Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States . . .” This clause, “except as punishment for crime,” opened the door to a work-around that effectively continued the institution of slavery. It converted the penal system from a mechanism for punishment and community protection to an economic engine—the generation of a cheap labor force. The Southern states began to pass laws that criminalized black life—it was illegal to be unemployed; it was illegal to walk on the railroad tracks; it was illegal to start a new job without your previous employer’s permission. Petty offenses, such as the theft of animals, were rewritten as felonies with lengthy prison sentences and fines. With more and more people—mostly former slaves—arrested and locked up, states leased the labor of their convicts. See Nathan Cardon, “*Less than Mayhem*”: *Louisiana’s Convict Lease, 1865–1901*, 58 LA. HIST. 417 (2017).

7. In addition to the expansion of criminal laws, state and local governments also imposed court fees and fines that indigent people were then forced to work off through their labor. Although Congress outlawed peonage in 1867, it continued to exist in some form until the 1940s. *Slavery v. Peonage*, PUB. BROADCASTING SERV., <http://www.pbs.org/tpt/slavery-by-another-name/themes/peonage/> [<https://perma.cc/9LJQ-92RZ>] (last visited October 1, 2019).

8. The use of criminal law as a mechanism for social control is not confined to Louisiana or the South. One of the most stunning example is the racist genesis of the United States’ War on Drugs. During a 1994 interview, John Ehrlichman, a top aide to President Richard Nixon, explained that while planning for the 1972 re-election campaign, Nixon realized he would be facing opposition from the anti-war movement and from the African American population. Ehrlichman revealed:

We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize it All*, HARPER’S MAG. (April 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [<https://perma.cc/GHY9-NJ5X>]. Prior to the presidential election of 1972 and even at the outset of the War on Drugs, the American crime rates and levels of incarceration were relatively stable, on par with those of Europe. Then, in the late 1980s and early 1990s, the War on Drugs escalated and was accompanied by federal mandatory minimum sentences for drug crimes. The states followed suit, and every state had passed some form of mandatory minimum sentencing legislation by the close of the century. Sentencing enhancements, habitual offender laws, and sentencing guidelines were gradually introduced.

passage of draconian and biased criminal procedures. In Louisiana, the legislative engines of mass incarceration have included non-unanimous jury verdicts;<sup>9</sup> extreme mandatory minimum sentences, including life without parole;<sup>10</sup> the expansion of crimes punishable with life sentences;<sup>11</sup> habitual offender enhancements in sentencing;<sup>12</sup> and the limiting of sentences that provided parole eligibility.

In addition to harsh laws, systemic structures and deficiencies make it easier and faster to obtain convictions. Louisiana has one of the worst

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9. In the South, the motivation to incarcerate more people was fueled not only by financial interests, but also as a mechanism for social control of African Americans. Louisiana was in many ways at the apex of racist and segregationist practices after Reconstruction. With the state's notoriously racist 1898 constitution, Louisiana became one of only two states to permit non-unanimous jury verdicts, ensuring that newly enfranchised black jurors would not stand in the way of convicting black men of crimes. Dan Swenson, *Understanding Louisiana's Nonunanimous Jury Law Findings: Interactive, Animated Slideshow*, ADVOCATE (Apr. 1, 2018, 8:00 AM), [https://www.nola.com/news/courts/article\\_6f93e1a3-8c1d-51b0-ae77-e3980ec8decb.html](https://www.nola.com/news/courts/article_6f93e1a3-8c1d-51b0-ae77-e3980ec8decb.html) [https://perma.cc/2YPZ-NJ27].

10. In addition to first- and second-degree murder, mandatory life-without-parole sentences are also imposed for aggravated rape and aggravated kidnapping. With a nod to the War on Drugs and Nixon's success at "getting the public to associate . . . blacks with heroin," the Louisiana Legislature passed a mandatory life-without-parole sentence for first offense possession with intent to distribute heroin. Tom LoBianco, *Aide says Nixon's war on drugs targeted blacks, hippies*, CNN (Mar. 26, 2016, 3:14 PM), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html> [https://perma.cc/XGR8-GKUX].

11. Historically, life in prison in Louisiana meant that a person would serve "ten-and-six," meaning ten years and six months in prison, before being eligible for parole. Notably, a life sentence in Louisiana was served at the state penitentiary at Angola, also known at that time as the "bloodiest prison in America," often making "ten-and-six" a death sentence. In 1979, the state eliminated "ten-and-six," and the new "Life Means Life in Louisiana" regime began. See William B. Quigley, *Louisiana Angola Penitentiary: Past Time to Close*, 19 J. PUB. INT. L. 163 (2018).

12. In 1995, Louisiana expanded its life-without-parole sentences for being a habitual offender to include even more people: if one of a person's three felony offenses was a crime of violence, a drug offense punishable by five years, or any felony punishable by more than 12 years, the sentence was mandatory life without parole. Today, mandatory life-without-parole sentences are no longer in force for possession with intent to distribute heroin and are limited in the habitual offender context to persons who were convicted of three or more felonies that were crimes of violence, drug offenses punishable by 10 years, certain sex offenses, or other felonies punishable by twelve or more years. LA. REV. STAT. § 15:529.1 (2001).

public defender systems in the nation, bedeviled by extreme caseloads and consistent underfunding.<sup>13</sup> The state has a pattern of corrupt, poorly trained, and racist police departments.<sup>14</sup> It has a history of district attorney's offices that prioritize convictions over prosecutorial ethics.<sup>15</sup> In short, Louisiana's system is well-tailored to incarcerate people, particularly African Americans, at unprecedented rates.

Nationally, the turn of the millennium saw the beginning of a dialogue questioning the effectiveness of the American "lock 'em up" approach. The United States has spent unprecedented amounts of money incarcerating more people than ever in human history,<sup>16</sup> yet crime and drug problems continue. Many states began reducing sentences, increasing access to parole, and experimenting with alternatives to incarceration, such

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13. Although there are many diligent, committed, and effective public defenders around the state, systemic issues of funding and coordination impact availability and consistency of resources, prevalence of extremely high caseloads, and training. There have been many reported instances of public defenders meeting their clients on the eve of trial, even in death penalty cases. S. CTR. FOR HUM. RTS., A REPORT ON PRE- AND POST-KATRINA INDIGENT DEFENSE IN NEW ORLEANS (2006), <https://www.schr.org/files/post/katrina%20report.pdf> [<https://perma.cc/9VXS-MURD>].

14. Donovan X. Ramsey, *How Katrina Sparked Reform in a Troubled Police Department*, ATLANTIC (Aug. 31, 2015), <https://www.theatlantic.com/politics/archive/2015/08/katrina-blew-the-lid-off-the-nopd/402814/> [<https://perma.cc/YB8F-YKQY>]; John Schwartz, *New Orleans Police, Mired in Scandal, Accept Plan for Overhaul*, N.Y. TIMES (Jul. 24, 2012), <https://www.nytimes.com/2012/07/25/us/plan-to-reform-new-orleans-police-department.html?module=inline> [<https://perma.cc/28EN-FW7Q>].

15. Anna Arceneaux, *New Orleans District Attorney Leon Cannizzaro Breaks the Law to Enforce It. We're Holding Him Accountable*, ACLU (Oct. 17, 2017), <https://www.aclu.org/blog/smart-justice/new-orleans-district-attorney-leon-cannizzaro-breaks-law-enforce-it-were-holding> [<https://perma.cc/W49L-7L3Y>]; *Justice Gone Wrong in New Orleans*, N.Y. TIMES (Oct. 20, 2015), <https://www.nytimes.com/2015/10/20/opinion/justice-gone-wrong-in-new-orleans.html> [<https://perma.cc/VQ47-XZ6Q>]; see also *Kyles v. Whitley*, 514 U.S. 419 (1995); *Smith v. Cain*, 565 U.S. 73 (2012); *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008); *Weary v. Cain*, 136 S. Ct. 1002 (2016).

