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INTRODUCTION

"Our Nation is moving toward two societies, one black, one white--separate and unequal." ¹ So concluded the Report of the National Advisory Commission on Civil Disorders, released in February 1968 and commonly known as the Kerner Commission Report, which identified racial discrimination and poverty as root causes behind the escalating series of riots in American cities. ² Later that year, in response to the report, a group of leading Washington, D.C. lawyers founded the Washington Lawyers' Committee for Civil Rights Under Law (now the Washington Lawyers' Committee for Civil Rights and Urban Affairs) ("Committee"). ³ Over the past half-century, the Committee's efforts have spanned the gamut of employment, housing, and education issues identified in the Kerner Commission Report as contributing to the deep racial disparities in American life, and the Committee has expanded its work to include advancing the rights of immigrants and persons with disabilities. ⁴

¹ Nat'l Advisory Comm. on Civ. Disorders, Rep. of the Nat'l Advisory Comm'n on Civ. Disorders 1 (1968) [hereinafter Kerner Commission Report].

² Id. at 9.

³ History, Wash. Law. Comm., <https://www.washlaw.org/about-us/history> (last visited Oct. 30, 2018).

⁴ Id.; Kerner Commission Report, supra note 1, at 7.

In addition, from the Committee's early days, one of the mainstays of the Committee's work has been efforts to reform the criminal justice system, and particularly to combat the system's profoundly disparate impact on communities of color, in particular the African American community. The Committee does not provide criminal defense services. Instead, the Committee has focused on a series of civil rights issues emerging out of the discriminatory application of the criminal laws, and the harsh and often unconstitutional carceral system. The Committee's litigation and advocacy has addressed what [*127] conduct should be criminalized and how it should be policed, the conditions in which those accused or convicted of crimes are confined in jails and prisons, and the lasting collateral effects of arrests and convictions on returning citizens that persist long after completion of any formal sentence.⁵

This article offers an overview of some of the Committee's key efforts over the past half-century to address the inequities produced by the District's criminal laws and the deficiencies in the District's treatment of individuals convicted and/or incarcerated under those laws. Through both litigation and public policy advocacy, the Committee has made significant impacts in these areas, including through public reports that helped build support for reforming the District's marijuana laws and through litigation victories that forced changes in the District's jails and federal prisons.⁶ The Committee's experience suggests that, going forward, advocates must continue to be prepared pursue both litigation and public advocacy efforts if they wish to achieve broad-based criminal justice reforms.

I. CRIMINALIZATION AND ARREST

Michelle Alexander's book, *The New Jim Crow*, set forth and popularized a wide-ranging critique of what she termed "mass incarceration," which she identified as a racialized system of social control that "refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison."⁷ The selection of what conduct to criminalize - and whom to label a criminal - is not a neutral process, Alexander argued, particularly when it comes to America's war on drugs.⁸ To the contrary, although formally race- [*128] neutral, the criminal justice system "manages to round up, arrest, and imprison an extraordinary number of black and brown men, when people of color are actually no more likely to be guilty of drug crimes and many other offenses than whites."⁹ As a result, "like Jim Crow, mass incarceration marginalizes large segments of the African American community, segregates them physically (in prisons, jails, and ghettos), and then authorizes discrimination against them in voting, employment, housing, education, public benefits, and jury service."¹⁰

Early in its history, the Committee--recognizing the potential discriminatory effects and other societal consequences of over criminalization--pushed, through litigation and other public advocacy, to hold police accountable for misconduct and to narrow the state's ability to criminalize low-level, victimless conduct, in particular gambling,

⁵ See Committee Fellows Tackle Intersection of Criminal System and Poverty, Wash. Law. Comm. (Nov. 21, 2017), <https://www.washlaw.org/news/657-committee-fellows-tackle-intersections-of-criminal-system-and-poverty>; see generally Wash. Law. Comm., D.C. Prisoners: Conditions of Confinement in the District of Columbia 2-3 (2015), <http://www.washlaw.org/pdf/conditions> of confinement report.pdf (examining the serious and recurring confinement issues within the D.C. Jail and Correctional Treatment Facility).

⁶ See Wash. Law. Comm., Racial Disparities in Arrests in the District of Columbia, 2009-2011: Implications for Civil Rights and Criminal Justice in the Nation's Capital 31-32 (2013), <https://www.washlaw.org/pdf/wlc> report racial disparities.pdf [hereinafter WLC Arrests Report]; see generally Wash. Law. Comm., D.C. Prisoners: Conditions of Confinement in the District of Columbia 2-3 (2015), <http://www.washlaw.org/pdf/conditions> of confinement report.pdf (examining the serious and recurring confinement issues within the D.C. Jail and Correctional Treatment Facility).

⁷ Michelle Alexander, *The New Jim Crow* 12-13 (rev. ed. 2012).

⁸ *Id.* at 5-8.

⁹ *Id.* at 17.

¹⁰ *Id.*

prostitution, and drug possession. ¹¹ The Committee's litigation efforts on police accountability have met with significant success, but litigation to force broader changes in the District's criminal laws proved unsuccessful. ¹² The Committee's public advocacy for action to address systematic disparities in the structure and enforcement of criminal laws in the greater Washington area continued, nonetheless. Most recently, the Committee's analysis of racial disparities in District arrests provided key support for successful efforts to decriminalize, and later legalize, low-level marijuana possession in the District - an offense for which African American residents were disproportionately arrested. ¹³

A. Police Accountability

Beginning at least as early as the 1980s and through the present, the Committee has brought police-misconduct cases targeting individual instances of police brutality, racially motivated arrests and other civil rights violations, including:

Habib v. Prince Georges County, ¹⁴ in which two brothers were savagely beaten by Prince Georges County police during their arrest, [*129] killing one brother and badly injuring the other. The case settled after a jury verdict for plaintiffs, for \$ 1.9 million. Habib helped shine a light on the Prince Georges department, which has a history of excessive police violence. ¹⁵

Gooden v. Howard County, ¹⁶ a case challenging the racially-motivated arrest and handcuffing of an African American woman by Howard County police on baseless charges of noise in her apartment. Although ultimately decided in favor of defendants on qualified-immunity grounds, the case helped establish the rights of arrestees in the Fourth Circuit for future cases.

Richards v. Gelsomino, ¹⁷ a case alleging a racially motivated arrest by a D.C. Metropolitan Police Department officer, which settled on favorable terms after the federal judge denied the police officer's motion to dismiss a civil rights claim.

J.A. v. Miranda, ¹⁸ a case in federal court in Maryland that settled after the court granted in part and rejected in part the police officer and Montgomery County defendants' motions to dismiss, in a case where officers had beaten and improperly arrested a bystander who was attempting to videotape the arrest of his brother by the same officers.

¹¹ See *infra* notes 14-42.

¹² See *infra* notes 43-46.

¹³ See WLC Arrests Report, *supra* note 6, at 13.

¹⁴ See Norris P. West, Man beaten by PG police gets \$ 1.9 million award Jury says officers used excessive force, *Balt. Sun*, (Mar. 18, 1993), <http://articles.baltimoresun.com/1993-03-18/news/1993077201> 1 *habib-george-county-prince-george* ("A federal jury awarded \$ 1.9 million yesterday to a black Rockville man and the estate of his brother after finding that four white Prince George's County police officers used excessive force against them in 1989.").

¹⁵ See Ta-Nehisi Coates, *Between the World and Me* 76-78 (2015) (detailing the death of Prince Jones, Jr. at hands of Prince Georges policeman); Jason Cherkis & Kevin Diaz, Black Victim, Black Cop, Black County, *Wash. City Paper* (Sept. 22, 2000), <https://www.washingtoncitypaper.com/news/article/13020801/black-victim-black-cop-black-county>.

¹⁶ See generally [*Gooden v. Howard Cty.*, 954 F.2d 960 \(4th Cir. 1992\)](#) (discussing qualified immunity defense).

¹⁷ [*Richards v. Gelsomino*, 240 F. Supp. 3d 173, 181 \(D.D.C. 2017\)](#) (denying motion to dismiss).

¹⁸ [*J.A. v. Miranda*, No. PX 16-3953, 2017 U.S. Dist. LEXIS 141643](#) (D. Md. Sept. 1, 2017).

Robinson v. Farley,¹⁹ in which the plaintiff, a 28-year-old man with physical and intellectual disabilities, left a bus stop after a Prince Georges County, Maryland police officer began watching him, and was followed to his grandmother's house, whereupon the officer called in reinforcements and beat the plaintiff needlessly, inflicting severe injuries. Plaintiff was never charged with a crime. The case settled favorably after a federal judge in the District of Columbia denied the defendants' motions to dismiss.

[*130] Avila v. Dailey,²⁰ in which the plaintiff, a construction contractor, gave a friend a ride home after the friend was involved in a fight at a restaurant. D.C. Metropolitan police seized plaintiff's van and held it for over a year, falsely stating it was needed as evidence, and apparently seeking to coerce plaintiff into identifying his friend. The court refused to grant defendants' motion to dismiss on qualified-immunity grounds, granted plaintiff partial summary judgment on Fourth Amendment grounds, and allowed the case to proceed on a Fifth Amendment claim.

Most recently, the Committee was able to secure a \$ 125,000 offer of judgment²¹ for a client who was detained in a baseless and racially based traffic stop by a police officer for Laurel, Maryland, and then strip searched (forced to pull down his pants so that his genitals and buttocks could supposedly be inspected) in full view of the public in a commercial parking lot.²² The client was never arrested or charged with a crime.²³ Although the Laurel police department officially disclaimed knowledge of the officer's actions, they in fact had information about the strip search, and presented the officer with a meritorious service award the week after the incident.²⁴ The illegal search occurred in 2014, the Committee and co-counsel filed suit in federal court in Maryland in 2015, and following extensive discovery and briefing, the court issued its opinion confirming the acceptance of the judgment and award of attorneys' fees in 2018.²⁵ The Committee's co-counsel was the Partnership for Civil Justice Fund.

The Committee's efforts to address police misconduct extended beyond litigation, as well. For instance, in 1984 the Committee launched an effort, in partnership with the Montgomery County, Md., branch of the NAACP and several major law firms, to study Montgomery **[*131]** County Police Department procedures and allegations of the mistreatment of people of color by county police.²⁶

B. Gambling and Prostitution

In the 1970s the Committee, "motivated by concern for the apparent discrimination on the basis of race, sex, and economic class in the enforcement of gambling and prostitution laws ... conducted a study of laws and enforcement practices concerning victimless crimes with the assistance of grants from the United States Catholic Conference

¹⁹ [Robinson v. Farley, 264 F. Supp. 3d 154, 156-58, 163](#) (D.D.C. Sept. 1, 2017) (denying defendants' motion to dismiss).

²⁰ [Avila v. Dailey, 246 F. Supp. 3d 347, 350-51, 360-61, 64, 67 \(D.D.C. 2017\)](#) (granting partial reconsideration and directing that trial proceed).

²¹ Andrews Michaels, Laurel Police Officer to Pay \$ 125,000 in Civil Rights Lawsuit, Wash. Post (Mar. 24, 2017, 12:50 PM), <https://www.baltimoresun.com/news/maryland/howard/laurel/ph-ll-police-civil-lawsuit-0330-20170324-story.html>.

²² Sergeant v. Acol, No. PWG-15-2233, slip op. at 1 (D. Md. Jan. 3, 2018).

²³ Victory: \$ 125,000 Judgment Entered Against Laurel Police Officer in Public Strip Search Case, Wash. Law. Comm. (Mar. 21, 2017), <https://www.washlaw.org/news/569-victory-125-000-judgment-entered-against-laurel-police-officer-in-public-strip-search-case>.

²⁴ Id.

²⁵ Sergeant, slip op. at 10.

²⁶ See Sonia Boin, D.C. Law Firm Joins Study of Police Treatment of Blacks, The News, Nov. 29, 1984, at A-9; R.H. Melton, Panel Set to Study Police Brutality Claims, Wash. Post., June 26, 1984, at B4.

and the United Church of Christ." ²⁷ One result of the study was a 1973 report on gambling enforcement in the District that recommended legalizing "numbers" games "as an alternative to police corruption, unequal enforcement and diminishing community respect for authority." ²⁸ Reporting on the Committee's findings, *Jet* magazine noted that legalization of numbers games would "halt the trend where a Black person who wagers a nickel on a three-digit number is more likely to be arrested than a white who gambles hundreds of dollars in Las Vegas, thousands on the stock market or five in a bingo game." ²⁹ The magazine highlighted the Committee's findings that in the District, "Blacks make up 92 percent of all gambling arrests and 72 percent of the population," and that an even greater disparity existed at the national level, where "70 percent of all persons arrested for gambling in the U.S. are Black, although the nation is 12 percent Black." ³⁰ In 1977, a citizens commission established by the D.C. Council did recommend legalizing certain forms of gambling, including by establishing an official lottery. ³¹ A voter initiative approving a lottery ultimately passed in November 1980, with the law taking effect in March 1981 after passing the Congressional review period. ³² However, supporters of the initiative appeared to focus on the additional revenue a lottery could raise for the cash-strapped District (which was instead **[*132]** being captured by Maryland's lottery) rather than on the racial disparities identified in the Committee's report seven years earlier. ³³

Another effort stemming from the Committee's concerns about the enforcement of vice crimes was the Committee's representation of two of six women charged with violating the District's statute prohibiting soliciting for prostitution. ³⁴ The women argued--and the trial court agreed--that the law was discriminatorily enforced against them on the basis of sex. ³⁵ The trial court further found that the statute unconstitutionally infringed on the defendants' free-speech and privacy rights. ³⁶ The D.C. Court of Appeals, however, was unconvinced. In an eight-page opinion, the court rejected the privacy and free-speech arguments and held that "the trial court's finding of discriminatory enforcement is unsupported by the record." ³⁷ The court noted that the statute was gender-neutral on its face and had been enforced against "a male who seeks to sell himself to another male for purposes of sodomy." ³⁸ Drawing an analogy to drug enforcement efforts, the court also opined that although "the major law enforcement efforts in enforcing the statute are directed against the sellers [rather than purchasers] of sex ... unquestionably there may be wholly valid reasons for such a circumstance," just "as is true in the enforcement of the narcotics laws, where sellers are the principal police targets." ³⁹

²⁷ Gwen T. Johnson, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: A Survey of the Lawyers' Committee Work for Criminal Justice*, [27 How. L.J. 1253, 1259 \(1984\)](#).

²⁸ *Id.* (citing Wash. Law. Comm., *Legalized Numbers in Washington* (1973)).

²⁹ *Lawyers Seek To Legalize Numbers Betting In D.C.*, *Jet*, Oct. 18, 1973, at 36.

³⁰ *Id.*

³¹ Jack Eisen, *Legal Gambling of Several Types Proposed for City*, *Wash. Post*, May 2, 1978, at A1, A14.

³² D.C. Law 3-172 (corresponds to **D.C. Code §§3-1301** et seq. (2016)); **D.C. Code § 22-1716** et seq. (1987).

³³ Eugene Robinson & Keith B. Richburg, *Area Voters Follow Their Traditions*, *Wash. Post*, Nov. 5, 1980; Keith B. Richburg & Ron Shaffer, *Progambling Ads May Turn Tide On Vote in D.C.*, *Wash. Post*, Oct. 30, 1980; Eisen, *supra* note 31, at A1.

³⁴ [United States v. Moses, 339 A.2d 46, 48 \(D.C. 1975\)](#).

³⁵ *Id.*

³⁶ [Id. at 50-51](#).

³⁷ [Id. at 55](#).

³⁸ *Id.*

³⁹ *Id.*

C. Drug Offenses

The Committee attempted, unsuccessfully, to establish through litigation the principle that individuals addicted to narcotics should not be held criminally responsible for drug possession, but that instead "various forms of rehabilitative treatment [should be] substituted for criminal incarceration of heroin addicts and other individuals convicted of drug abuse."⁴⁰ The Committee hoped, in a series of trials, to build on decisions in the U.S. Court of Appeals for the D.C. Circuit [*133] and the Fourth Circuit that struck down public-intoxication convictions of alcoholics.⁴¹ The Committee argued that narcotic addiction was a recognized medical condition, and that for individuals who, as a result of that condition, had "lost control over the use of narcotics, possession is not a voluntary act, involves no criminal intent, and thus is not properly punished under common law principles of criminal responsibility," nor could the Eighth Amendment countenance "punishing a sick person for the symptoms of his disease."⁴²

The Committee's litigation efforts on this issue culminated--and foundered--in two appellate decisions, one issued by the U.S. Court of Appeals for the D.C. Circuit and one by the D.C. Court of Appeals. The D.C. Circuit issued a fractured set of opinions in *U.S. v. Moore*, the upshot of which was the conclusion--by five of the nine judges across two main opinions--that neither the common law nor the Eighth Amendment prohibits holding a person who is addicted to narcotics criminally responsible for possessing narcotics, which the judges viewed as a voluntary act (distinct from the defendant's merely experiencing a craving for narcotics).⁴³ The D.C. Court of Appeals followed suit, holding that the "defense sought to be asserted"--that a person charged with heroin possession "may raise an affirmative defense of lack of common law criminal responsibility due to heroin addiction"--had been "explored inch by inch and rejected in" *Moore*, and that the D.C. Court of Appeals agreed with that rejection.⁴⁴

Both the D.C. Circuit and the D.C. Court of Appeals also based their conclusions, in part, on their assessments that federal and local drug laws provided sufficient flexibility and treatment options to avoid injustice to those convicted of mere possession.⁴⁵ History shows otherwise. [*134] Rather, "in less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase."⁴⁶

⁴⁰ Peter Barton Hutt, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: The Role of the Washington Lawyers' Committee for Civil Rights Under Law in the Handling of Drug Abuse*, [27 How. L.J. 1243, 1243 \(1984\)](#).

⁴¹ [Id. at 1245-46](#).

⁴² [Id. at 1246](#).

⁴³ [United States v. Moore, 486 F.2d 1139, 1147-48, 1153-54 \(D.C. Cir. 1973\)](#), cert. denied, **414 U.S. 980 (1973)** (per curiam) (opinion of Wilkey, J.); [id. at 1198-1200](#) (opinion of Leventhal, J.).

⁴⁴ [Gorham v. United States, 339 A.2d 401, 403 \(D.C. 1975\)](#).

⁴⁵ [Moore, 486 F.2d at 1202-03](#) ("As to possession of narcotics by addicts for personal use, we take note of the limited impact projected by Congress for the present law - with Congressional contemplation that the Government would withhold criminal prosecution of mere addicts, and that they would be subject to pretrial diversion and the court's broad probation authority."); [Gorham, 339 A.2d at 413](#) ("Diversion, probation and incarceration are the methods that the community has now chosen in reaction to the crime of heroin possession. At a minimum, criminalization forces the nontrafficking addict who will not seek out treatment into the treatment facilities made available through the criminal justice system. This is to the good of all concerned. The addict who is able to refrain from heroin usage after he has been processed through this system has benefitted personally as has the community which will no longer have to support his self-destructive habit which carries with it a harmful effect on society.").

⁴⁶ Alexander, *supra* note 7, at 6 (citing Marc Mauer, *Race to Incarcerate* 33 (rev. ed. 2006)).

The Committee later found much greater success in advocating for drug-law reforms outside the litigation context. Forty years after Moore, in July 2013, the Committee released the first of four reports, with the support of an advisory committee of five retired and senior federal and District judges,⁴⁷ examining aspects of the criminal justice system in and around the District.⁴⁸ This first report analyzed comprehensive datasets provided by the District's Metropolitan Police Department ("MPD") and D.C. Superior Court showing the racial and geographical distribution of arrests for various types of offenses in the District from 2009 through 2011.⁴⁹ The report found that African Americans were significantly over-represented in arrests for a broad range of offenses. Among the report's key findings:

Although African-Americans comprised roughly half of the District's adult population, eight out of ten arrests made between 2009-2011 were of African-Americans.⁵⁰

Wards with more African-American residents witnessed a higher number of arrests. Nine out of ten of the District's African-American residents resided in five of its eight wards, and seven out of ten arrests made in the city occurred in these five wards.⁵¹

Six out of ten drug arrests involved simple possession, for which African-American arrestees accounted for close to nine out of ten arrests during the three-year time-span.⁵² Wards that had a high percentage of African-American residents had a higher percentage of all drug arrests, while wards that had a higher percentage of white residents had a lower percentage of drug arrests, although African-American arrestees still accounted for most arrests in these wards.⁵³ Despite the disparities in drug arrests between the two [*135] groups, data from the National Survey on Drug Use and Health showed that rates of illegal drug use among whites and African-Americans were roughly equal.⁵⁴

The report's overall conclusion was stark: "arrests over the three-year period exhibited serious and pervasive racial disparities," requiring an "in-depth investigation into the factors generating this disparate racial impact."⁵⁵ The report also recommended that "in light of the overwhelming racial disparities identified in arrests related to misdemeanor drug offenses, and marijuana arrests in particular," it should be "an immediate priority" to place a "renewed focus ... on treating drug abuse as a public health concern rather than a primary focus of the criminal justice system ... determining the extent to which the use of certain currently illegal drugs should be decriminalized or legalized."⁵⁶

⁴⁷ Among the judges on the advisory committee were Patricia M. Wald, retired Chief Judge of U.S. Court of Appeals for the D.C. Circuit--who was the court-appointed appellate counsel to the defendant in *United States v. Moore*--and John M. Ferren, a senior judge of the District of Columbia Court of Appeals, who represented Ms. Gorham in *Gorham v. United States*.

⁴⁸ WLC Arrests Report, *supra* note 6, at 1.

⁴⁹ *Id.* at 1.

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 8.

⁵² *Id.* at 14.

⁵³ *Id.* at 15.

⁵⁴ *Id.* at 16.

⁵⁵ *Id.* at 31.

⁵⁶ *Id.* at 32.

The Committee's report drew significant press coverage.⁵⁷ Moreover, it was widely credited—along with a similar report on marijuana arrests by the ACLU of the National Capital Area released earlier in 2013—as a driving force behind ultimately successful efforts to first decriminalize, and then legalize through a public referendum, simple possession of small amounts of marijuana.⁵⁸ The Washington Post reported that the Committee and ACLU findings had "shaped the debate" on decriminalizing marijuana possession under District law⁵⁹ and had contributed to an "overall change in opinion" on marijuana [*136] legalization in the District.⁶⁰ Activists also cited the report's findings in hearings before the D.C. Council's Committee on the Judiciary and Public Safety regarding the Metropolitan Police Department's stop-and-frisk policies.⁶¹

II. CONDITIONS OF CONFINEMENT

The bulk of the Committee's criminal justice litigation efforts have heavily focused on vindicating prisoners' rights to constitutionally adequate conditions of confinement.⁶² Although significant deficiencies remain, these efforts have produced meaningful advances for prisoners.

A. Early Efforts of the Washington Lawyers' Committee to Address Over-Criminalization of Communities of Color

The Committee made an early and long-lasting advance for prisoners' rights in the District of Columbia with three cases that established improved due process in the District's prison disciplinary systems. The first cases, *Pollard v. Washington*⁶³ and *Woodward v. Washington*,⁶⁴ initiated in 1971, were class actions litigated by the Committee and lawyers from Covington & Burling. These cases challenged disciplinary proceedings in which prisoners were punished and transferred into maximum security confinement for alleged disciplinary infractions "without notice, hearing, counsel or any of the other rudiments of a fair trial[.]"⁶⁵ The Committee also joined in a related case in the Eastern District of Virginia, *Wright v. Jackson*.⁶⁶ The end result was a detailed code of prison disciplinary procedures, largely drafted by the plaintiffs' lawyers, that was finally enacted into law by the D.C. Council over a decade later as the Lorton Regulations Approval [*137] Act of 1982.⁶⁷ This law remained in effect until the closure of the Lorton facilities and the 2001 transfer of the District's sentenced felons into the Federal Bureau of

⁵⁷ See, e.g., Peter Hermann, Study Cites Racial Disparities in D.C. Arrests, Wash. Post (July 12, 2013), https://www.washingtonpost.com/local/study-cites-racial-disparities-in-dc-arrests/2013/07/11/02a46260-ea18-11e2-8f22-de4bd2a2bd39_story.html?utm_term=.fbb4ee5e8029; Martin Austermuhle, Report: Arrests in D.C. Disproportionately Affect African-Americans, WAMU (July 12, 2013), <https://wamu.org/story/13/07/12/report-arrests-in-dc-disproportionately-affect-african-americans/>; Report Finds Racial Disparity Among D.C. Arrest Rates, WTOP (July 12, 2013, 6:12 PM), <https://wtop.com/news/2013/07/report-finds-racial-disparity-among-dc-arrest-rates/>.

⁵⁸ See, e.g., Matt Ferner, Washington, D.C. Votes to Legalize Recreational Marijuana, Huff. Post (Nov. 4, 2014), https://www.huffingtonpost.com/2014/11/04/washington-dc-legal-marijuana_n_5947520.html; Dan Merica, D.C. Council Votes to Ease Marijuana Laws, CNN (Mar. 4, 2014), <http://politicalticker.blogs.cnn.com/2014/03/04/d-c-council-votes-to-ease-marijuana-laws/>; Matt Cohen, Will the Marijuana Decriminalization Bill Solve D.C.'s Race and Gender Disparity Problem?, DCist (Nov. 15, 2013, 12:18 PM), <http://dcist.com/2013/11/will-the-marijuana-decriminalization.php>.

⁵⁹ Aaron C. Davis, D.C. Poised for Giant Leap Toward Legalizing Marijuana, Wash. Post (Oct. 24, 2013), https://www.washingtonpost.com/local/dc-politics/dc-poised-for-giant-leap-toward-legalizing-marijuana/2013/10/24/db183fb0-3cbe-11e3-b6a9-da62c264f40e_story.html?utm_term=.8d93aa9b1ed1.

⁶⁰ Aaron C. Davis & Peyton M. Craighill, In major shift, D.C. residents strongly support legalizing marijuana, Wash. Post (Jan. 15, 2014), https://www.washingtonpost.com/local/dc-politics/in-major-shift-dc-voters-strongly-support-legalizing-marijuana/2014/01/15/9fcc6d04-7d6a-11e3-93c1-0e888170b723_story.html?utm_term=.53d4a390eb79.

⁶¹ See Marielle A. Moore, The Next Stage of Police Accountability, *14 Seattle J. Soc. Just.* 145, 161 (2015).

⁶² See DC Prisoners' Project, Wash. Law. Comm., <https://www.washlaw.org/projects/dc-prisoners-rights> (last visited Nov. 1, 2018).