16. More African American adults are under correctional control today—either prison, jail, probation, or parole—than were enslaved in 1850, a decade before the Civil War began. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 180 (2012).

as specialized courts,<sup>17</sup> drug abuse treatment, and restorative and community-based programs like mediation and community supervision.<sup>18</sup>

Even Louisiana enacted a few limited reforms. In 2001, the state modified its habitual offender statute and eliminated mandatory life-without-parole sentences for possession with intent to distribute heroin.<sup>19</sup> In 2008, it formed a commission to review the state's sentencing statutes and make recommendations for reform.<sup>20</sup> A lack of consensus and political will, however, prevented the commission from producing more than a hollow effort.<sup>21</sup> In 2012, state officials fighting against budget constraints made administrative changes that expanded evidence-based correctional practices.<sup>22</sup> These efforts helped reduce the number of people incarcerated in Louisiana's prisons by 9% by 2015; interestingly, this decrease came with a corresponding decline in crime.<sup>23</sup> But even with that reduction, Louisiana continued to have the highest incarceration rate in the country.

It was not until 2017 that Louisiana was finally able to make reforms sufficiently significant to reduce Louisiana's incarceration rate from the highest to the second highest in the country. After a year's worth of data analysis and study, the legislature passed, and the governor signed, the most significant overhaul of criminal justice laws in state history.<sup>24</sup> In June 2018, the impact of these reforms was reflected in Governor John Bel

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17. These specialized courts include, for example, drug, family, juvenile, re-entry, and veteran courts.

18. ADRIENNE AUSTIN, VERA INST. OF JUSTICE, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY, 2001–2010 (2010), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/criminal-justice-trends-key-legislative-changes-in-sentencing-policy-2001-2010/legacy\\_downloads/Sentencing-policy-trends-v1alt-v4.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/criminal-justice-trends-key-legislative-changes-in-sentencing-policy-2001-2010/legacy_downloads/Sentencing-policy-trends-v1alt-v4.pdf) [<https://perma.cc/EY5K-KKXL>].

19. LA. REV. STAT. § 40:966(C)(1) (2001).

20. AUSTIN, *supra* note 18.

21. Jan Moller, *Prison Sentence Reform Efforts Face Tough Opposition in the Legislature*, TIMES-PICAYUNE (May 16, 2012), [https://www.nola.com/news/crime\\_police/article\\_536ddbaf-597d-5ef1-bcad-9bc72cb21de3.html](https://www.nola.com/news/crime_police/article_536ddbaf-597d-5ef1-bcad-9bc72cb21de3.html) [<https://perma.cc/XBC2-BRNZ>].

22. LA. BD. OF PARDONS & PAROLE, ANNUAL REPORT (2013), <https://doc.louisiana.gov/media/1/2014/02/2013-ANNUAL-REPORT.pdf> [<https://perma.cc/CRD4-TC4Q>].

23. PEW CHARITABLE TRS., LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS (2018), [https://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_louisianas\\_2017\\_criminal\\_justice\\_reforms.pdf](https://www.pewtrusts.org/-/media/assets/2018/03/pspp_louisianas_2017_criminal_justice_reforms.pdf) [<https://perma.cc/SX28-PA6M>].

24. *Louisiana's 2017 Criminal Justice Reforms: The Most Incarcerated State Changes Course*, PEW CHARITABLE TR. (Mar. 2018), [https://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_louisianas\\_2017\\_criminal\\_justice\\_reforms.pdf](https://www.pewtrusts.org/-/media/assets/2018/03/pspp_louisianas_2017_criminal_justice_reforms.pdf) [<https://perma.cc/VLB6-78F7>].

Edwards' historic announcement that "Louisiana recently hit an important milestone: we no longer have the highest imprisonment rate in the nation."<sup>25</sup>

The reform movement was the product of initiatives and collaborations between stakeholders, advocacy organizations, and politicians. Louisiana law clinics were a part of the movement, participating in, and even initiating, some of the reforms that helped reverse the shameful, centuries-long path that had led Louisiana to incarcerate people at a higher rate than any state in the country.

## II. LOUISIANA'S LAW SCHOOL CRIMINAL CLINICS ARE UNIQUELY SITUATED TO ENGAGE IN CRIMINAL JUSTICE REFORM

In an environment like Louisiana's criminal justice system, where there is so much work to be done and comparatively so few attempting to do it, a clinic student's good idea can fairly quickly become a reality. The Louisiana Parole Project, which is currently helping Helen, Ivy, and Michele re-enter society, was born out of an LSU Clinic student's frustration.<sup>26</sup>

In 2015, a clinic group drove back to LSU from client visits at Angola.<sup>27</sup> One student had spent most of the day working with his client to develop a viable re-entry plan and was struck by the lack of options available to his client in the community. Although the client did well in prison, participated in rehabilitative programming, and had a positive disciplinary record, he served a lengthy sentence and would obviously need services upon release.

The client's family could not assist him because they disappeared from his life shortly after he was incarcerated. Given the client's age and poor

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25. *Gov. Edwards Announces Initial Results of Implementation of Criminal Justice Reform Legislation*, OFF. OF THE GOVERNOR (June 28, 2018), <http://gov.louisiana.gov/index.cfm/newsroom/detail/1500> [<https://perma.cc/WA89-YUUY>].

26. This student went on to publish a thoughtful critique of some of the due process issues in the Louisiana parole system in an article that is now included as required reading for the Parole Clinic class. See R. Kyle Alagood, *Parole Release Hearings: The Fallacy of Discretion*, 5 T. MARSHALL SCH. L. J. GENDER, RACE & JUST. 1 (2015).

27. The drive between the law schools and the institutions in which their clients are incarcerated is always the perfect time for students to reflect on their work and ideal for faculty supervision. The students' impressions of their client interactions are fresh in their minds, and the environment of the car ride encourages engaging discussion. It never fails that some of the best reflection, case planning, and discussions about justice occur on Highway 61.

health, he could not practically seek gainful employment. Additionally, he could not access Social Security because of his youth and lack of work history at the time of arrest. The clinic student correctly observed that, despite the client's success in prison programs, the Parole Committee would have concerns about his release because there were so few resources available to craft a viable re-entry plan.

The small number of successful re-entry programs were community-specific or only provided one essential service, such as housing or employment. The state did not offer programs that addressed all of the specific, individual needs of long-serving inmates released from prison. The clinic student suggested the utility of a statewide program that could provide all of the services someone coming out of prison may need—employment, housing, family reunification, transitional assistance, and so on.

The student's idea stuck with his teachers, and in 2016 the Louisiana Parole Project became a reality. The organization now has five full-time employees.<sup>28</sup> The Parole Project collaborates with current clinic students at Tulane, Loyola, and LSU to get clients out of prison and reintegrated into the community.<sup>29</sup>

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28. All of the employees of the Parole Project were formerly incarcerated. Three were serving life sentences at the time of their release, two of whom were *Miller* lifers.

29. The Mission Statement of the Louisiana Parole Project (LPP) is:

Parole Project is dedicated to public safety through smart reintegration of returning citizens. Our supporters know that successful re-entry saves taxpayer money, repairs families and improves communities. LPP believes that our efforts on behalf of transitioning juvenile and 40-year lifers is a necessity and should be a priority for our communities as well. Most of our clients who are paroled will be on supervision for the remainder of their lives, and LPP wants them to be shining examples of criminal justice reinvestment and reform in Louisiana. Clients who become employed, obtain safe, stable housing, transportation and healthcare become taxpayers, not tax burdens.