Prisons pursuant to the D.C. Revitalization Act, ⁶⁸ a law that serves as the "enlightened legislative product of an enlightened city government, with no suggestion on the face of it that this was substantially a code written by representatives of the affected inmates themselves, who seized opportunities to have enacted, in the name of the Constitution, policies that appeared to go beyond constitutional requirements." ⁶⁹

B. The Founding of the D.C. Prisoners' Legal Services Project

In the early 1980s, the District of Columbia entered the war on drugs and passed a series of draconian drug laws and mandatory minimum sentences that caused a dramatic increase in the District prison population. ⁷⁰ At its peak, the eight prisons at the Lorton, Virginia Correctional complex housed more than 9,000 prisoners, almost 1,700 prisoners were housed at the DC Jail, and 1,000 prisoners were housed in a series of halfway houses. ⁷¹ In addition, approximately 5,000 prisoners convicted of D.C. Code offenses were housed in the federal prison system. ⁷² The prison complex was established in 1910 with the construction of the Workhouse at Occoquan, followed by the construction of the Central Facility in 1914, and the Maximum Security Facility in 1920. ⁷³ Buildings that incarcerated Alice Paul and the Suffragettes when they were arrested for seeking the franchise for women remained in use as prison dormitories until the complex closed in **[*138]** 2001. ⁷⁴ These prisons were old, in disrepair, violent, and lacked adequate medical and mental health services, educational opportunity, or programs designed to rehabilitate prisoners. ⁷⁵ Staff corruption was rampant. ⁷⁶

In the 1970s and early 1980s, there was a series of conditions of confinement cases brought by the firms of Covington & Burling and Shaw, Pittman, Potts & Trowbridge, the National Prison Project of the American Civil Liberties Union, and the Public Defender in response to increased crowding and deteriorating conditions. Initially, three of the Lorton prisons - Occoquan, Central and Maximum - and the DC Jail were found to have conditions that

⁶³ See William H. Allen, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: The Lawyers' Committee and the Lorton Disciplinary Code*, 27 How. L.J. 1231 passim (1984) (discussing *Pollard v. Washington*, No. 2055-71 (D.D.C. 1971)).

⁶⁴ Id. at 1233 (discussing *Woodward v. Washington*, No. 71-1659 (D.D.C. 1971)).

⁶⁵ Id. at 1232.

⁶⁶ See generally *Wright v. Jackson*, 505 F.2d 1229 (4th Cir. 1974) (examining inmates' claims of due process violations).

⁶⁷ *Moore v. Gaither*, 767 A.2d 278, 280-81 (D.C. 2001) (explaining how the Lorton Regulations Approval Act of 1982 came about).

⁶⁸ Spencer S. Hsu & Cheryl W. Thompson, VA. Prisons may Take 1800 Lorton Inmates, *Wash. Post* (Jan. 31, 1998), https://www.washingtonpost.com/archive/local/1998/01/31/va-prisons-may-take-1800-lorton-inmates/7285d640-1dc5-43a6-80de-14bc16c54a4a/?utm_term=.905f69deae4b

⁶⁹ Allen, *supra* note 63, at 1238.

⁷⁰ See Jennifer Senior, 'Locking Up Our Own,' What Led to Mass Incarceration of Black Men, *N.Y. Times* (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/books/review-locking-up-our-own-james-forman-jr.html> (tracing increasingly harsh penalties for drug use in the District of Columbia and their effect on over-incarceration and attendant social ills, and an inability or unwillingness on the District government's part to comply with prison conditions orders issued by the courts).

fell below the constitutional minimum and enjoined to make improvements.⁷⁷ Many more cases and injunctions followed.

The conditions litigation cast a bright light on the crisis in the District's prisons and Jail. A group of advocates came together to create a sustainable institutional response. Covington & Burling gifted an attorneys' fee earned in the litigation regarding the Lorton Modular facility. The Agnes and Eugene Meyer Foundation and the Morris and Gwendolyn Cafritz Foundation and the Public Welfare Foundation offered early support and the D.C. Prisoners' Legal Services Project was formed.⁷⁸ The Project opened its doors in early 1989 with an executive director, staff attorney, and secretary.⁷⁹

In 2006, the D.C. Prisoners' Legal Services Project merged with the Washington Lawyers' Committee.⁸⁰ As part of the Committee, [*139] attorneys and advocates continued to provide self-help materials, engage in individual administrative representation, pursue systemic litigation and seek reform through policy advocacy.⁸¹

C. Persistent response to persistent problems

The District's and the Nation's failed project of incarceration as a method of social control necessarily and irrevocably leads to the deprivation of the humanity of prisoners, guards and the community. While the work of the Project and the Committee to address and mitigate the harm of unconstitutional prison conditions has evolved to meet current challenges, persistent themes in the work have remained steady since the Project was founded.

These themes include:

1. Access to Medical and Mental Health Services

The Project was founded when HIV/AIDS was moving quickly into the injection drug user community. For the first decade, HIV dominated the Project's work. The prison health system was grossly deficient for the level of chronic

⁷¹ Closing of Lorton Correctional Complex: Hearings on H.R. 461 Before the Subcomm. on the Dist. of Columbia of the Comm. on Gov't Reform and Oversight, 104th Cong. 32-33, 46 (1995).

⁷² Id. at 33.

⁷³ Id. at 73.

⁷⁴ See Wilson Korges, The Lasting Legacy of Suffragists at the Lorton Women's Workhouse, *Folklife* (Mar. 21, 2018), <https://folklife.si.edu/magazine/lasting-legacy-of-suffragists-at-lorton-occoquan-womens-workhouse>; Serge F. Kovalski, Lorton's Final Lockdown, *Wash. Post* (Nov. 20, 2001), https://www.washingtonpost.com/archive/local/2001/11/20/lortons-final-lockdown/dddc4cf1-42f2-4fdb-ac07-2524a452ac16/?noredirect=on&utm_term=.c03b4a04b95e.

⁷⁵ Louise Bernikow, Night of Terror Leads to Women's Vote in 1917, *Women's eNews* (Oct. 30, 2004), <https://womensenews.org/2004/10/night-terror-leads-womens-vote-1917/#.Us2mp> Uko6M8.

⁷⁶ See Lafayette Bailey, Segregated, Silenced and Far From Home, *Wash. Post* (Oct. 3, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A1765-2004Oct1.html>; see also Seth Ferranti, The Lorton Experience, *Gorilla Convict* (Oct. 21, 2011), <https://www.gorillaconvict.com/2011/10/the-lorton-experience-2/>.

⁷⁷ See *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 865, 869 (D.D.C. 1989); *Twelve John Does v. D.C.*, 855 F.2d 874, 874-75, 879 n.1 (D.C. Cir. 1988) (summarizing Lorton and D.C. Jail cases); *Campbell v. McGruder*, 580 F.2d 521, 551 (D.C. Cir. 1978); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 122-23 (D.D.C. 1976).

⁷⁸ Personal recollection of Alan A. Pemberton. Mr. Pemberton was counsel in the Modular Facility litigation.

⁷⁹ Interview with Grace M. Lopes, Project's initial Executive Director.

and acute illness found in the pre-AIDS prison population.⁸² That system broke entirely under the demands to treat prisoners with AIDS and AIDS related illnesses, with tuberculosis as an especially acute concern.⁸³ The Project addressed these issues through litigation, including lawsuits challenging the unconstitutionality of conditions at the D.C. Jail, especially with respect to HIV and tuberculosis care during the Project's service as counsel in the case,⁸⁴ and seeking to remedy unconstitutionally deficient health services at the Lorton Minimum and Medium Security Facilities and at Lorton's Youth Center.⁸⁵ In addition, the Project undertook policy initiatives with the District government. Staff members of the Project fought for increased funding for medical and mental health care during the budget cycle⁸⁶ and urged policies that addressed harm reduction **[*140]** including condoms in prison, voluntary testing, increased use of anti-viral medication and prisoner education.⁸⁷

Similarly, prisoners experience mental illness at rates much higher than the general population.⁸⁸ Leaving aside whether prison is an appropriate setting for persons with mental illness in any case, the failure to provide mental health treatment is persistent and wide-spread. It was a significant feature in the Lorton and D.C. Jail litigation and dominates the prisoners' rights docket today.⁸⁹ The Committee's groundbreaking litigation to address the abusive use of solitary confinement in the federal Bureau of Prisons, described below,⁹⁰ is a direct continuation of this work. District prisoners who have mental illness far too often find their way into the cruelest corners of the federal system where they are treated with the harshest forms of isolation. The Committee has taken on the most extreme conditions at the BOP's most secure facility -the Administrative Facility at the Maximum Security Prison in Florence Colorado--and one of the oldest prisons in the federal system--Lewisburg Penitentiary.⁹¹

Prisoners with disabilities are routinely abused and neglected. Today, the Committee represents deaf prisoners across the country to ensure reasonable accommodations and the ability to communicate with staff and the outside world.⁹²

⁸⁰ Memorandum from Executive Director Rod Boggs et al to Director Gustavo Velasquez and General Counsel Alexis Taylor (Aug. 11, 2008) (on file with Wash. Law. Comm.).

⁸¹ [DC Prisoners' Project](#), *supra* note 62.

⁸² The Financial Condition of the District of Columbia and the Federal Payment Reauthorization: Hearing on H.R. 2902 Before the Comm. on the D.C. H.R., 103d Cong. 208-10 (1994) (testimony of Jonathan M. Smith Exec. Dir. of the DC Prisoners' Legal Serv. Project) [hereinafter Hearings].

⁸³ *Id.*

⁸⁴ *Id.*; [Jackson](#), 416 F. Supp. at 120.

⁸⁵ Hearings, *supra* note 82, at 199-202 (testimony of Jonathan M. Smith, Exec. Dir. of the DC Prisoners' Legal Serv. Project).

⁸⁶ Personal recollection of Jonathan M. Smith. Mr. Smith was the Executive Director of the DC Prisoners' Legal Services Project.

⁸⁷ See generally Nathan McCall, AIDS Toll Rising in DC Jails; Better Care Sought for Afflicted Inmates, Wash. Post, Feb. 4, 1991, at D1; Keith A. Harriston, Protest Asks Condoms for D.C. Inmates; High Incidence of HIV is Cited, Wash. Post, April 9, 1993, at B5; [DC Prisoners' Project](#), *supra* note 62; Toni Locy, Judge Orders Health Plan Implemented at D.C. Jail, Wash. Post, Nov. 2, 1994, at A8; Serge F. Kovalski, Jail Medical Services are Returned to D.C. Control: Judge Cites Progress and Ends Receivership, Wash. Post, Sept. 19, 2000, at B01 (addressing health problems and medical services in D.C. jails).

⁸⁸ Jim Oliphant, Death Behind Bars: Suicides in Jails and Prisons Could Be Prevented, Experts Say. But It Would Take a Public Commitment, Nat'l. L.J. Online, (Dec. 2, 2002 12:00 AM), at 2.

⁸⁹ Personal knowledge of Phil Fornaci. Mr. Fornaci is Senior Counsel, Washington Lawyers' Committee for Civil Rights and Urban Affairs and Project Director of the DC Prisoners' Project.

⁹⁰ See *infra* notes 177-209 and accompanying text.

⁹¹ *Id.*

[*141]

2. Harsh and Abusive Physical Condition

The Project and later the Committee have worked to mitigate the harshest of the physical conditions in the District's prisons, DC Jail and the federal BOP. As counsel for DC Jail prisoners in *Inmates of DC Jail v. Jackson*, Project staff and attorneys from Shaw Pittman, successfully maintained a population cap and achieved other reforms.⁹³ Later, in *Inmates of Modular Facility v. Barry*, the Project and Covington & Burling secured a wide-ranging consent decree imposing measures to reduce violence and protect prisoners from harm.⁹⁴ Significantly, the decree imposed a cap on the number of prisoners who could be housed in the prison.⁹⁵

After the dismissal of the *Campbell v. McGruder* litigation in 2004, and the worsening of conditions at the D.C. Jail, the Project engaged in significant litigation and policy advocacy to address continued overcrowding and escalating violence at the D.C. Jail. With the transfer of D.C. prisoners to the federal system, the Project focused on litigation and advocacy against the federal BOP.⁹⁶

3. Sentencing and Parole

Litigation and advocacy regarding the operation of the prison system is essential. More than 30 years of successful court cases demonstrate that the best reform is to reduce the number of people who are incarcerated. Since the Project's beginning, Project and Committee staff have fought to reduce excessively harsh sentences, over-detention and the failures of the parole system. In the 1980s and 1990s, the Project was a frequent witness before the District of Columbia Council on sentencing law legislation.⁹⁷ A significant legislative success for the Project was to lead the coalition that secured passage of a compassionate release law that allowed prisoners determined by a doctor to be within six months of death due to a terminal illness to be released on parole.⁹⁸ This law provided relief and comfort to dozens of prisoners and their families in the final stages of AIDS.

⁹² See *Minnis v. Johnson*, No. 1:10-cv-00096-TSE -TRJ (E.D. Va. Nov. 16, 2010); *Jarboe v. Md. Dep't of Pub. Safety and Corr. Serv.*, No. 1:12-cv-00572-ELH (D. Md. Feb. 20, 2015); *Adams & Knights v. Ky.*, No. 3:14-cv-00001-GFVT (E.D. Ky. June 25, 2015); *Bryant v. Fed. Bureau of Prisons*, No. 2:11-cv-00254-CAS (C.D. Cal. June 2, 2014). Ongoing cases involving deaf and hard of hearing prisoners include: [Heyer v. Fed. Bureau of Prisons](#), 849 F.3d 202 (2017); *Briggs v. Mass. Dep't of Corr.*, No. 15-40162-GAO (D. Mass. June 26, 2016); ***McBride v. Mich. Dep't of Corr.***, 294 F. Supp. 3d 695, 721 (E.D. Mich. 2018); *Levy et al. v. La. Dep't of Pub. Safety and Corr.*, No. 3:16-cv-00542-JWD-EWD (M.D. La. Aug. 16, 2016).

⁹³ [Jackson](#), 416 F. Supp. at 124-25.

⁹⁴ [Inmates of Modular Facility v. D.C.](#), No. 96-7094, 1996 WL 734195, at 1 (D.C. Cir. Nov. 25, 1996).

⁹⁵ *Id.*

⁹⁶ See discussion *infra* Section IV.

⁹⁷ See Hearings, *supra* note 82, at 208-10 (testimony of Jonathon M. Smith, Exec. Dir. of the D.C. Prisoners' Legal Serv. Project).

⁹⁸ See [18 U.S.C. § 3582\(c\)\(1\)\(A\)](#) (2002); [28 CFR 572.40](#) (1994) ("[18 U.S.C. 4205\(g\)](#) was repealed effective November 1, 1987, but remains the controlling law for inmates whose offenses occurred prior to that date. For inmates whose offenses occurred on or after November 1, 1987, the applicable statute is [18 U.S.C. 3582\(c\)\(1\)\(A\)](#)."); John A. Beck, *Compassionate Release from New York State Prisons*, [27 J.L. Med. & Ethics 216](#) (Fall 1999); Brie Williams, et al, *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 *Annals of Internal Med.* 122, 122-23 (2011); Marty Roney, 36 states release ill or dying inmates, USA Today (Aug. 14, 2008, 12:29 PM), <https://usatoday30.usatoday.com/news/nation/2008-08-13-furloughs> N.htm.

[*142] Dysfunction in the parole system has also been a constant theme over the last 30 years. In 1991 the Project sued the District for Due Process violations in *Ellis v. D.C.*⁹⁹ As Twain is said to have remarked, history may not repeat itself, but it "rhymes."¹⁰⁰ Beginning in 2010, the Committee entered into litigation with the Parole Commission regarding Due Process that remains ongoing.¹⁰¹

4. Private Prisons

The District of Columbia was an early customer of the private prison industry. Due to the demands of an overcrowded system, economic woes and political pressure from Congress, the District began shipping prisoners to out-of-state prisons and private facilities in 1997.¹⁰²

These prisons, understaffed and poorly managed, became the next target for litigation: *Green v. D.C.* (challenge to unconstitutional conditions in non-District, non-federal institutions housing District prisoners under contract)¹⁰³; *Inmates of Sussex II v. Angelone* (challenge to Virginia contract facility's punitive and degrading use of four-point restraints--strapping prisoners to steel bunks for up to 48 hours--resulting in the cessation of restraint practices and the subsequent **[*143]** termination of the District's contract with the facility)¹⁰⁴; *In re Northeast Ohio Correctional Center* (challenge to operations at contractor-operated private facility in Youngstown, Ohio, housing some 1400 District prisoners, challenging barbaric health care, unrestrained violence and other abuses; resulted in substantial damages to class members and injunctive relief)¹⁰⁵; *Wright v. Corrections Corp. of America* (long-running suit challenging cost and other terms of for-profit telephone service at contractor-operated facilities housing District inmates out-of-state).¹⁰⁶

5. The Diaspora of the D.C. Revitalization Act

The District faced a financial collapse in 1995 with an operating deficit of more than \$ 722 million.¹⁰⁷ The District's bonds were at junk status and the City ran out of money to pay its bills.¹⁰⁸ A Control Board was imposed by

⁹⁹ See *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996) (holding that the district should not be enjoined to comply with the board's procedural regulations).

¹⁰⁰ Talk:History, Wikiquote (last updated Apr. 11, 2017), <https://en.wikiquote.org/wiki/Talk:History>. There has been debate on whether the quote is from Twain or if he was misquoted. See Historic reoccurrence (last updated Jan. 15, 2018), https://en.wikiquote.org/wiki/Historic_reoccurrence.

¹⁰¹ *Daniel v. Fulwood*, 823 F. Supp. 2d 13 (D.D.C. 2011), rev'd 766 F.3d 57, 60 (D.C. Cir. 2014). After the case was remanded, the U.S. Parole Commission promulgated a new regulation that applied factors set out in the D.C. Board's 1972 guidelines. *Daniel v. Smoot*, 287 F. Supp. 3d 74, 77-78 (D.D.C.) (2018), adhered to in part on reconsideration, *316 F. Supp. 3d 79 (D.D.C. 2018)*.

¹⁰² See Jonathan Smith, *The District of Columbia Revitalization Act and Criminal Justice: The Federal Government's Assault on Local Authority*, 4 U. D.C. L. Rev. 77, 90 (1997) (noting that the District of Columbia's experience with private prisons prior to the Revitalization Act had been "very poor," and advocating against the mandatory use of private prisons for D.C. felons). Mr. Smith was at the time the Executive Director of the Project. He is currently the Executive Director of the Committee.

¹⁰³ See *Green v. District of Columbia*, No. 90-793, 1991 U.S. Dist. LEXIS 1977, at 2 (D.D.C. Feb. 13, 1991).

¹⁰⁴ See Annual Report of the District of Columbia Prisoners Legal Services Project (2001) (on file with Wash. Law. Comm.).

¹⁰⁵ *Busey v. Corr. Corp. of Am. (In re Northeast Ohio Corr. Ctr.)*, No. 99-3733, 2000 U.S. App. LEXIS 8780, at 2 (6th Cir. Apr. 28, 2000).

¹⁰⁶ *Wright v. Corr. Corp. of Am.*, No. 1:00-CV-00293(GK), *2016 U.S. Dist. LEXIS 6855 at 2-3* (D.D.C. Jan. 21, 2016).

¹⁰⁷ Jon Bouker, *The D.C. Revitalization Act: History, Provisions and Promises* 81 (2008), <https://www.brookings.edu/wp-content/uploads/2016/07/appendix-1.pdf>.

Congress and in 1997, the National Capital Revitalization and Self-Government Improvement Act of 1997 (known as the Revitalization Act) was passed into law.¹⁰⁹ The Revitalization Act had widespread impact on the District's finances and was an assault on home rule, but it kept the City afloat. Part of the Faustian bargain struck by the District was that it lost control of large portions of its criminal justice system. The Superior Court and the Court of Appeals, as well as the Public Defender Services, were federalized; Lorton was closed and convicted D.C. Code offenders were transferred to the federal Bureau of Prisons; the D.C. Parole Board was abolished and the parole function assigned to the United States Parole Commission; and the District was forced to rewrite its criminal sentencing laws to eliminate indeterminate sentences (parole eligible sentences) and impose on newly convicted prisoners sentences with a determinate length.¹¹⁰

[*144] The federalization of the criminal justice system sent District prisoners from the frying pan into the fire. They were removed from a decrepit and poorly run prison system under local control and close to home, to a harsh and unabiding federal system far from home and out of reach from political pressure. The initial years following the Act were chaotic and dangerous. D.C. prisoners were first often sent to private facilities or rural local jails.¹¹¹ Violence often ensued.¹¹² Once arriving in federal custody, the panoply of issues addressed through litigation and policy by the Committee in the ensuing twenty years took hold.

///. SOME OF THE MOST SIGNIFICANT CASES AND PROJECTS REGARDING PRISON CONDITIONS

A. D.C. Jail Cases

The Project took on some of its most significant, and sustained, efforts on behalf of District prisoners when it became lead counsel in the long-running D.C. Jail litigation, which focused on the issues of severe overcrowding and grossly inadequate health care. The litigation originated in the 1970s with two class action lawsuits--*Campbell v. McGruder* and *Inmates of DC Jail v. Jackson*--seeking redress for unconstitutional conditions at the D.C. Jail. *Campbell* was filed on behalf of pretrial detainees confined to the Jail.¹¹³ *Inmates of D.C. Jail* was filed on behalf of sentenced prisoners housed at the Jail.¹¹⁴ For many years thereafter, the District consistently violated the District Court's orders in both cases and failed to bring the Jail up to minimum constitutional standards.¹¹⁵

1. Inadequate Health Care

The provision of medical services at the D.C. Jail and the Correctional Treatment Facility ("CTF") has had a troubled history. The D.C. Department of Corrections ("DOC"), which had also managed medical care at the Lorton prison complex before its closure in 1998, had faced multiple lawsuits over the DOC's deliberate indifference to **[*145]** prisoners' medical and mental health needs.¹¹⁶ There were similar problems at the D.C. Jail, which continued after the closing of Lorton.¹¹⁷

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Balanced Budget of 1997, Pub. L. No. 105-33, § 11231, **111 Stat. 251, 745 (1997)**; see also [D.C. Code § 24-131](#) (2001); [Smith, supra](#) note 102 (discussing the potential ramifications of the Act); D.C. Sent'g Comm., Revitalization Act, [dc.gov, https://scdc.dc.gov/page/revitalization-act](https://scdc.dc.gov/page/revitalization-act) (last visited Nov. 2, 2018).

¹¹¹ See generally *supra* notes 102-106 and accompanying text.

¹¹² *Id.*

¹¹³ [Campbell v. McGruder, 416 F. Supp. 111, 112 \(D.D.C. 1976\)](#).

¹¹⁴ [Jackson, 416 F. Supp. at 120](#).

¹¹⁵ Hearings, *supra* note 82 (testimony of Jonathan M. Smith, Exec. Dir. of the DC Prisoners' Legal Serv. Project).

¹¹⁶ *Id.*

In 1995, the U.S. District Court for the District of Columbia removed medical services at the Jail from the DOC's control, placing these services under the temporary supervision of a court-appointed Receiver.¹¹⁸ This decision came after the District's failure to address problems with medical care raised in two lawsuits brought against the Jail in 1971 and 1975.¹¹⁹ Among other issues, these cases alleged that DOC was failing to provide minimally adequate medical care for inmates at the D.C. Jail.¹²⁰

The Receiver determined that medical care should be provided by an outside entity, and awarded a contract in March 2000 to the Center for Correctional Health and Policy Studies (CCHPS).¹²¹ CCHPS was a nonprofit organization formed by medical staff who had provided services at the Jail under the Receivership.¹²² CCHPS was awarded a contract to provide services at both the Jail and the CTF.¹²³

Unfortunately, CCHPS's performance as medical provider was poor, and broadly impacted by the overcrowded conditions at the Jail during the period 2000-2005. In 2003, with the dismissal of the *Campbell v. McGruder* class action, the role of the court-appointed monitor also ended, leaving no on-site monitoring of compliance with court orders and the end of the population cap at the Jail.¹²⁴ A 2004 report on medical services at the Jail performed by the U.S. General Accounting Office confirmed that the DOC had failed to provide sufficient oversight of medical services, while limiting access to the facility [*146] by advocates.¹²⁵ During the period 2003-2004 in particular, the Project received constant complaints from prisoners at the Jail and the CTF, in particular from women prisoners.¹²⁶

In 2004, the Project initiated a study in collaboration with the Johns Hopkins Bloomberg School of Public Health, focusing on women in the Jail and CTF.¹²⁷ In November 2005, the Project produced a public report, in collaboration with Johns Hopkins, *From the Inside Out: Talking to Incarcerated Women About Healthcare*.¹²⁸

In October 2006, the D.C. Council organized a joint hearing of the Committee on the Judiciary and the Committee on Health, in response to the Project's advocacy efforts.¹²⁹ That month, the District awarded a three-year contract

¹¹⁷ D.C. Dep't of Corr., Dep't of Corrections Closes Final Prison and Accomplishes Major Milestone, dc.gov (Nov. 19, 2001), <https://doc.dc.gov/release/department-corrections-closes-final-prison-and-accomplishes-major-milestone>.

¹¹⁸ *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357, 1359. (D.C. Cir. 1998).

¹¹⁹ See *Jackson*, 416 F. Supp. at 119; *Campbell*, 416 F. Supp. at 111.

¹²⁰ See *Campbell*, 416 F. Supp. at 111.; *Jackson*, 416 F. Supp. at 119. The CTF was not part of these lawsuits.

¹²¹ U.S. General Accounting Office, Medical Services Generally Met Requirements and Costs Decreased, but Oversight is Incomplete 1 (2004), <https://www.gao.gov/assets/250/243270.pdf>.

¹²² Id.

¹²³ Id.