*Our Mission and Vision*, PAROLE PROJECT, <https://www.paroleproject.org/our-mission/> [<https://perma.cc/D8JS-WRDG>] (last visited July 13, 2019). Having served decades in prison, most LPP clients were convicted of crimes they committed as children and were released as middle-aged or elderly adults. They are at very low risk for recidivism but have significant needs upon release. At a minimum, Parole Project clients have served 25 years, and many have served much longer terms. The world when they entered prison as children is much different than the world into which they are released as adults. The Parole Project endeavors to smooth this transition by working to meet each client's individual needs and providing individualized programming. Staff meets with clients while

Clinic student-driven reform initiatives helped shape the Louisiana's criminal justice landscape even before the genesis of the Louisiana Parole Project. In 2003, the Tulane Clinic successfully brought a challenge to the constitutionality of a statute<sup>30</sup> that allowed judges in Orleans Parish to

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they are still incarcerated to assess their needs and begin identifying services that are vital upon each client's release. Staff also counsels and educates incarcerated clients so the clients can set realistic expectations and make informed decisions about how to best develop their re-entry plans. Parole Project staff appears at clients' parole hearings to provide information about each client's particularized re-entry plan. When released, staff picks each client up at the front gate of the institution and begins an intensive, in-residence transitional program for as long as the client needs the services. The Parole Project ensures both short-term and long-term stable housing for clients depending on their needs. The provision of housing is a collaborative effort with Catholic Charities of the Diocese of Baton Rouge and the Refinery Mission. The Parole Project provides long-term assistance and monitoring of clients' progress and continues to provide assistance as issues of re-entry arise in clients' lives, no matter where the clients may be living. Other essential services include individualized mentoring by someone who was formerly incarcerated and has successfully navigated community reintegration. The Parole Project employs a multidisciplinary approach to reorientation and re-entry that gradually integrates clients into their communities. That approach includes: (1) employment services, including resume writing, job-seeking skills, interactive job interview exercises, workplace etiquette, and direct employment assistance; (2) financial assistance in providing some resources for supplies, clothing, and food, as well as training in banking literacy, credit building, investing and saving, household budgeting, and money management; (3) consumer education that includes interactions with sales and service staff, comparative shopping, product research, needs versus wants, and so on; (4) training in technology, encompassing computer literacy, internet basics, online shopping, internet banking, online access to government services, social media, cell phone usage, and use of technology in public places; (5) family and community reunification, involving friends and peer mentors, relationships with neighbors, supportive faith groups, community-based drug and alcohol recovery programming, and useful community organizations; (6) instruction regarding contemporary social norms, including appropriate interaction between men and women, public dining, workplace etiquette and supervisor–employee interaction, and appropriate social and professional communication; (7) access to health care, enrollment in and understanding of Medicaid and Medicare, navigating the primary care provider process, the importance of wellness checkups; and (8) meeting transportation needs, such as driver's education, driver's license procurement, basic navigation, and introduction to public transportation. *See generally* PAROLE PROJECT, <https://www.paroleproject.org/> [<https://perma.cc/D8JS-WRDG>] (last visited July 13, 2019).

30. LA. C. CRIM. PROC. arts. 412–14 (2015); LA. REV. STAT. 15:114 (2015).

select the grand jury foreman.<sup>31</sup> Notably, in all other parishes, the selection is made by a vote of the grand jury. This law targeted the parish with the highest African American population and was specifically enacted to reduce the impact of African American people on grand jury deliberations. Additionally, in 2004, the Tulane Clinic successfully challenged the constitutionality of Louisiana's statute<sup>32</sup> governing the treatment of defendants found permanently incompetent to stand trial. Furthermore, after Hurricane Katrina in 2005, the two New Orleans clinics—Loyola and Tulane—were instrumental in rehabilitating and reshaping the devastated criminal justice system. This history of reform participation thus carried the clinics into this most recent and coordinated criminal justice reform movement.

Criminal justice reform is a team sport. The most recent Louisiana reform effort joined the forces of national organizations, such as the Pew Research Center, Vera Institute for Justice, Equal Justice Initiative, Southern Poverty Law Center, and MacArthur Foundation. The effort also involved collaboration and coordination with local players, such as the Louisiana Center for Children's Rights, Voice of the Experienced, Foundation for Louisiana, Louisiana Sentencing Commission, Louisiana State Public Defender Board, Louisiana Association of Criminal Defense Lawyers, and Louisiana law schools' criminal clinics. Within this larger group effort, the clinics occupy a unique position in the reform movement.

Of the many players working toward Louisiana's criminal justice reform, only the clinics can practice every form of advocacy, from taking on individual clients to drafting legislation. Unlike local criminal justice policy organizations, clinics represent criminal defendants in their individual cases. In contrast to large national groups, clinics have hands-on experience, know the loci of the problems, and understand how the local system works. Unlike public defenders' offices that are representing individual clients, clinics are not primarily legal service providers. The law requires that public defenders represent all qualified indigent defendants in their jurisdiction. The restriction of their mandate prohibits many types of reform work, such as legislative advocacy, and resource limitations resulting from excessive caseloads serve as practical restrictions on engaging in other types of reform work, such as post-conviction litigation.

The educational mission of clinics allows faculty members to choose cases and clients that achieve particular pedagogical goals. Because the number of cases is intentionally limited and the types of cases are intentionally chosen, clinics can leave room for advocacy work. The

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31. *State v. Dilosa*, 848 So. 2d 546 (La. 2003).

32. LA. CODE CRIM. PROC. art. 648(B)(2).

selective and small caseloads in clinics exist so that faculty can, to their best abilities, expose students to best practices. Work can be slowed down so that students can focus their attention on one or two clients. This pace gives students and faculty the time that public defenders so rarely have to reflect on their work, think creatively, and act multidimensionally to achieve client objectives. Although criminal justice organizations rarely engage in direct representation and public defenders rarely participate in non-litigation reform efforts, clinics can identify systemic issues affecting clients and pick from a variety of types of reform advocacy to accomplish clients' goals.

Additionally, law school clinics benefit from a certain prestige that reform organizations do not always have. The university affiliation brings a reputational and intellectual cachet, as well as an appearance of neutrality on issues. This may be particularly true in Louisiana, where most judges, lawyers, and lawmakers attended one of Louisiana's law schools.

Lastly, and perhaps most notably, clinics are uniquely situated because often no other agency or organization is available to do the work. Nothing illustrates this point more aptly than the clinics' role following Hurricane Katrina. The Orleans Indigent Defender Program, like other public defenders' offices in the state, had been funded through fines and fees imposed on defendants who were convicted of offenses.<sup>33</sup> The vast majority of convictions were for traffic tickets.<sup>34</sup> After the storm, there was no traffic, no traffic violators, no traffic convictions, and no fees assessed; thus, the public defender's office went out of business.<sup>35</sup> With no public defender system in place, local attorney volunteers, through organizations like the Louisiana Association of Criminal Defense Lawyers (LACDL), were first on the ground to assist in representing the thousands of incarcerated defendants who had been scattered to jails and prisons throughout the state.<sup>36</sup> In the weeks following the flood, the Chief Judge for the Orleans Criminal District Court recognized that systemic reform,

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33. Derwyn Bunton, *Public Defense Reform Shows Both the Challenge and the Possibility of Post-Katrina New Orleans*, ORLEANS PUB. DEFENDERS (Sept. 9, 2015), <https://www.opdla.org/news/public-defense-reform-shows-both-the-challenge-and-the-possibility-of-post-katrina-new-orleans> [<https://perma.cc/BL7M-BHSK>].

34. *Id.*

35. *Id.*

36. In 2010, the Louisiana Association of Criminal Defense Lawyers combined with the Louisiana Public Defenders Association with a unifying purpose: to preserve, protect, and defend the right to counsel that the founding fathers created and made part of the fundamental law of the United States and of Louisiana. *About Us*, LA. ASS'N CRIM. DEF. LAW., <https://www.lacdl.org/aboutus> [<https://perma.cc/QJG7-GJPK>] (last visited October 3, 2019).

as well as indigent representation, was needed.<sup>37</sup> His answer was to appoint the Tulane and Loyola Clinics to represent all of the incarcerated Orleans Parish indigent criminal defendants.<sup>38</sup> The Chief Judge did not expect the clinics to represent each individual defendant in litigation on the merits of his or her case; rather, the appointment was the mechanism seeking and authorizing the clinics' participation in making the systemic changes that were needed to return the criminal justice system to working order.

Although many national organizations came to New Orleans after the storm to help in the reconstruction, their lawyers were neither licensed to practice law in Louisiana, nor did they have any experience with local courts or local players. In contrast, the New Orleans clinics knew the state's legal landscape and were able to quickly engage in efforts that steered the criminal justice system toward recovery and reform.<sup>39</sup> Clinicians from both Loyola and Tulane were instrumental in reimagining and rebuilding the public defender system in New Orleans and throughout the state. Some of the other post-Katrina systemic work included: documenting the condition of the flooded evidence room (and subsequently participating in a coalition to restructure evidence room practices); challenging the constitutionality of the statutes that funded the indigent defense system; and revealing and challenging the state's treatment of defendants found incompetent to stand trial.<sup>40</sup> In the course of these many post-Katrina reform efforts, the Tulane Clinic met a client whose case would perfectly illustrate the unique breadth and flexibility of the law school clinic.

### III. NEVER GIVE UP, NEVER SURRENDER: HOW AN INDIVIDUAL CLINIC CASE BECAME ACT 469

Post-Katrina, after the collapse of the Orleans Indigent Defender Program, Louisiana's indigent defense system was the subject of numerous legal challenges. At a hearing on one of these legal challenges,

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37. See generally Derwyn Bunton, *Public Defense Reform Shows Both the Challenge and the Possibility of Post-Katrina New Orleans*, ORLEANS PUB. DEFENDERS (Sept. 9, 2015), <https://www.opdla.org/news/public-defense-reform-shows-both-the-challenge-and-the-possibility-of-post-katrina-new-orleans> [https://perma.cc/89XG-7277].

38. See Katherine Mattes, *The Tulane Criminal Law Clinic: An Evolution into a Combined Individual Client and Advocacy Clinic*, 18 CLINICAL L. REV. 77, 84–85 (2011).

39. The current LSU clinical program was not in existence until 2008.

40. Mattes, *supra* note 38.

a brave former public defender took the stand and testified to his own professional incompetence.<sup>41</sup> He testified that, prior to the storm, his caseload was so high that it forced him to provide inadequate representation. He explained that with so many cases, he was unable to investigate or prepare for trial. One case particularly haunted him—the case of Michael M.

Michael had been charged with simple burglary for breaking into a pie shop at night. Michael had two prior convictions: one for unlawful entry of a business and one for possession with intent to distribute a small amount of cocaine. Because he was so overwhelmed, the public defender did not calculate Michael's sentencing exposure himself but instead asked the assistant district attorney. The ADA told him that Michael was facing eight to twenty-four years. Advised of this exposure and knowing that the judge always sentenced on the low end of the range, Michael made the decision to go to trial. He lost. At sentencing, the ADA revealed that he had made a mistake and that Michael was subject to a mandatory life-without-parole sentence under the habitual offender statute that had been passed in 1995 as part of Louisiana's get tough(er) on crime movement. Michael was to spend the rest of his life behind bars for crawling through the window of a closed pie shop.

The lawyer's testimony was described in a newspaper article reporting on the legal challenges to the underfunded public defender system.<sup>42</sup> Michael, who had already served 10 years of his life sentence at Angola, read the article and saw that his lawyer had admitted to providing ineffective assistance of counsel specifically in his case. Michael filed a petition for post-conviction relief, claiming ineffective assistance of counsel and attaching a copy of the newspaper article.

In 2007, a district court judge appointed the Tulane Clinic to represent Michael on his ineffective assistance claim.<sup>43</sup> Michael's former public defender took the stand again, and Michael himself testified that, if he had known he was facing mandatory life-without-parole instead of eight years,

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41. Transcript of Record at 9, *Louisiana v. Edwards*, No. 463-200 (Orleans Parish Criminal District Court, Section K, March 30, 2007).

42. Gwen Filosa, *Judge Vows to Free 42 Suspects*, *TIMES-PICAYUNE*, Mar. 31, 2007.

43. In Louisiana, like many states, a person is not entitled to a lawyer on post-conviction, unless the court finds that the claim raises sufficient merit to warrant an evidentiary hearing. In those rare instances, the court must appoint counsel for the hearing. LA. CODE CRIM. PROC. art. 930.7 (3026). Because public defenders do not have the mandate or resources to accept appointments to post-conviction cases, the courts often appoint law school clinics to represent defendants who make colorable post-conviction claims.

he most certainly would have accepted the eight-year plea bargain offer from the prosecutor. The trial court found that Michael had indeed received ineffective assistance of counsel.<sup>44</sup>

Unfortunately, this victory was short-lived. The state appellate court reversed the trial court, holding that Michael's petition was time-barred. The appellate court concluded that Michael must have known that his lawyer had been ineffective after he was sentenced to life without parole, so this revelation did not fit into the "newly discovered" evidence exception to the two-year time limit for ineffective assistance of counsel claims.<sup>45</sup> The Louisiana Supreme Court declined to review the appellate court's ruling.<sup>46</sup>

After defeat in the state court, the Tulane Clinic filed a petition for habeas relief in the Federal District Court.<sup>47</sup> The District Court denied relief<sup>48</sup> on the grounds that a federal court is prohibited from considering a substantive claim that has not been considered by a state court due to a state procedural bar. After the Federal Fifth Circuit declined to issue a certificate of appealability, Michael's ineffective assistance of counsel claim was procedurally dead.<sup>49</sup>

Refusing to accept defeat, the clinic decided on a different litigation attack. Michael's life-without-parole sentence had been imposed under a 1995 habitual offender law so draconian that, in 2001, the Louisiana Legislature felt compelled to ameliorate it.<sup>50</sup> In 2006, the legislature went a step further, amending the statute so that the ameliorated 2001 version applied retroactively to people, like Michael, who had been sentenced under the harsher version.<sup>51</sup> However, two years later, in *State v. Dick*, the Louisiana Supreme Court held that the legislature could not authorize courts to resentence people under the ameliorated sentencing provisions because doing so violated the separation of powers doctrine.<sup>52</sup> The court explained that the modification of a final sentence constituted a

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44. Order of April 21, 2008, *State v. Monroe*, 389-642 (Parish of Orleans Criminal District Court, Division K).

45. *State v. Monroe*, No. 2008-K-0630 (La. Ct. App. 4th Cir., July 22, 2008).

46. *State v. Monroe*, 9 So. 3d 157 (La. 2009).

47. Petition for Writ of Habeas Corpus, *Monroe v. Cain*, No. 09-6559 (E.D. La., Sept. 28, 2009) (Doc. 1).

48. See Order of Dec. 3, 2009, *Monroe v. Cain*, No. 09-5669 (E.D. La.) (Doc. 3).

49. *Cert. denied*, *Monroe v. Cain*, No. 09-30912 (5th Cir. 11/9/2009).

50. LA. REV. STAT. § 40:966(C)(1) (2001); see also *State v. Sugasti*, 820 So. 2d 518 (La. 2002).

51. LA. REV. STAT. § 15:308 (2006).

52. *State v. Dick*, 951 So. 2d 124, 132 (La. 2007).

commutation of sentence, a power reserved solely to the executive branch.<sup>53</sup>

Following *State v. Dick*, the legislature tried again twice to provide relief for the cohort of people who, like Michael, had been sentenced under the harshest version of the habitual offender statute. After the last legislative change and the Tulane Clinic's loss in federal court, the clinic decided, despite *State v. Dick*, to seek resentencing. The clinic lost again in the state circuit court<sup>54</sup> and again in the Louisiana Supreme Court.<sup>55</sup>

By this time, it had been seven years since the clinic took Michael's case—seven years of litigation and seven years of losing. After seven years of representing a person serving a sentence even the Louisiana Legislature thought was excessive, the clinic could not simply walk away and leave him to spend the rest of his life in prison. Invoking the inspirational motto from *Galaxy Quest*, “Never give up, never surrender!”<sup>56</sup> the clinic students gathered to brainstorm.

Because the clinic had not been able to get his conviction overturned and had not been able to get his life-without-parole sentence modified to a term-of-years sentence, the thought became: what if the “without parole” part were changed? If the law is the problem, rewrite it. Thus, the students drafted a statute that provided parole eligibility to all those defendants, like Michael, who were sentenced under the state's harshest habitual offender law. Since the courts last applied the statute in 2001, and it was then 2016, everyone who had been sentenced under this particular provision had already served at least 15 years; thus, the draft statute only provided parole eligibility after 15 years.

The next step was to locate a sponsor for the bill. The students found a legislator likely to support their bill, Daniel R. Martiny, a Republican from Jefferson Parish who had demonstrated an interest in criminal justice reform. The state senator agreed to meet with the clinic students. When the students and faculty arrived at the senator's office, they were surprised to be joined by half a dozen women who were already sitting in the waiting room. These women were married to incarcerated men serving life without parole and had come to the senator with a bill to expand parole eligibility to a much broader class of prisoners. A number were holding bouquets of roses.