¹²⁴ D.C. Prisoners' Legal Services Project & Johns Hopkins Bloomberg School of Public Health, *From the Inside Out: Talking to Incarcerated Women About Health Care 1* (2005), <http://www.washlaw.org/pdf/WomensHealth-Hopkins.pdf>.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ D.C. Dept. of Corr., Department of Corrections Institutes Community-Oriented Healthcare for Inmates, dc.gov (Oct. 2, 2006), <https://doc.dc.gov/release/department-corrections-institutes-community-oriented-healthcare-inmates>.

to Unity Healthcare, a community-based medical and mental health service provider. ¹³⁰ Unity utilized a public health model of health care delivery, with its medical providers working both in the Jail/CTF and in the community, providing continuity of care for people released to the community. ¹³¹

2. Overcrowding

The Jail's long-running inability to provide adequate health care was due in large part to perpetual overcrowding. In 1985, Judge William Bryant found that the conditions at the Jail continued to violate prisoners' constitutional rights:

Time and time again, defendants [the District has] requested the court to defer to their accumulated wisdom, to stay its hand, to give them more time. Time and again, these requests have been honored in the hope and expectation that defendants would solve these problems expeditiously and effectively. However, instead of matters improving[,] they have deteriorated. ¹³²

[*147] The Court's findings were based on many factors, including evidence that assaults and stabbings were regular occurrences. ¹³³ To help remedy these unconstitutional conditions, Judge Bryant imposed a population cap of 1,694 at the Jail. ¹³⁴ This population cap was routinely exceeded, at times by several hundred prisoners. ¹³⁵

After the passage of the D.C. Revitalization Act in 1997, and the transfer of sentenced D.C. prisoners to the federal Bureau of Prisons (BOP), the D.C. Department of Corrections retained control over the D.C. Jail, yet conditions did not improve. ¹³⁶

In the early 2000s, overcrowding at the Jail was at its peak. Predictably, the extremely dangerous and unconstitutional conditions at the Jail exploded into bloodshed over four days in December 2002. ¹³⁷ Givon Pendleton and Mikal Gaither, two pretrial detainees held at the Jail, were brutally murdered. ¹³⁸ A third detainee, Bradley Autman, was near-fatally stabbed. ¹³⁹ In less than two years leading up to the December 2002 murders, District officials had increased the number of inmates housed at the Jail by more than 40%. ¹⁴⁰ At the same time, the Project and other advocates had issued repeated and urgent warnings to the DOC about life-threatening conditions as the Jail became more frequent and ominous. ¹⁴¹ The District ignored them. ¹⁴²

¹³⁰ Id.

¹³¹ Id.

¹³² [U.S. v. District of Columbia, 703 F. Supp. 982, 985 \(D.D.C. 1988\)](#) (emphasis omitted) (quoting *Campbell v. McGruder*, No. 71-1462, Mem. & Order at 50 (D.D.C. July 15, 1985)).

¹³³ Kathy Patterson & Council of D.C., Bill 15-31, "District of Columbia Jail Improvement Act of 2003" 14 (2003), [http://lims.dccouncil.gov/562/B15-0031-COMMITTEERE PORT.pdf](http://lims.dccouncil.gov/562/B15-0031-COMMITTEERE%20PORT.pdf).

¹³⁴ [United States v. District of Columbia, 703 F. Supp. at 986.](#)

¹³⁵ Id.

¹³⁶ See Patterson, *supra* note 133, at 10-11.

¹³⁷ Id. at 3.

¹³⁸ Id.

¹³⁹ Complaint at 9, *Beale v. D.C.*, No. 1:04-CV-0959 (D.D.C. June 10, 2004); see also Serge F. Kovaleski, Inmate Dies, Another Hurt in D.C. Jail Stabbings, *Wash. Post* (Dec. 17, 2002), https://www.washingtonpost.com/archive/local/2002/12/17/inmate-dies-another-hurt-in-dc-jail-stabbings/08612add-803a-4527-8fd7-d073380ab25e/?utm_term=.00a165a342c8.

¹⁴⁰ Complaint, *supra* note 139, at 4.

¹⁴¹ Id. at 4-6.

In 2004, the Project, joined by plaintiffs' attorney Douglas Sparks and the law firm of Covington & Burling, filed a wrongful death action on behalf of Pearl Beale, the mother of Mr. Pendleton.¹⁴³ Mr. Pendleton was a pretrial detainee murdered by a man awaiting trial (and later convicted) on two murder charges.¹⁴⁴ No corrections officer [*148] witnessed the murder.¹⁴⁵ After four years of extremely contentious litigation, the District settled the case in what is believed to be the largest individual damages settlement in the history of litigation against the D.C. Department of Corrections.¹⁴⁶

Yet despite securing damages for two victims of overcrowding at the Jail, the dangerous conditions persisted. In 2004, *Campbell v. McGruder* was quietly dismissed after a successful motion by the District that the continuing consent decree violated the terms of the Prison Litigation Reform Act.¹⁴⁷

B. Federal Prisoners

The Project's merger with the Committee in 2006 enabled the Project to take on litigation involving the federal Bureau of Prisons (BOP), where D.C. felons had been held since 1998. By 2006, approximately 7,000 D.C. prisoners were in the BOP.¹⁴⁸

Because D.C. prisoners are commonly convicted of more typical "state offenses" (e.g. robbery, low-level drug distribution, assault, arson, homicide), rather than more typical "federal offenses" (high level drug conspiracies, financial crimes, interstate offenses), D.C. prisoners tend to be held in the highest security BOP facilities.¹⁴⁹ Under the calculus of the BOP, "street crimes" like those for which D.C. prisoners tended to be convicted, merited a higher security classification.¹⁵⁰

With the movement of D.C. prisoners into the BOP, litigation challenging conditions of confinement became more complex than when challenging conditions at Lorton. The BOP is a much larger system, with more than 210,000 prisoners, with D.C. prisoners representing a small fraction of the total population.¹⁵¹ Additionally, because [*149] there is no single constituency for federal prisoners, Eighth Amendment litigation involving the BOP had

¹⁴² See *id.* at 10.

¹⁴³ Wash. Law. Comm., Special 40th Anniversary Issue: District of Columbia Settles Case Involving Wrongful Death of Prisoner 15 (2008), <https://www.washlaw.org/pdf/UPDATE-Fa08-FINAL.pdf>.

¹⁴⁴ Jason Cherkis, Pearl Beale Gets Justice: City Gives Biggest Payout in Wrongful Death Of Inmate, Wash. City Paper (Dec. 2, 2008), <https://www.washingtoncitypaper.com/news/city-desk/blog/13056826/pearl-beale-gets-justice-city-gives-biggest-payout-in-wrongful-death-of-inmate>.

¹⁴⁵ *Id.*

¹⁴⁶ Wash. Law. Comm., *supra* note 143, at 15.

¹⁴⁷ [*Campbell v. McGruder*, No. 03-7045, 2004 U.S. App. LEXIS 1069, at 1-2](#) (D.C. Cir. Jan. 23, 2004).

¹⁴⁸ William J. Sabol et al., Bureau of Justice Statistics Bulletin: Prisoners in 2006 2 (2007), <https://www.bjs.gov/content/pub/pdf/p06.pdf>.

¹⁴⁹ Housing of DC Felons Far Away from Home: Effects on Crime, Recidivism and Reentry, Hearing Before the Subcomm. on Fed. Workplace, Postal Serv., and the Dist. of Columbia of the H. Comm. on Oversight and Gov. Reform, 111th Cong., 49, 82 (2010) (testimony of Philip Fornaci).

¹⁵⁰ Martin Austermuhle, D.C. Inmates Serve Time Hundreds of Miles from Home. Is It Time to Bring Them Back?, WAMU, (Aug. 10, 2017), <https://wamu.org/story/17/08/10/d-c-in-mates-serving-time-means-hundreds-miles-home-time-bring-back/>.

¹⁵¹ Sabol et al., *supra* note 148, at 2, 4, 21.

been relatively rare, as compared with litigation involving state prison systems.¹⁵² With the move of D.C. prisoners to the BOP, however, a new constituency for reform in the BOP was created, and the BOP was opened up litigation by attorneys for D.C. prisoners, most significantly by the D.C. Prisoners' Project, now a part of the Committee.

In 2007, the Committee initiated its first case involving the BOP, specifically the federal prison in Lewisburg, Pennsylvania, a facility with a long reputation for brutal conditions. The case, *Womack v. Lappin*, involved a D.C. prisoner, David Womack, who had been held in a solitary confinement cell for 26 days in full body restraints. This was a test of federal officials' claims of qualified immunity in such circumstances, and the Project won an important decision denying those immunity claims.¹⁵³

The BOP proved to be a recalcitrant defendant, and the case was litigated through trial in 2012.¹⁵⁴ Although ultimately an all-white Harrisburg, Pennsylvania jury refused to award damages after a week-long trial in 2012, Womack established that BOP officials could be held accountable for Eighth Amendment violations over claims of sovereign and qualified immunity defenses.¹⁵⁵

In another matter, the Committee challenged the BOP's failure to protect a D.C. prisoner against assault after exposing him falsely as a "snitch." In *Doe v. Wooten*,¹⁵⁶ the Committee and Covington & Burling LLP established the BOP's responsibility to take reasonable steps to insure a prisoner's safety in the face of actual and potential threats.¹⁵⁷ Doe survived two trips to the Eleventh Circuit Court of Appeals, again overcoming qualified immunity and jurisdictional defenses.¹⁵⁸ Ultimately, the BOP was forced to move the plaintiff to a non-BOP facility, where he safely served out his sentence.¹⁵⁹

[*150]

1. Private Prisons

In 2007, the Committee took on the issue of private prisons, which had begun to contract with the BOP. At the time of Lorton's closing, a new private facility, Rivers Correctional Institution (RCI), was opened, with the goal of housing D.C. prisoners through a contract with the BOP.¹⁶⁰ This facility holding about 1,300 prisoners had only one doctor

¹⁵² See Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, [84 N.Y.U. L. Rev. 881, 974-75, 978 \(2009\)](#).

¹⁵³ [Womack v. Smith, No. 08-2229, 2009 U.S. App. LEXIS 2840, at 1-8](#) (3d Cir. Feb. 12, 2009).

¹⁵⁴ See *Womack v. Smith*, No. 1:06- [CV-2348, 2012 WL 1245752](#) (M.D. Pa. Apr. 13, 2012).

¹⁵⁵ This is a personal recollection of Phil Fornaci. See generally Judgment at 1, *Womack v. Smith*, No. 1:06-CV-2348, Doc. 237 (M.D. Pa. 2012); see also [Womack, supra](#) note 153, at 2-8.

¹⁵⁶ *Doe v. Wooten*, No. 1:07- [CV-2764-RWS, 2010 WL 2821795](#) (N.D. Ga. July 16, 2010).

¹⁵⁷ *Id.* at 4-5.

¹⁵⁸ See *Doe v. Wooten*, No. 09-13707, 2010 WL 1645136, at 2 (11th Cir. Apr. 26, 2010); [Doe v. Wooten, 747 F.3d 1317, 1326 \(11th Cir. 2014\)](#).

¹⁵⁹ Personal recollection of Phil Fornaci.

¹⁶⁰ The D.C. Revitalization Act included language that one half of all D.C. prisoners were to be held in private contract facilities in the BOP. Although this goal was never possible, on average nearly 500 D.C. prisoners are held at RCI since 2000 at any given time. See *Doing Time: Are DC Prisoners Being Adequately Prepared for Reentry with Equal Access to BOP Services?*, Hearing Before the Subcomm. on Fed. Workplace Postal Serv., and the Dist. of Columbia of the H. Comm. On Oversight and Gov. Reform, 110th Cong., 6, 25 (2007) (statements of Rep. Eleanor Holmes Norton and Harley G. Lappin).

on staff, who worked less than full time at the facility.¹⁶¹ Complaints about medical care at RCI flowed from D.C. prisoners since its opening.¹⁶²

In 2007, the Committee, again with Covington & Burling, filed a class action lawsuit challenging the failure to provide adequate medical care.¹⁶³ Filed initially in D.C. District Court, the case was quickly transferred to the Eastern District of North Carolina.¹⁶⁴ This move was ultimately fatal to the case.

Mathis alleged a wide range of deliberate indifference to prisoners' medical needs against the BOP and the private contractor (the GEO Group), citing Eighth Amendment, the Rehabilitation Act and third-party beneficiary contract liability theories.¹⁶⁵ In a 2009 decision, the District Court dismissed all claims.¹⁶⁶ Most importantly, the Court ruled against finding liability against GEO Group, based primarily on an earlier Fourth Circuit decision, *Holly v. Scott*.¹⁶⁷ In that somewhat odd decision, the Fourth Circuit concluded that GEO's ownership and operation of Rivers did not convert GEO into a government [*151] actor and did not permit the private acts of GEO to be imputed to the BOP as government action.¹⁶⁸

Under the *Holly* precedent, even plaintiffs seeking injunctive relief rather than damages under a Bivens action, could not find relief against either the GEO Group or RCI.¹⁶⁹ Similar reasoning was applied in a subsequent suit filed by the Committee in 2010, *Somie v. GEO Group, Inc.*,¹⁷⁰ again seeking injunctive relief on behalf of prisoners at RCI, this time over denial of religious rights.¹⁷¹ The District Court again rejected these claims, citing *Holly* to support the proposition that GEO Group is not a government actor, and extinguishing even claims for injunctive relief in non-Bivens actions.¹⁷²

2. Mental Health and Solitary Confinement

In 2012, the Committee filed a class action on behalf of all prisoners with mental illness held in the BOP's "supermax" ("ADX") facility in Florence, Colorado.¹⁷³ The case was developed after two years of investigation and

¹⁶¹ Complaint at 28-29, *Mathis et al. v. GEO Grp., Inc.*, No. 1:07CV1155 (D.D.C. June 28, 2007).

¹⁶² See Robert Piere, N.C. Prison Doesn't Serve D.C. Inmates Well, Critics Say, *Wash. Post* (Oct. 15, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/14/AR20071014_01420_pf.html.

¹⁶³ Complaint, *supra* note 161, at 34-37.

¹⁶⁴ Transfer Order at 1, *Mathis et al. v. GEO Grp., Inc.*, No. 1:07-cv-01155-RMU (D.D.C. Feb. 28, 2008).

¹⁶⁵ Complaint *supra* note 161, at 27, 40-43, 46.