A few minutes after arrival, both groups were ushered into a large conference room. When the senator joined the groups, he asked if the two

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53. *Id.* at 132–33.

54. *State v. Monroe*, 2013-K-0828 (La. Ct. App. 4th Cir., Nov. 26, 2013).

55. *State v. Monroe*, 156 So. 3d 40 (La. 2014).

56. *GALAXY QUEST* (Dreamworks 1999).

bills could be combined into one, which confronted clinic students and faculty with a quick lesson in diplomacy and community relations. The bill the clinic had drafted targeted a very limited group to whom the legislature had already attempted to provide relief, but the bill the group of women had drafted would grant parole eligibility to people serving life-without-parole sentences for a seemingly random collection of offenses that were violent and much more serious, such as second-degree murder, serial sex offenses, and aggravated kidnapping. Even with the growing call for reform, clinic students knew that joining the two bills would sink the one they had drafted to help Michael.

The clinic students and faculty attempted to diplomatically explain that reform would have to be achieved incrementally and that passage of their more limited bill might lead the way for further reform in subsequent legislative sessions. This resulted in a tense but instructive discussion. Objectively, the clinic strategy was sound, but for these women whose loved ones were serving life sentences, incremental reform would take too long. Ultimately, the senator agreed to sponsor both bills separately.

Then came nurturing and promoting the bill through the legislative process, colloquially known as “sausage making.”<sup>57</sup> The students participated in the legislative committee hearings, one testifying before the Senate Judiciary Committee and another before the House Committee on the Administration of Justice. They described the history of the legislature’s attempt to provide retroactive ameliorative sentencing, and they explained the bill’s scope. At the final vote, the bill passed with little opposition and became Act 469, which the governor then signed into law.

After the bill’s passage, months went by before the Department of Corrections set a date for Michael’s parole hearing. In the meantime, the “next generation”<sup>58</sup> of students began to put together a packet to present to the Committee on Parole. With guidance and sample packets from the LSU Clinic, students: (1) gathered certificates reflecting Michael’s accomplishments while incarcerated and letters of support from those who knew him; (2) worked with him and his family to design a re-entry plan;

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57. Much to the dismay of sausage makers, legislators often quote Otto von Bismarck, who stated, “If you like laws and sausages, you should never watch either one being made.” Bismarck intended this comment to be a compliment to the legislative process because, like sausage making, the legal process can lead to healthy and beneficial results. See Robert Pear, *If Only Laws Were Like Sausages*, N.Y. TIMES (Dec. 4, 2010), <https://www.nytimes.com/2010/12/05/weekinreview/05pear.html> [<https://perma.cc/YK9F-DUBD>].

58. Legal cases are often not resolved during the limited time during which particular students are enrolled in the clinic, and clients often experience several “generations” of students during the years of their representation.

and (3) drafted a memo to the Committee on Parole advocating for supervised release. Clinic students successfully argued to the Parole Committee that Michael was a good candidate for parole.<sup>59</sup> Michael was released and continued to serve his life sentence on parole supervision in the community.

But Michael's case was not over. A year later, in *ex rel. Esteen*, the Louisiana Supreme Court again considered the issue the clinic had presented four years earlier in Michael's case.<sup>60</sup> Reversing *State v. Dick*, the Court explained that a commutation of sentence is an individualized act of mercy issued by the executive, while in this case the legislature had retroactively applied the ameliorative sentencing provisions to an entire class of people. There was no separation of powers problem.<sup>61</sup>

With this new ruling, another generation of Tulane Clinic students filed a motion to correct Michael's illegal sentence. On September 27, 2018, the judge vacated Michael's life-without-parole sentence and resented him to eight years, which was the sentence the judge had wanted to give Michael in 1997.<sup>62</sup> Twenty-one years and twenty-two student-attorneys later, Michael was a free man. The wide variety of work required to get him there—including briefs and oral arguments in both state and federal court, legislative drafting and advocacy, and mitigation investigation for the parole hearing—could not have been done other than by a law clinic.

Act 469 provided parole eligibility not only for Michael, but also for many others who had been sentenced under the harshest habitual offender statute in Louisiana's history. Although each of these people is now entitled to be resented after *ex rel. Esteen*, many who run the risk of receiving a long sentence are choosing instead to seek release on parole under Act 469. While working on behalf of its client, the Tulane Clinic provided parole eligibility to many who would otherwise spend decades more in prison. Michael's story exemplifies the special ability of Louisiana's law school clinics to impact the criminal justice system at every level.

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59. Since his release, Michael has married and is employed as a chef in New Orleans.

60. Southern University Law School's Criminal Clinic represented the defendant in *ex rel. Esteen*. *State ex rel. Esteen v. State*, 239 So. 3d 233 (La. 2018).

61. *Id.* at 236.

62. *See supra* text accompanying notes 44–49.

#### IV. WORKING ON SYSTEMIC REFORM PROVIDES UNCOMMON INSIGHT AND EMPOWERMENT TO LOUISIANA'S LAW CLINIC STUDENTS

Ultimately, one mission of law school clinics must center on educating students to be tomorrow's lawyers. When clinics are involved in justice reform work—particularly reform work rooted in direct, individual client representation—students learn to be creative in their legal thinking. Even with the current push toward experiential learning in legal education, most simulation-based courses or extracurricular advocacy competitions present students with very traditional and limited ideas of legal practice—drafting memos, writing appellate briefs, trial advocacy, and moot court.<sup>63</sup> Although these experiences are necessary and valuable to students, this narrow focus on traditional lawyering skills does not push students to think creatively and expansively about how to achieve their clients' goals or how to effect systemic change in the law.

Often, students—and many lawyers—think of legal reform as the purview of the powerful or the politically connected. Many, if not most, do not understand that they have the ability to personally effect change in the law. Clinics can help students recognize their power and offer them the opportunity to directly impact the criminal justice system. When students engage in this type of clinical work, they learn problem-solving advocacy skills that law schools do not traditionally teach, such as strategic planning, community engagement and education, and legislative advocacy. This multidimensional lawyering is empowering. Students learn that their work can change not only the life of an individual client, but also the criminal justice system and the communities it impacts. They learn that when the system treats clients unjustly, they must challenge the system or ultimately fail in their obligation to their clients.

##### *A. Lessons Learned from Advocating for Michael M. and Act 469 Reform: Perseverance, Creative Lawyering, and the Intersection of Litigation and Legislation*

When clinics engage in reform work, they give the next generation of lawyers not only the skills necessary to change the system, but also the confidence and creativity to actually do so. By expanding clinical practice beyond direct representation, students learn not to surrender to an unfair system.

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63. See Myra E. Berman, *Portals to Practice: A Multidimensional Approach to Integrating Experiential Education into the Traditional Law School Curriculum*, 1 J. EXPERIENTIAL LEARNING 157 (2014).

For seven years, the Tulane Clinic advocated for Michael M. within the existing legal structure, fighting a clearly unjust law—mandatory life without parole for three non-violent, relatively minor felonies. Once clinic students recognized that the existing legal structure was not going to provide him, as well as others similarly situated, with relief, they began to think creatively. Classic advocacy tools had failed. Michael’s problem was not going to be solved through litigation, so the law had to be re-imagined. Instead of asking the court to change Michael’s life-without-parole sentence to a term of years, the clinic asked the legislature to change the law to allow parole for Michael and those like him. If the courts had been the only option, the story of Michael M. would have ended in defeat, but not only did clinic students ultimately win for him, they won for approximately 200 people similarly situated.

Michael’s case taught many lessons to the students who worked with him: how systemic deficiencies in a public defender system can lead to devastating results for an individual defendant; how lawyering can go beyond the confines of existing law and include efforts to actually change statutes; how complex, difficult, and time consuming the work can be; and how legislative efforts and court results can intersect and conflict. Most importantly, Michael’s case showed students how perseverance can result in creative and rewarding lawyering and generate change far beyond the objectives of a particular client. The students who helped win Michael’s hard-fought victory have carried that fighting spirit into their legal careers.

One of the clinic students, Tobias Hasler, who helped draft and advocate for the legislation that became Act 469, is now an assistant district attorney in California.<sup>64</sup> He wrote that his experience with Act 469 has benefited his career both through skills and confidence. He gained insight into the legislative and reform process that has made him the “go-to” person within his office regarding the interpretation and application of some of California’s recent reforms, and he has served as his office’s liaison with advocacy groups working on legislation of interest to his office. His involvement with the legislative process through his clinic work has inspired him to engage in the role of “citizen legislator.”<sup>65</sup> The walls of his office reflect his pride in his clinic work: hanging there is a copy of the signed Act 469, serving as a daily reminder that lawyers must use every advocacy tool available in pursuit of their clients’ goals and a fair criminal justice system.

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64. Email of Tobias Hasler to author (Aug. 10, 2019) (on file with author).

65. *Id.*

*B. Lessons Learned from Advocating for Parole Reform: The Necessity for Holistic Advocacy and the Power of Storytelling*

Involvement in every facet of each client's legal predicament also provides students with rare insight into their clients' lives, making them truer representatives of their clients' positions and goals. Clinic students learn how all the work they do, even and especially outside of court, can impact their clients' lives. For example, the LSU Clinic requires that students draft a biographical narrative brief about each client's life. One semester, students represented a client at Hunt Correctional Center who had made substantial rehabilitative efforts while in prison: he obtained his GED; completed a long list of substance abuse, skills training, and rehabilitative programming; and became successful and valued in his work. The two students assigned to his case wrote a brief that described his efforts to turn his life around and presented a thoughtful plan for his successful re-entry if granted parole. When the students visited their client at Hunt to show him the brief, he read it in complete silence. Once he finished reading, the client took a deep breath and told the students, "I have never read anything that ever said anything good about me . . . Thank you!" On the drive back to school, one of the students commented that she now understood how even the small things clinic students do, such as sharing drafts of their briefs with their clients, can have a huge impact on someone's life.

By working to empower their clients, clinic students also become aware of their own power as actors in the criminal justice system. The immense responsibility of representing clients who are facing or serving long sentences forces students to think deeply about the profession they will soon enter. The story of juvenile lifers in Louisiana, a story pushed along by the clinics at every stage, shows how clinic work exposes students to the complicated realities of the criminal justice system and the impressiveness of their own power and responsibility within it.

*C. Lessons Learned from Advocating for Juvenile Lifers: The Value of Collaborative Reform and the Power of Hope and Perseverance*

The United States is the last nation in the world that sentences children to life in prison without the possibility of parole.<sup>66</sup> Until 2005, children could even be sentenced to the death penalty.<sup>67</sup> Fortunately, recent United

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66. Katie Rose Quandt, *Why Does the U.S. Sentence Children to Life in Prison?*, JSTOR:DAILY (Jan. 31, 2018), <https://daily.jstor.org/u-s-sentence-children-life-prison/> [<https://perma.cc/H8YA-JVJV>].

67. *Id.*; see *Roper v. Simmons*, 543 U.S. 551 (2005).

States Supreme Court decisions have narrowly defined the circumstances in which children can be constitutionally sentenced to life without parole.<sup>68</sup> As a result, many prisoners, now in their 40s, 50s, 60s, and even 70s,<sup>69</sup> who were condemned to die in prison for crimes they committed as children now have an opportunity to be considered for release. Prisons now release many of these juvenile lifers and give them an opportunity to live out the remainder of their life sentences in their communities under parole supervision.<sup>70</sup> In the years of effort to secure these former juvenile lifers' releases, clinic students learned countless lessons about the ability of lawyers to effect change and the complexities of their duties to their clients.

### *I. Miller v. Alabama: Possible Relief for Juvenile Lifers*

In 2012, the United States Supreme Court held in *Miller v. Alabama* that the application to juveniles of a mandatory life-without-parole sentencing scheme for murder, regardless of the particularities of the defendant and offense, violates the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>71</sup> The Court applied the reasoning from its prior cases reviewing the excessiveness of sentencing juveniles to

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68. The United States Supreme Court has recently addressed excessive sentencing for juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty); *Graham v. Florida*, 560 U.S. 48 (2010) (life sentence without parole for non-homicide offenses); *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life imprisonment without parole); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (retroactivity of *Miller*). In March 2019, the Court granted certiorari in *Mathena v. Malvo*, which will examine the constitutionality of a discretionary life-without-parole sentencing scheme for children. *Granted & Noted List October Term 2019 Cases for Argument*, U.S. SUPREME COURT (Jul. 1, 2019), <https://www.supremecourt.gov/orders/19grantednotedlist.pdf> [<https://perma.cc/CQC9-Z52X>]. Currently, 21 states and the District of Columbia have banned the use of life sentences for children, and five others do not use it. *States That Ban Life Without Parole for Children*, CAMPAIGN FOR FAIR SENT'G YOUTH (last visited July 13, 2019), <https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/> [<https://perma.cc/G6PU-EZ5G>].

69. The oldest *Miller* lifer to be released was Clifford Hampton, who served 61 years and was released at 78 years old. *Weil Secures Parole for Oldest Juvenile Lifer Incarcerated in Louisiana*, WEIL, GOTSCHAL & MANGES LLP, <https://www.weil.com/articles/weil-secures-parole-for-oldest-juvenile-lifer-incarcerated-in-louisiana> [<https://perma.cc/P9EW-92B5>] (last visited October 2, 2019).

70. As of August 12, 2019, there have been 67 parole hearings for juvenile lifers, with 52 granted parole.

71. *Miller v. Alabama*, 567 U.S. 460 (2012).

death<sup>72</sup> and to life without parole for non-homicide offenses.<sup>73</sup> The Court identified the unique characteristics of children that make them less culpable than adults.<sup>74</sup> It explained that this diminished culpability requires that a judge consider the mitigating characteristics of youth before imposing the most severe sentence available.<sup>75</sup> The Court explained that the life-without-parole sentence must be reserved for the rare and uncommon “irreparably corrupt” child, and that all others shall be given a meaningful opportunity for release upon demonstrated maturity and rehabilitation.<sup>76</sup>

When the Court decided *Miller*, approximately 2,100 “*Miller* lifers”—those serving mandatory life sentences for murders committed as juveniles—were incarcerated in the United States,<sup>77</sup> with approximately 300 in Louisiana.<sup>78</sup> *Miller*, however, left one significant question unanswered: did its holding apply only prospectively, or did it also apply retroactively to all 2,100 people who had already been sentenced under mandatory life-without-parole sentencing statutes? If *Miller* applied retroactively, states would have to determine which of the people serving life-without-parole sentences for offenses committed as juveniles were the rare, irreparably corrupt juveniles not susceptible to rehabilitation and which of these people must be given a meaningful opportunity for release.

## 2. Clinics Join in the Fight for the Retroactivity of *Miller*

The Juvenile Justice Project of Louisiana (JJPL)<sup>79</sup> was central in organizing Louisiana’s response to *Miller*. After identifying everyone in Louisiana serving a life-without-parole sentence imposed on them as

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72. *Roper v. Simmons*, 543 U.S. 551 (2005).

73. *Graham v. Florida*, 560 U.S. 48 (2010) (holding unconstitutional a life-without-parole sentence as applied to a juvenile for a non-homicide offense).

74. *Miller*, 567 U.S. 460.

75. *Id.* at 479.

76. *Id.* (citing *Graham v. Florida*, 560 U.S. 48, 68 (2011)).

77. See Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT’G PROJECT (July 23, 2019), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/T64W-XTFZ>].

78. Grace Toohey, *After Supreme Court Mandate: How is Louisiana Giving Juvenile Lifers Their Shot at Freedom?*, ADVOCATE (Oct. 6, 2018), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_ade5f902-c282-11e8-9ed0-ab7428f9acf9.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_ade5f902-c282-11e8-9ed0-ab7428f9acf9.html) [<https://perma.cc/7UKR-X6WA>].

79. The Juvenile Justice Project of Louisiana later became the Louisiana Center for Children’s Rights (LCCR). Before becoming the LCCR, the Juvenile Justice Project was also instrumental in guiding Louisiana’s implementation of *Graham*.

children, JJPL gathered case information and institutional history in an attempt to identify the strongest candidates to use to argue *Miller*'s retroactivity. Just a few months after the decision in *Miller*, JJPL identified four strong candidates and asked the Tulane Clinic and the Loyola Clinic to represent two candidates each.