¹⁶⁶ *Mathis et al. v. GEO Grp., Inc.*, No. 2:08-CT-21-D, 2009 BL 380966 at 23 (E.D.N.C. Nov. 9, 2009).

¹⁶⁷ *Id.* at 6 (citing [*Holly v. Scott*, 434 F.3d 287, 293-94 \(4th Cir. 2006\)](#)).

¹⁶⁸ [*Holly*, 434 F.3d at 292-94](#).

¹⁶⁹ See *id.*

¹⁷⁰ *Somie v. GEO Group, Inc.*, No. 5:09- [CT-3142-FL, 2011 WL 4899692](#) (E.D.N.C. Oct. 13, 2011).

¹⁷¹ *Id.* at 1.

¹⁷² *Id.* at 3-5.

¹⁷³ Initially filed as *Bacote v. Fed. Bureau of Prisons*, on behalf of five individual prisoners. It was later amended as *Cunningham v. Fed. Bureau of Prisons* in a class action complaint, which also included The Center for Legal Advocacy d/b/a Disability Law Colorado as a plaintiff. *Cunningham v. Fed. Bureau of Prisons*, No. 12-cv-01570- RPM-MEH, 2016 WL 8786871 (D. Colo. Dec. 29, 2016).

analysis, in response to a plea from a friend of a Mr. Bacote, a man with both intellectual and psychiatric disabilities.¹⁷⁴ Co-counsel were attorneys from Arnold & Porter LLP.¹⁷⁵

The ADX facility is the BOP's most secure prison, nicknamed by staff the "Alcatraz of the Rockies."¹⁷⁶ Depending on which unit they are in, prisoners spend at least 20, and as much as 24, hours per day locked alone in their cells.¹⁷⁷ The cells measure approximately 12 feet by 7 feet, and have solid walls that prevent prisoners from viewing the interiors of other cells or having direct interactions with other prisoners.¹⁷⁸

[*152] Despite the well-documented dangers of placing prisoners with mental illness in this kind of isolation, the BOP routinely placed such men at the ADX.¹⁷⁹ In some units, psychotropic medication is not allowed, regardless of the prisoner's diagnosis.¹⁸⁰ Individual, private counseling was not provided to any prisoners, nor were mental health evaluations done of new arrivals to the ADX, as required by BOP policy.¹⁸¹

By 2014, the BOP engaged in settlement negotiations, which continued for two years.¹⁸² During this period, the BOP revised its policies around mental illness and other relevant rules, clearly in response to this case.¹⁸³ The BOP also created small facilities at three different BOP facilities to house prisoners with mental illness who could not be subjected to solitary confinement.¹⁸⁴ Many of the original plaintiffs, all of whom suffer from serious mental illnesses, were removed from the ADX during the early years of the litigation.¹⁸⁵

In 2016, the parties entered into a comprehensive settlement agreement that expanded mental health services, out-of-cell time and programming for residents with mental illness, along with a commitment to expanded evaluation protocols to exclude most, but not all, prisoners with serious mental illness from the ADX.¹⁸⁶ It also provided for monitoring by outside experts to ensure compliance.¹⁸⁷

3. USP Lewisburg

In 2017, less than one year after settlement of the ADX case, the Committee filed a similar complaint against the BOP, this time focused on the BOP maximum security prison in Lewisburg, Pennsylvania (where David Womack's

¹⁷⁴ Based on the personal recollection of Phil Fornaci.

¹⁷⁵ Cunningham, 2016 WL 8786871.

¹⁷⁶ Complaint at 2, Bacote v. Fed. Bureau of Prisons, No. 1:12 CV01570, 2012 WL 4891269 (D. Colo. July 18, 2012).

¹⁷⁷ Id. at P 22.

¹⁷⁸ Id.

¹⁷⁹ Id. at P 43.

¹⁸⁰ Id. at P 23.

¹⁸¹ Id. at P 47.

¹⁸² Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, at 3, Cunningham v. Fed. Bureau of Prisons, No. 12-cv-01570- RPM, 2016 WL 8786871 (D. Colo. Dec. 29, 2016).

¹⁸³ See U.S. Bureau of Prisons Policy Statement 5310.16, "Treatment and Care of Inmates With Mental Illness," Fed. Bureau of Prisons (May 1, 2014). <https://www.bop.gov/policy/progstat/5310> 16.pdf

¹⁸⁴ Cunningham, 2016 WL 8786871, at 2.

¹⁸⁵ Id.

¹⁸⁶ Addendum to Joint Motion to Approve Settlement, at 3-4, Cunningham v. Fed. Bureau of Prisons, No. 12-cv-01570- RPM, 2016 WL 8786871 (D. Colo. Dec. 29, 2016).

¹⁸⁷ Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, supra note 182, at 14.

case had arisen).¹⁸⁸ Co-counsel in **[*153]** this matter is Latham & Watkins LLP.¹⁸⁹ Lewisburg was designated a "special management unit" in 2009, creating another BOP long-term solitary confinement facility.¹⁹⁰ Numerous D.C. prisoners are housed there.¹⁹¹

Despite the commitments of the BOP in the course of the ADX litigation and settlement, conditions at Lewisburg for prisoners with mental illness are even worse than at the ADX. At this facility, prisoners are locked in their cells for at least twenty-three hours per day (usually more), either alone or with another prisoner.¹⁹² At USP Lewisburg, where there are no psychiatrists on staff or available by phone, prisoners with pre-existing mental illness diagnoses routinely have their psychiatric medications discontinued.¹⁹³ No one-on-one counseling is provided, even for prisoners who have attempted suicide.¹⁹⁴ Use of "four-point restraints," that is, attaching prisoners to a table by their four limbs for days and weeks at a time, is common.¹⁹⁵ The only mental health "treatment" provided is a "therapeutic package" consisting of crossword, word search, and Sudoku puzzles, coloring books, and written instructions on meditation.¹⁹⁶

The *McCreary v. Federal Bureau of Prisons* class action lawsuit was filed in June 2017.¹⁹⁷ More than one year later, defendants' motion to dismiss was denied but no class has yet been certified.¹⁹⁸

This experience of extended litigation is particularly common with regard to USP Lewisburg, where the *Womack* case took more than seven years for trial. In 2011, the Committee initiated another case, with co-counsel at the Pennsylvania Institutional Law Committee and the law firm of Dechert LLP, on behalf of prisoners at Lewisburg.¹⁹⁹ This case, *Richardson v. Kane*, sought to address the rampant violence at the facility, which had resulted in at least two deaths of prisoners during the previous three years.²⁰⁰

[*154] Richardson challenged the practice of placing hostile inmates together in cells and/or recreation cages despite the serious risk that the hostile inmates will cause substantial material harm to each other.²⁰¹ As part of this placement, BOP employees punish inmates who refuse dangerous placements by putting them in restraints for hours at a time, sometimes as long as twenty-four hours or more.²⁰²

¹⁸⁸ *McCreary v. Fed. Bureau of Prisons*, No. 1:17-CV-01011, 2018 BL 221117 (M.D. Pa. June 20, 2018).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1, 5.

¹⁹¹ D.C. Corr. Info. Council, *Inspection Rep.: USP Lewisburg 1* (2015).

¹⁹² *McCreary*, 2018 BL 221117 at 5.

¹⁹³ *Id.* at 6-7.

¹⁹⁴ *Complaint* at 26-28, *McCreary*, 2018 BL 221117.

¹⁹⁵ *Id.* at 28; *McCreary*, 2018 BL 221117, at 7 (M.D. Pa. Jun. 20, 2018).

¹⁹⁶ Ex. A, *McCreary*, 2018 BL 221117.

¹⁹⁷ *McCreary*, No. 1:17-cv-01011-YK-SES (M.D. Pa. Jun. 20, 2018).

¹⁹⁸ *McCreary*, No. 1:17-CV-01011-YK-SAS (M.D. Pa. Jun. 20, 2018).

¹⁹⁹ *Richardson v. Kane*, No. 3: CV-11-2266, 2013 WL 1452962, at 1 (M.D. Pa. Apr. 9, 2013).

²⁰⁰ *Id.* at 2; [Complaint at 2, Richardson, 2013 WL 1452962](#).

²⁰¹ *Richardson*, 2013 WL 1452962, at 1.

²⁰² *Id.* See also *McCreary*, 2018 BL 221117, at 8.

Most claims in the Richardson case were dismissed on a motion to dismiss 2013.²⁰³ In 2015, the Third Circuit Court of Appeals vacated and remanded the case.²⁰⁴ As of 2018, class certification has not been decided, but discovery is ongoing.²⁰⁵

C. Public Advocacy

The D.C. Prisoners' Project ("Project")--before and after its merger with the Committee--not only has fiercely litigated on behalf of prisoners, but also has been able to use public advocacy to achieve further gains, which include creating additional avenues to litigate the District's obligations to those in its custody. These efforts have been most effective with respect to the Jail and CTF, where local District officials retain control. With the end of the Campbell litigation, the Project focused on legislative and other public advocacy efforts to bring about changes in management at the Jail, in particular with regard to the soaring population at the Jail.²⁰⁶

On May 23, 2003, the Council's Committee on the Judiciary issued its report on Bill 15-31, now renamed "The District of Columbia Jail Improvement Act of 2003."²⁰⁷ The goal of the Bill was explicit:

The purpose of Bill 15-31 is to improve what are currently unsafe, unhealthy, overcrowded, and inhumane conditions at the District of Columbia Central Detention Facility ("Jail")... including a classification system and housing plan; institute a population ceiling at the Jail; and the requirement that the facility obtain accreditation by a national professional correctional organization. These specific improvements are designed to result in a safer institution. To fail to pass legislation in this arena would constitute a failure to recognize **[*155]** and act on what is potentially a dangerous situation for inmates, staff and residents of the District of Columbia.

The D.C. Jail Improvement Act finally was enacted in January 2004, but the requirements of the Act were resisted by the D.C. government.²⁰⁸ Among other features, the Act required that the Mayor hire a private consultant to determine the maximum number of people who could be held at the Jail at any one time.²⁰⁹ Despite the findings of the private consultant report, which proposed a population cap, the District refused to issue the cap.²¹⁰ For the next year, the Project engaged in sustained advocacy with the D.C. Council, the Office of the Mayor, and the media, to highlight the District's failure to comply with the Act and set a population cap.²¹¹ Spurred on by the Project's advocacy, a Washington Post editorial on April 26, 2005, "The City as Lawbreaker," noted regarding the District's refusal to comply with the Act, "Whether the [Mayor Anthony] Williams administration is enamored of the law or hates it is secondary to the requirement to obey. The executive is not a law unto itself."²¹²

²⁰³ Richardson, 2013 WL 1452962, at 1.

²⁰⁴ [Richardson v. Bledsoe, 829 F.3d 273, 291 \(3d Cir. 2016\)](#).

²⁰⁵ Richardson, No. 3: [CV-11-2266, 2013 WL 1452962 \(M.D. Pa. 2013\)](#).

²⁰⁶ See generally DC Prisoners: Issues for the Obama Administration, Wash. Law. Comm. (2009), <https://www.washlaw.org/images/docs/Reports%20-%20Issues%20for%20the%20Obama%20Administration.pdf> (addressing D.C. prisoner issues for the Obama administration).

²⁰⁷ [Kathy Patterson & Council of D.C., supra](#) note 133.

²⁰⁸ Id. at 2; District of Columbia Jail Improvement Amendment Act of 2003, D.C. Law 15-62, D.C. Stat. § 24-201.71 (2003).

²⁰⁹ [Kathy Patterson & Council of D.C., supra](#) note 133, at 2.

²¹⁰ Id. at 2; Press Release, D.C. Prisoners' Legal Services Project, D.C. Inmates File Lawsuit Over Mayor's Refusal to Obey the Law (June 29, 2005).

²¹¹ [Press Release, D.C. Prisoners' Legal Services Project, supra](#) note 210.

²¹² The City as Lawbreaker, Wash. Post (Apr. 26, 2005), 2005 WLNR 28689758.

In June 2005, the Project, in collaboration with the law firm of Wiley Rein LLP, filed *Anderson v. Williams* in D.C. Superior Court on behalf of prisoners at the DC jail seeking compliance with the DC Jail Improvement Act.²¹³ For more than two years, the Project pressed for the implementation of a population cap at the Jail through mediation and finally through summary judgment briefing.²¹⁴ In August 2007, Judge Melvin Wright ruled in favor of plaintiffs and granted the relief sought: imposition of a population cap at the D.C. Jail. that the Mayor's duty to establish a cap was a "non-delegable duty."²¹⁵

In October 2007, at a hearing that included members of the media in attendance, the District agreed to set a population cap, but at 3,198 prisoners, nearly double the population under the *Campbell v. McGruder* consent decree, and more than 1,000 prisoners over the target [*156] level established by the District's consultants.²¹⁶ Judge Wright threatened to hold the Mayor in contempt of court for his refusal to set a limit consistent with the requirements of the law, and gave him one week to either agree to a cap within the consultants' recommended range or to take an appeal.²¹⁷ Despite initial public statements indicating an intent to appeal, the District subsequently changed course and agreed to establish a cap on the Jail's population of 2,164, as reported in the *Washington Post* on October 11, 2007.²¹⁸

Much more recently, long after the termination of most Jail litigation, the Committee, working with a panel of distinguished former judges, and lawyers at Covington & Burling LLP, issued extensive investigative reports on various aspects of the criminal justice system in the D.C. region.²¹⁹ The third such report to appear drew attention to continuing areas of concern about conditions of confinement for some 1200 prisoners at the D.C. Jail and 800 prisoners at the Jail's neighboring facility, the contractor-operated Correctional Treatment Facility.²²⁰ The WLC Conditions of Confinement Report discussed several recurring issues that it identified as requiring the prompt attention of the D.C. Department of Corrections and policymakers in the District.