JJPL understood that it needed to focus its work on the broader policies and the advocacy required to navigate the retroactivity issue without concerning itself with individual client needs or conflicts that might develop between individual client representation and broader strategic decisions. JJPL also knew that handling *Miller* cases, particularly the targeted representative cases, would require significant time and attention. If courts applied *Miller* retroactively, *Miller* lifers would need representation at sentencing hearings that resembled death penalty-phase hearings. A court would have to consider the individual's circumstances, the nature of the offense, and the unique characteristics of youth before deciding whether each defendant was the worst of the worst, that is, irreparably corrupt. Each hearing would require extensive offense and mitigation investigation and expert testimony. To do these cases justice, the legal team would not only have to provide extensive individual client representation, but must also participate in larger strategic planning. For the reasons discussed above, the clinics were, realistically, the only ones on the ground that could perform this function.

One of the first tasks was to help the people whose lives were in the balance understand the impact and issues that *Miller* created. Another initial task was to guarantee that these people had a voice in the strategic decisions being made to ensure that courts would apply *Miller* retroactively in Louisiana. The vast majority of *Miller* lifers were incarcerated at the Louisiana State Penitentiary at Angola.<sup>80</sup> With the cooperation of the prison administration, JJPL organized a series of "call-outs," inviting the *Miller* lifers to attend question and answer sessions. Advocates from JJPL and a number of other organizations, including clinicians and clinic students, participated in these call-outs. At the call-outs, coalition members explained the *Miller* decision; how courts would likely decide the issue of retroactivity; how to present the issue of retroactivity to the Louisiana Supreme Court in the most favorable light; and what each of the *Miller* lifers needed to do to preserve their rights to make the claim that their sentences were unconstitutional.

For the clinic students, the call-outs presented an exciting opportunity to participate in more than individual case representation. These sessions

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80. The three women *Miller* lifers, Ivy, Helen, and Michelle, were incarcerated at the Louisiana Correctional Institute for Women.

provided their first taste of the community engagement and education work that is key to successful reform. Through the call-outs, the students came to understand their individual cases within the larger scope of *Miller*. But most importantly, not just for the students but also the clinicians and other advocates, the call-outs showcased the complicated emotional impact this decision had on the lives of so many. Where there had been no hope, there was now hope, but where new hope arises, there is also fear and anxiety. The excitement and tension was palpable at these meetings and brought a heavy weight of responsibility. For these students, it was the first time they stood in a room full of people who were looking to them as the instrument of their hope.

While the call-outs were being held at Angola, the Tulane and Loyola Clinics filed Motions to Correct an Illegal Sentence on behalf of their selected clients. In each of these cases, the students drafted the motions and argued in state district courts that *Miller* must be applied retroactively. The four district courts that heard the motions issued a variety of rulings for which the state and the defense sought review at the appellate level.

### 3. *Tulane Clinic Appointed to the Louisiana Supreme Court Case Considering the Retroactivity of Miller*

While three clinic cases were under consideration in the circuit courts, Darryl Tate, another *Miller* lifer, made it to the Louisiana Supreme Court. He had filed his motion *pro se* in the district court, where he had been quickly denied relief. He then sought review in a circuit court.<sup>81</sup> The circuit court granted his writ and ordered the district court to resentence him in accordance with *Miller*. The state sought review with the Louisiana Supreme Court, arguing that *Miller* did not apply retroactively and, therefore, did not apply to people, like the defendant, whose sentences were already final. The Louisiana Supreme Court granted the writ.<sup>82</sup>

The Louisiana Supreme Court asked the Tulane Clinic to represent Tate in briefing and oral argument on the issue of retroactivity. Because of the wide impact the Court's ruling would have on the lives of the 300 people serving life without parole in Louisiana and on the national dialogue on retroactivity, the clinic invited Bryan Stevenson and the Equal Justice Initiative to join as co-counsel. Stevenson had argued *Miller* before the Supreme Court and had made it the mission of the Equal Justice

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81. Interestingly, the district court did not deny Mr. Tate relief on the issue of retroactivity. Instead, the court held that *Miller* did not apply to Tate because seventeen-year-olds can be tried as adults in Louisiana, and Tate was seventeen at the time of the offense. See *State v. Tate*, 130 So. 3d 829, 841 (La. 2013).

82. *State v. Tate*, 111 So. 3d 1023 (La. 2013).

Initiative to eliminate life-without-parole sentences for juveniles. After briefing, the entire Tulane Clinic attended oral arguments.

Unfortunately, on November 5, 2013, the Louisiana Supreme Court ruled in a five to two decision that, although *Miller* announced a new rule of constitutional procedure, the rule “was neither substantive nor a watershed rule that alters our understanding of the bedrock procedural elements essential to fairness of a proceeding”; therefore, “Tate and those other similarly situated defendants are not entitled to the retroactive benefit of the *Miller* rule in post-conviction proceedings.”<sup>83</sup>

#### 4. Clinic Students Learn a Lesson from Stakeholder Engagement

About two weeks after *State v. Tate* was decided, clinic students experienced an unavoidable element of the defense attorney’s practice: realizing that someone they were trying to help felt betrayed. While at Angola talking with a *Miller* lifer about the ruling, a Tulane Clinic group learned that many of the men who had participated in the call-outs were angry at Tulane and the other coalition leaders. Many blamed the *Tate* loss on “negativity.” Learning that these men were upset with the clinic representation was distressing, which led to valuable discussions and a revelation.

When clinic students later shared what they had been told with a formally incarcerated community activist, he explained that many of the men at Angola embraced a book titled *The Power of Positive Thinking*.<sup>84</sup> At the call-outs, advocates had predicted that the juvenile-lifers were unlikely to find a friendly audience in the Louisiana Supreme Court, and they would therefore likely have to go to federal court and then the U.S. Supreme Court to find relief. Many of the lifers considered that prediction, or “negative thinking,” to be a cause, at least in part, of the Court’s holding in *Tate*.

The advocates, clinicians, and clinic students had viewed the prediction as realism and had shared it with the *Miller* lifers to manage expectations and prepare them for a long road. The *Miller* lifers, however, viewed it as defeatist thinking that had led to the failure at the Louisiana Supreme Court and prolonged their incarceration. This experience allowed clinic students to appreciate all the value that hope plays to incarcerated people and therefore better understand the people they represent. As another formerly incarcerated activist put it to a clinic class, “[W]hat gives

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83. *State v. Tate*, 130 So. 3d 829, 841 (La. 2013).

84. NORMAN VINCENT PEALE, *THE POWER OF POSITIVE THINKING* (1952).

a lawyer the right to take away someone's hope? That is all we have to keep us from despair—hope.”

5. *Montgomery v. Louisiana: United States Supreme Court Holds Miller Is Retroactive*

After the loss at the Louisiana Supreme Court, the Equal Justice Initiative and the Tulane Clinic filed a petition for a writ of certiorari with the United States Supreme Court, asking the Court to decide whether *Miller* applied retroactively to cases on collateral review. Although states and the federal circuits split on *Miller*'s retroactivity, the Court denied certiorari on May 27, 2014.<sup>85</sup>

The Tulane Clinic remained confident, however, that the Court would have to intervene at some point. Following *Tate*, the Louisiana Supreme Court denied relief to one of the clinic's other clients and to the handful of other *Miller* lifers seeking relief. The clinic sought review with the United States Supreme Court on these cases, and it also filed petitions for writ of habeas corpus under 28 U.S.C. § 2254 in the Eastern District of Louisiana for each of the clinic clients. While these cases were pending in federal district court, the United States Supreme Court granted certiorari on a case filed after *Tate*—*Montgomery v. Louisiana*.

In 2016, four years after deciding *Miller*, the United States Supreme Court finally answered the question of retroactivity in *Montgomery v. Louisiana*.<sup>86</sup> The Court held that *Miller* announced a substantive rule of constitutional law and that there was a “grave risk” that “the vast majority of juvenile offenders . . . are being held in violation of the Constitution.”<sup>87</sup> The Court discussed the need for a mechanism that provides a meaningful opportunity for release for all *Miller* lifers who were in prison. Consideration of youth at the time of sentencing was insufficient because it focused on “transient immaturity” and not subsequent growth after years of incarceration.<sup>88</sup>

The Court found that states can satisfy the constitutional mandate of a meaningful opportunity for release by extending parole eligibility.<sup>89</sup> Particularly, the Court stated, “The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that

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85. *Docket No. 13-8915*, U.S. SUP. CT., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-8915.htm> [<https://perma.cc/WZE6-NCXQ>] (last visited Aug. 3, 2019).

86. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

87. *Id.*

88. *Id.*

89. *Id.*

children who commit even heinous crimes are capable of change.”<sup>90</sup> The next stage was to implement the mechanism of parole for juvenile lifers.

### 6. Clinics Help Implement Miller/Montgomery in Louisiana

*Montgomery* overruled *Tate* and required Louisiana to develop a procedure to provide the *Miller* lifers with a meaningful opportunity to be considered for release. Suddenly, hundreds of *Miller* lifers with unconstitutional sentences were rightfully demanding resentencing. Louisiana law, however, only authorized one sentence for homicide: mandatory life without parole.<sup>91</sup> Trial courts did not know what to do: some courts modified sentences to life with parole eligibility, but in many parishes the district attorneys successfully moved to stay resentencing to give the legislature an opportunity to act.

In the cases out of New Orleans, the Orleans Parish District Attorney moved that the defendants’ motion to correct an illegal sentence be held in abeyance pending the enactment of legislation that authorized courts to grant relief on retroactive *Miller* claims. Essentially, the result is the court was holding these cases in abeyance anticipating legislative action. The state argued that a delay was unlikely to be substantial because the Louisiana Legislature’s 2016 Regular Session was in progress and was scheduled to conclude just a few months later on June 6, 2016.

The excitement and hope that had greeted the *Montgomery* opinion was therefore followed by incredible confusion, anxiety, and distress, not only for the *Miller* lifers, but also for their advocates. The *Miller* lifers wanted to know their fates—when would they get resentenced, and how much longer would they have to wait? Trying to plan and coordinate efforts, the coalition, including clinicians from Loyola, LSU, and Tulane, led by the Louisiana Center for Children’s Rights (LCCR, formerly JJPL), engaged in regular strategy meetings.

The coalition advocates quickly decided to ask for a statute that sought parole eligibility after a set number of years, but it then had to debate on the exact number of years, which legislators to approach, and whether completely eliminating life-without-parole sentences was a viable goal. Clinic students attended these discussions, which presented complicated issues of strategy and ethics because each possible approach left a number of *Miller* lifers without relief, at least for the moment.

Tulane Clinic students helped research and compose talking points for testimony before the senate and house subcommittees and then attended

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90. *Id.*

91. LA. REV. STAT. § 14:30.1 (2011).

the hearings and reported back to their clients and colleagues.<sup>92</sup> After great effort, the coalition shepherded a bill through both the senate and house committees that would have provided parole eligibility after 30 years to those who were not found to be the “worst of the worst.” In a stunning move of political play, however, a state senator filibustered the bill during the last three minutes of the 2016 legislative session.<sup>93</sup> Advocates left the capital that day in shocked disbelief. After months of planning, maneuvering, and compromise, there was no sentencing statute. The legislature did not resolve the limbo that had stalled the promise of *Miller* and *Montgomery* for months.

It took another full year before the Louisiana Legislature passed sentencing statues that implemented the holdings of *Miller* and *Montgomery*. Act 277 of the 2017 Legislative Session finally created specific resentencing procedures for *Miller* lifers and defined the rules for parole eligibility.<sup>94</sup> Changes to the Louisiana Code of Criminal Procedure provided a mechanism through which *Miller* lifers could be resentenced and obtain eligibility for parole consideration.<sup>95</sup> Once resentenced, *Miller* lifers would become eligible for parole after they served 25 years and met a number of other conditions.<sup>96</sup>

Now that Louisiana had these procedures, all of the *Miller* lifers needed representation for their resentencing hearings, and those who

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92. Interestingly, Angola allowed the *Miller* lifers to watch the televised subcommittee proceedings.

93. Madison Pauly, *How Louisiana Tried and Failed to Stop Life Prison Sentences for Teens*, MOTHER JONES (Jun. 8, 2016), <https://www.motherjones.com/politics/2016/06/louisiana-still-throwing-kids-in-jail-for-life/> [<https://perma.cc/M9CL-CNP2>].

94. Act No. 277, 2017 La. Acts 681.

95. Act 277 amended Louisiana Code of Criminal Procedure article 878.1 to provide a procedure whereby *Miller* lifers could be resentenced and obtain parole eligibility. Instead of providing parole eligibility to every *Miller* lifer, the amendment to 878.1 created a mechanism for district attorneys to seek life without parole at resentencing at their discretion. If a district attorney failed to give notice of its intent to seek life without parole by October 2017, then an automatic sentence of life with parole eligibility after 25 years was imposed. Those to whom the district attorney gave notice of life without parole were entitled to a sentencing hearing at which the court must consider the unique characteristics of youth. *See* LA. CODE CIV. PROC. art. 878.1 (2018).

96. LA. REV. STAT. § 15:574.4(G) (2018). Those additional conditions for eligibility include: no major disciplinary infraction in the 12 months prior to the parole hearing date; substance abuse treatment; GED or educational waiver; reception of a low-risk assessment by the Department of Corrections; and completion of a re-entry program.

obtained eligibility for parole consideration would need assistance in preparing for their parole hearings. This also created an incredible need for transition services as *Miller* lifers left prison.<sup>97</sup> These middle-aged and elderly men and women would need a tremendous amount of support as they adjusted to a life in the community after spending most of their formative years and all of their adult years behind bars.<sup>98</sup> Once again, no established legal service provider was available to take on this work. Because no constitutional or statutory right to counsel exists in parole proceedings, public defender offices around the state were unable to take on the representation. Even if they could legally take the cases, none had the financial resources needed to do them justice. Civil legal services were unable to take on parole representation because of their funding prohibitions on engaging in criminal work.

The answer again lies in the assistance of law school clinics. The clinics at Tulane, Loyola, and LSU have all represented *Miller* lifers at parole hearings, with the majority represented by the LSU Clinic. As of May 14, 2019, 64 *Miller* lifers have appeared before the Parole Committee, and the Committee has granted parole to 51. The LSU Clinic has represented 41 *Miller* lifers at their parole hearings, and the Committee has released 35 of them. The LSU Clinic has also represented seven “40-year lifers” who have been released.<sup>99</sup> Clinic students at Tulane have represented three *Miller* lifers, and students at Loyola have represented two. All five were released. From the day *Miller* was decided to the day each client is released, the Louisiana law clinics have played an essential role in reducing the number of juvenile lifers in Louisiana prisons. Along the way, clinic students have learned about the frustrating intricacies of the criminal justice system and their own potential to both help and hurt those trapped inside it.

## CONCLUSION

Criminal justice reform is taking place in Louisiana with proven results. Of course, much more work needs to be done, and change comes incrementally. The involvement of law school clinics in the reform

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97. See generally PAROLE PROJECT, <https://www.paroleproject.org/> [<https://perma.cc/2WPG-A9ZC>] (last visited October 7, 2019).

98. *Id.*

99. Offenders serving a life sentence for second-degree murder shall be eligible for parole consideration if: the offender committed the offense after July 2, 1973, and prior to June 29, 1979; the offender has served at least 40 years of the sentence imposed; and the committee on parole has granted parole with a unanimous vote of those present. See generally, Act No. 280, 2017 La. Acts 692.

demonstrates the rather unique ability of clinics to serve a role between individual client representation and strategic reform implementation. Additionally, despite limitations of resources, time, and student expectations, clinical legal education's participation in a larger collaborative movement empowers students because they learn that their individual efforts as legal professionals can effect change—not only for one client, but for entire communities of people. Clinic engagement in reform trains students to think creatively and expansively about their power as agents for social change. It broadens their skill set beyond litigation and teaches them to be more effective and thoughtful lawyers.

Ivy and Helen's picture around a Christmas tree represents their hope at a new beginning in their lives. As for the clinic students, the gift of the hugs, gratitude, and tears Ivy and Helen shared with them inspires students with the immense possibilities and power they have as they begin their professional lives.