The Committee's report drew significant attention from the media, public, and policymakers.²²¹ The District ultimately did not renew [*157] its contract with CCA, which expired in 2017.²²² Furthermore, the District is

²¹³ Complaint for Declaratory & Injunctive Relief, *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. 2005).

²¹⁴ *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. 2005).

²¹⁵ Order for Summary Judgment, *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. Aug. 24, 2007); Complaint for Declaratory & Injunctive Relief, at 3, 9-10, *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. 2005).

²¹⁶ *Campbell v. McGruder*, No. 1:71-cv-1462, (D.D.C. 1971); Robert E. Pierre, D.C. Judge Pressures City on Jail Population, *Wash. Post* (Oct. 6, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/05/AR2007100502268.html>.

²¹⁷ Pierre, *supra* note 216.

²¹⁸ David Nakamura, D.C. Agrees to Abide by 2004 Limit On Inmates, *Wash. Post* (Oct. 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/10/AR2007101001743.html>.

²¹⁹ Wash. Law. Comm., D.C. Prisoners: Conditions of Confinement in D.C. 1 (2015), http://www.washlaw.org/pdf/conditions_of_confinement_report.pdf.

²²⁰ *Id.* at 2.

²²¹ See Courtney Belme & James Ridgeway, Report Blasts Conditions at District of Columbia Jail, *Solitary Watch* (Aug. 26, 2015), <http://solitarywatch.com/2015/08/26/report-blasts-conditions-at-district-of-columbia-jail/>; Alex Zielinski, Correction Required: The D.C. Jail is Falling Apart. What Should Replace It?, *Wash. City Paper* (July 2, 2015, 11:00 AM), <http://www.washingtoncitypaper.com/news/city-desk/blog/13069734/correction-required-the-d-c-jail-is-falling-apart-what-should-replace-it>; Martin Austerhuhle, Report: Condition of D.C. Jail 'Alarming,' Improvements Needed for Inmates, *WAMU 88.5* (June. 11, 2015), http://wamu.org/story/15/06/11/report_condition_of_dc_jail_alarming_improvements_needed_for_inmates; Aaron C. Davis, D.C. mayor's budget plan keeps tax cuts intact, alters school improvement funding, *Wash. Post* (Mar. 24, 2016), https://www.washingtonpost.com/local/dc-politics/dc-mayors-budget-plan-keeps-tax-cuts-intact-changes-school-improvement-funding/2016/03/24/2e55c5c4-f132-11e5-89c3-a647f7fce95e0_story.html?utm_term=.80cf48d6e5ec.

moving forward with plans to build a new jail to replace the D.C. Jail and CTF.²²³ These plans have sparked controversies about the conditions of confinement of youth charged as felons, as well as concerns about the funding and transparency of the project, which are separate issues of their own.²²⁴

In the fourth of its criminal justice reports, the Committee analyzed prison conditions for women in the District.²²⁵ Women's prison conditions tend to receive even less public attention than those of men. Although the population of women in prison is significantly smaller than that of their male counterparts, the challenges they face and the social repercussions of their treatment in prison are arguably greater. Significant litigation challenged the conditions for women in D.C. prisons in the 1990s on an equal protection theory, but the D.C. Circuit ruled en banc that women could not claim an equal protection violation because they were not "similarly situated" vis a vis male prisoners.²²⁶ Prison conditions for women remain poor.²²⁷ Moreover, the report came to the conclusion that the vicious cycle of poverty, criminal activity, incarceration, recidivism, and breakdown of families and communities seemed to have an even more adverse impact on women of color than their male counterparts.²²⁸ Recent years have seen a disturbing growth in the incarceration of women. In fact, the years 1980-1998 saw an increase of more than 500 percent in incarcerated women nationwide.²²⁹ In the District, this increase was even more exaggerated, as the same time period saw an 800 percent increase in [*158] the number of women prisoners.²³⁰ This increase in incarceration resulted in more mothers being taken away from their children and contributed to the breakdown of families and other community institutions.²³¹ These breakdowns inevitably fortified the cycle of poverty, incarceration and recidivism.

While addressing these broader systemic issues, the report focused on the hurdles that women face as part of the criminal justice system. It concentrated on the CCA's operations at CTF, where D.C. women are jailed, and at Hazelton Secure Female Facility ("SFF"), a federal prison in West Virginia where the largest number of D.C. women convicted of felonies are housed.²³² The report concluded by providing eleven recommendations to address the issues identified in its findings, focusing on a lack of trauma care, family support, training and education, and proper

²²² See District to Assume Operation of the Correctional Treatment Facility in February of 2017, D.C. Dep't of Corr. (Mar. 25, 2016), <https://doc.dc.gov/release/district-assume-operation-correctional-treatment-facility-february-2017>.

²²³ Elizabeth O'Gorek, What's Going on With Plans for New DC Jail? ANC 6B New Hill East Task Force holds meeting amid rumors, Hill Rag (Oct 3, 2017), <http://hillrag.com/2017/10/03/whats-going-plans-new-dc-jail/>.

²²⁴ Martin Austerhuhle, Report: Condition of D.C. Jail 'Alarming,' Improvements Needed for Inmates, WAMU 88.5 (June 11, 2015), <http://wamu.org/story/15/06/11/report> condition of dc jail alarming improvements needed for inmates.

²²⁵ Wash. Law. Comm., D.C. Women in Prison: Continuing Problems and Recommendations for Change (2016), available at <http://www.washlaw.org/pdf/dc> women in pri son report.pdf.

²²⁶ [*Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 913 \(D.C. Cir. 1996\)](#).

²²⁷ Wash. Law. Comm., *supra* note 225, at 3.

²²⁸ *Id.* at 7.

²²⁹ See *id.* at 17 (citing U.S. Gen. Acct. Off., Women in Prison: Issues and Challenges Confronting U.S. Correctional Systems (B-280204) (Dec. 1999) ["1999 GAO Report"], at 2.).

²³⁰ See *id.* (citing Bureau of Justice Statistics, Sentenced Female Prisoners Under the Jurisdiction of State or Federal Correctional Authorities, December 31, 1978-2014 (July 29, 2015) (showing an increase from 45 female prisoners in 1980 to 359 female prisoners in 1998 for the District of Columbia)).

²³¹ See *id.* at 7 (explaining that the cycle of removing mothers from their homes breaks down the family and continues the cycle for future generations).

medical care.²³³ The Women in Prison report garnered some media attention,²³⁴ but its impact on law and policy so far has been limited, in part because many of the recommended remedies would be dependent on amendments to federal legislation.

IV. PAROLE AND POST-INCARCERATION

The Committee's efforts to protect the rights of incarcerated individuals are not limited to the conditions of the incarceration itself. The Committee also has sought to enforce D.C. prisoners' rights to seek and obtain parole, as well as to counteract the numerous barriers faced by returning citizens and individuals with criminal convictions who were never incarcerated at all.²³⁵

One of the less visible changes brought by the D.C. Revitalization Act, in addition to making D.C. prisoners into federal prisoners, was the federalization of D.C. parole. Under the D.C. Revitalization Act, [*159] the D.C. Board of Parole was disbanded.²³⁶ Decisions regarding parole grants for people with so-called "indeterminate sentences," that is, sentences that include parole eligibility after serving a minimum prison term, were moved under the jurisdiction United States Parole Commission (USPC).²³⁷

Additionally, the USPC was given control over revocations of parole and supervised release.²³⁸ Under the sentencing scheme adopted after enactment of the D.C. Revitalization Act, the USPC was given jurisdiction over the activities of formerly incarcerated people, with the power to re-incarcerate parolees or people on supervised release for failure to comply with USPC release rules.²³⁹ Day-to-day supervision is provided by the federal Court Services and Offender Supervision Agency (CSOSA), a federal agency which derives its legal authority from the USPC.²⁴⁰

The Committee has led efforts to protect the rights of D.C. prisoners and those released from BOP custody against the unregulated actions of the USPC. In *Sellmon v Reilly*,²⁴¹ a 2008 case litigated by non-WLC attorneys,²⁴² District Court Judge Ellen Huevelle ruled that the USPC had violated the ex post facto clause of the U.S.

²³² See *id.* at 6.

²³³ Wash. Law. Comm., *supra* note 225, at 87-94.

²³⁴ See Rachel Kurzius, Report: Some D.C. Women Imprisoned More Than 1000 Miles From Their Families, DCist (Mar. 25, 2016, 12:25 PM), http://dcist.com/2016/03/report_dc_wo_men_in_prison.php.

²³⁵ See [DC Prisoners' Project](#), *supra* note 62; see also "Returning Citizens Opportunity to Succeed Amendment Act of 2017," Statement Before the Comm. on the Judiciary of Council of the District of Columbia (Dec. 7, 2017) (Testimony of Philip Fornaci, at 1, 3, 4, 7).

²³⁶ See Balanced Budget of 1997, Pub. L. No. 105-33, § 11231, **111 Stat. 251, 745 (1997)**; see also [D.C. Code § 24-131](#) (2001).

²³⁷ See *id.* at § 11212(a); see also Philip Fornaci, Restoring Control of Parole to D.C.: A Presentation to the D.C. Council, (Mar. 16, 2018) at 5.

²³⁸ See Balanced Budget of 1997, *supra* note 236; see also Philip Fornaci, *supra* note 237, at 3-5 (Parole was abolished for federal offenders in 1984, under the Sentencing Reform Act, which created the practice of "supervised release." As an alternative to parole and probation for people convicted of federal felonies, a supervised release period starts after a person is released from prison. He or she is put under direct supervision and monitoring by a federal agency of their compliance with release rules, with the possibility of re-incarceration or other sanctions for violation of those rules. Supervised release does not replace a portion of the sentence of imprisonment, like parole does, but rather is imposed in addition to the time spent in prison. Under the D.C. Revitalization Act, all D.C. sentences for felony offenses committed after August 4, 2000 no longer included parole eligibility, but instead included a period of supervised release following incarceration.)

²³⁹ See *id.*; see also Fornaci, *supra* note 237, at 6 (citing [D.C. Code § 24-131](#)).

²⁴⁰ See *id.* at § 11233(a)-(d); see also Philip Fornaci, *supra* note 237, at 5, 18, 19.

Constitution in applying its own rules in making parole grant decisions.²⁴³ By substituting its own parole guidelines and practices in place of the rules formerly used by the D.C. Board of Parole, the Court found that **[*160]** the USPC had significantly increased the risk that D.C. prisoners would serve longer terms of incarceration.²⁴⁴

In the wake of the Sellmon decision, the Committee initiated a massive effort to secure rehearings for hundreds of D.C. prisoners denied parole prior to Sellmon, mobilizing the private bar to provide representation to D.C. prisoners at the far-flung facilities where they were being held.²⁴⁵ Several hundred D.C. prisoners were subsequently released on parole after Sellmon, and the Committee has continued its efforts to provide legal representation to D.C. prisoners at parole hearings.²⁴⁶

In 2010, the Committee filed another case challenging the USPC's handling of parole grant hearings, this time for D.C. prisoners convicted of offenses that occurred prior to 1985. The Sellmon decision required the USPC to apply the D.C. Board of Parole's rules in place beginning in 1985, but did not consider the guidelines in place for prisoners whose offenses occurred prior to 1985.²⁴⁷ Those parole decisions should have been adjudicated under rules issued by the D.C. Board of Parole in 1972. The Daniel v. Fulwood complaint was dismissed on a motion to dismiss in 2011, but that decision was reversed in 2014 by the Court of Appeals.²⁴⁸ In 2015, the Committee and the USPC reached a settlement agreement, with the USPC issuing new regulations to formalize parole criteria for prisoners whose offenses occurred from 1972 to 1985, utilizing the former D.C. Board of Parole 1972 Guidelines.²⁴⁹

In 2017, the Committee returned to court to seek enforcement of the settlement agreement in Daniel, arguing that the USPC had failed to apply the 1972 Guidelines in good faith.²⁵⁰ While the Court allowed the USPC broad discretion in decision-making in these cases, the Court found that the USPC had violated the agreement with regard to the frequency of re-hearings.²⁵¹

[*161] The Committee has also challenged certain parole and supervised revocation practices of the USPC. In Chandler v. U.S. Parole Commission, the Committee successfully challenged the labeling of a prisoner as a sex offender by the USPC despite the lack of any conviction for a sex offense.²⁵² In Ford v. Caulfield, the Committee secured a judgment that a formerly incarcerated D.C. resident who had repeatedly had his parole "revoked" when

²⁴¹ See [Sellmon v. Reilly, 561 F. Supp. 2d 46 \(D.D.C. 2008\)](#).

²⁴² See [id. at 48](#) (Sellmon was filed by Jason Wallach, formerly of the law firm of Dickstein Shapiro).

²⁴³ [Id. at 49](#).

²⁴⁴ *Id.*

²⁴⁵ See "Housing of DC Felons Far Away from Home: Effects on Crime, Recidivism and Reentry," Statement Before the Subcomm. on Fed. Workforce, Postal Serv. And the District of Columbia of the H. Comm. on Oversight and Gov't Reform, 111th Cong. (May 5, 2010) (testimony of Philip Fornaci, at 1-2).

²⁴⁶ *Id.*

²⁴⁷ See [Sellmon, 561 F. Supp. 2d at 49](#).

²⁴⁸ See [Daniel v. Fulwood, 766 F.3d 57, 58 \(D.C. Cir. 2014\)](#).

²⁴⁹ See Fornaci, *supra* note 237, at 10 (citing [Daniel v. Fulwood, 766 F.3d 57, 58](#) (D.C. Cir. Sept. 12, 2014)).

²⁵⁰ Motion to Enforce Settlement Agreement, Daniel v Fulwood, No. 1:10-cv-00862 (D.C. 2017).

²⁵¹ Memorandum Opinion, Daniel v. Smoot, No. 1:10-cv-00862 (D.D.C. 2018).

²⁵² See [Chandler v. U.S. Parole Comm'n, 60 F. Supp. 3d 205, 224-25 \(D.D.C. 2014\)](#).

he was in fact no longer on parole. ²⁵³ Mr. Ford had been repeatedly arrested and imprisoned for violations of parole even after his parole term had ended. ²⁵⁴ The Project subsequently secured significant monetary damages on his behalf. ²⁵⁵

Concerns regarding the USPC's handling of both parole granting decisions and its parole and supervised release revocation practices have compelled the Committee and other D.C. organizations to seek the restoration of local control of parole from the USPC. Currently, almost 80 percent of the USPC's caseload is D.C. prisoners and supervisees, a federal agency acting in the role of local paroling agency. ²⁵⁶ The USPC acts without authority from, and not in collaboration with, any D.C. government agency.

By 2018, approximately 1,700 of 4,600 D.C. prisoners held in BOP facilities were incarcerated through USPC revocations of parole and supervised release, not for committing new offenses. More than 1,000 D.C. prisoners languish in the BOP despite eligibility for parole. ²⁵⁷ One-third of the D.C. Jail population is made up people accused of parole, supervised release and probation violations. ²⁵⁸ Successful efforts to localize parole, and to reform parole and supervision practices in D.C., could result in the lowest level of mass incarceration in the District in more than 40 years.

The Committee also has sought to highlight the numerous employment, housing and other barriers - beyond incarceration, fines, or other aspects of any formal sentence - faced by individuals who have been arrested or convicted. These barriers, commonly referred to as "collateral consequences," were the subject of the second of the Committee's **[*162]** series of four criminal justice reports. ²⁵⁹ The Collateral Consequences Report examined the various penalties imposed by ancillary rules, statutes and broader systemic practices that make it difficult for those with conviction records to get jobs, housing, or public assistance, or to participate in civil life, under the laws of the District, Maryland, and Virginia. ²⁶⁰

The impact of these collateral consequences on the broader community is substantial, given the large number of people with criminal records and the racially disparate impact of the criminal justice system. For instance, the Collateral Consequences Report noted that, at the time, about 10 percent of the District's population - some 60,000 people - had been convicted of an offense. ²⁶¹ As the Committee previously reported, African Americans make up a disproportionate share of those arrested in the District, ²⁶² and such disparities "appeared to persist through the court process, with about 87 percent of D.C. Superior Court cases that could be matched to an arrest [in the period studied by the WLC Arrest Report] involving African American defendants." ²⁶³ The D.C. Sentencing Commission similarly found that of the 2,154 felony offenders sentenced by the D.C. Superior Court in 2012, almost 93 percent

²⁵³ See [Ford v. Caulfield, 652 F. Supp. 2d 14, 19, 22 \(D.D.C. 2009\)](#).

²⁵⁴ [Id. at 14-15](#).

²⁵⁵ Stipulation of Settlement and Dismissal, Ford v Mitchell, C.A. 10-1517 (D.C.D.C. 2014).

²⁵⁶ See Fornaci, *supra* note 237, at 7.

²⁵⁷ *Id.* at 8.

²⁵⁸ *Id.* at 3.

²⁵⁹ Wash. Law. Comm., The Collateral Consequences of Arrests and Convictions under D.C., Maryland, and Virginia Law (Oct. 22, 2014) [hereinafter Collateral Consequences Report] http://www.washlaw.org/pdf/wlc_collateral_consequences_report.pdf.

²⁶⁰ *Id.* at Exec. Summary.

²⁶¹ See *id.* at 1.

²⁶² See *supra* notes 27-39, and accompanying text.

²⁶³ See Collateral Consequences Report, *supra* note 259, at 3 (citing WLC Arrest Report at 27).

were African-American,²⁶⁴ and the Collateral Consequences Report noted that "overall, the rate of incarceration of African Americans in D.C. has been estimated to be some 19 times the rate of whites."²⁶⁵ The report also noted the disproportionately high share of African Americans in the Maryland and Virginia prison populations.²⁶⁶

The report's findings regarding some of the most significant collateral consequences include:

Employment: Inquiries into criminal history can present a significant hurdle for individuals looking for jobs, especially in the wide variety **[*163]** of field - such as commercial drivers, elevator mechanics, and property managers in the District - that require occupational licenses.²⁶⁷ Although laws in the District, Maryland, and Virginia each provide certain protections intended to prevent an individual's conviction from serving as a de facto bar to employment - including "ban-the-box" provisions in the District and Maryland limiting employers' ability to inquire about an applicant's criminal history - licensing boards and employers retain broad discretion to consider the applicant's criminal history, and limits on the use of criminal history to deny a license or job generally are not subject to effective judicial enforcement.²⁶⁸

Housing: Each of the three jurisdictions allows private agents or landlords to freely inquire into, and reject, applicants based on criminal history.²⁶⁹ With respect to public housing (including rent assistance), federal regulations require that public housing authorities and other owners of assisted housing be permitted to take criminal history into account to some degree but leave local authorities and owners "significant discretion with respect to how an individual's criminal history should affect his or her eligibility for benefits."²⁷⁰ Of the three jurisdictions studied, only the District had enacted regulations intended to limit the exercise of that discretion.²⁷¹

Civic Participation: All three jurisdictions prohibit individuals convicted of a felony from voting or serving on a jury, among other rights, for at least some period of time. Virginia's constitution provides for the permanent disqualification of individuals with felony convictions unless their rights are individually restored by the Governor.²⁷² Although Virginia's current policies attempt to streamline the rights-restoration process - including by proactively identifying individuals who may qualify to have their rights restored after they are no longer incarcerated or under active supervision - the continuation of those policies is subject to the discretion of the then-sitting Governor. The District and Maryland, in contrast, have provided for the automatic restoration of voting and other rights to qualified individuals.²⁷³

[*164] Some of the Collateral Consequences Report's recommendations included (1) strengthening and expanding "ban-the-box" and similar provisions, including by providing for judicial enforcement of such provisions, (2) limiting the discretion of licensing boards, employers and landlords in considering an applicant's criminal history, particularly with respect to years-old convictions or convictions for minor offenses, and (3) providing for the

²⁶⁴ Id. at 3-4 (citing District of Columbia Sentencing and Criminal Code Revision Commission, 2012 Annual Report, at 52, (April 26, 2013), http://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/annual_report_2012.pdf).

²⁶⁵ Id. at 4 (citing M. Mauer & R. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, at 11 (Sentencing Project, July 2007)).

²⁶⁶ See id.

²⁶⁷ See id. at 6.

²⁶⁸ Id. at Exec. Summary, 7.

²⁶⁹ See Collateral Consequences Report, *supra* note 259, at 16-17.

²⁷⁰ Id. at 14.

²⁷¹ See id. at Exec. Summary.

²⁷² See id. at 19; *Howell v. McAuliffe*, 292 Va. 320, 349 (2016) (holding that the Governor may not restore rights to individuals with felony convictions on a blanket basis).

²⁷³ Collateral Consequences Report, *supra* note 259, at 20.

automatic restoration of voting rights upon an individual's release from incarceration (as is the case in the District), rather than requiring the individual to wait until all aspects of a sentence have been completed (as in Maryland) or until the Governor affirmatively restores the individual's rights (as in Virginia).²⁷⁴

The Collateral Consequences Report has served as a resource for advocates and others in analyzing the impact of collateral consequences,²⁷⁵ as well as for the Committee's own continued advocacy on these issues.²⁷⁶

V. FUTURE DIRECTIONS

The most prominent problems affecting prisoners nationally include the continuing use of solitary confinement, the mistreatment of prisoners with disabilities (most prominently people with mental illness) and of course the sheer number of people incarcerated. These same issues are central to our advocacy on behalf of D.C. prisoners as well, and will likely remain the areas of focus for the Committee in the years ahead in both litigation and public policy advocacy.

D.C. prisoners are disproportionately held in high security settings in the BOP, and their conditions of confinement in these facilities will continue to dominate the Committee's work. The Committee's litigation with federal prisoners with psychiatric disabilities held in the BOP's highest security prisons - the ADX and USP [*165] Lewisburg - has revealed shocking violations of basic human rights, including torture, and deliberate indifference to prisoners' mental health needs. While our litigation on these issues will seek to address the needs of D.C. prisoners in particular, the Committee will address these issues in broad-based legal actions so as to address inhumane conditions for all BOP prisoners.

Widespread use of solitary confinement exacerbates mental health symptoms, with several federal courts finding that placement of people with serious mental illness into solitary confinement settings is a violation of the Eighth Amendment.²⁷⁷ Nonetheless, many of the Committee's clients moved out of the ADX or USP Lewisburg in the course of litigation, due to their mental health diagnoses, have been placed in solitary confinement in other high security prisons.²⁷⁸ Further, in late 2019, the BOP is expected to open a new "supermax" prison in Thomson, Illinois and another new high security prison in Eastern Kentucky a few years later.²⁷⁹ Given the BOP's track record in mistreating prisoners with psychiatric disabilities, and the BOP's continuing budget shortfalls despite this expansion, we can anticipate that these prisoners will suffer most severely in the new facilities.

²⁷⁴ See *id.* at Exec. Summary, 23, 25.

²⁷⁵ See Jason Juffras et al., The Impact of "Ban the Box" in the District of Columbia, DC Auditor, at 4 (June 10, 2016) <http://www.dcauditor.org/sites/default/files/FCRSA%20%20Ban%20the%20Box%20Report0.pdf> (analyzing the District's Fair Criminal Record Screening Amendment Act of 2014 for the Office of the District of Columbia Auditor); see also Equal Rights Center, *Unlocking Discrimination: A DC Area Testing Investigation About Racial Discrimination and Criminal Records Screening Policies in Housing* 11 (Oct. 2016), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>.

²⁷⁶ Bill 21-0706 Fair Criminal Record Screening for Housing Act of 2016, Comm. on the Judiciary of the Council of the District of Columbia, Written Testimony of Owen Doherty, at 1-2 (July 11, 2016), <https://lawyerscommittee.org/wp-content/uploads/2016/07/Washington-Lawyers-Committee-Written-Testimony-Bill-21-0706.pdf> (testifying in support of the Fair Criminal Record Screening for Housing Act of 2016, later enacted as D.C. Law 21-0259).

²⁷⁷ See e.g., *Ind. Prot. And Advocacy Serv. Comm. v. Comm'n*, No. 1:08-cv-01317, [2012 WL 6738517](https://www.courtlistener.com/docket/10000000/2012-wl-6738517/) (S.D. Ind. Dec. 21, 2012).

²⁷⁸ Personal recollection of Phil Fornaci based on contact with former ADX prisoners.

²⁷⁹ Officials: Illinois Prison to Open Next Year, U.S. News (June 10, 2018, 12:28 PM) <https://www.usnews.com/news/best-states/illinois/articles/2018-06-10/officials-illinois-prison-to-open-next-year>; see also Eli Hager, Hal Rogers wants a prison in Letcher County. The Trump administration has doubts, *Lexington Herald-Leader* (Nov.8, 2017), <https://www.kentucky.com/news/state/article183540796.html#storylink=cpyhttps://www.kentucky.com/news/state/article183540796.html>.

The Committee has also turned its attention to the unconstitutional conditions in immigration detention facilities. For example, in *Doe v. Shenandoah Valley Juvenile Center Commission*,²⁸⁰ the Committee sued the owner and operator of an immigration detention facility on behalf a 17-year-old unaccompanied Mexican minor who had been detained at the Shenandoah Valley facility simply because he had entered the United States without authorization after suffering domestic abuse and other violence in Mexico. The case alleges conditions at the Shenandoah facility that "shock the conscience, including violence by staff, abusive and excessive use of seclusion and restraints, and the denial of necessary mental health care."²⁸¹ The complaint **[*166]** also complained of discriminatory harsh treatment of Latino immigrants vis-a-vis white non-immigrant prisoners.²⁸²

Conditions in D.C. jail facilities continue to deteriorate, with the crumbling infrastructure at D.C. Central Detention Facility worsening those conditions.²⁸³ The Committee remains the primary watchdog for conditions in local jail facilities, and will continue this role moving forward.

But the most significant opportunities for addressing the needs of D.C. prisoners may come as the result of non-litigation advocacy, in particular efforts to restore local control of parole to the D.C. government. With parole and supervised release revocations resulting in more than one-third of all D.C. incarcerations,²⁸⁴ reform of parole and supervised release supervision practices could have a dramatic impact on reducing the total number of D.C. prisoners.

Yet even if the Committee is successful in reducing the D.C. prisoner population, as well as in other areas of criminal justice reform, the inherent problems of reintegration into society after a period of incarceration or a criminal conviction will remain. The Committee's work will therefore also continue to include strategies for addressing the impact of criminal records on access to housing, employment and public accommodations. These impacts are most acutely felt by the District's African-American and immigrant communities, whose representation in the criminal system is hugely disproportionate to their numbers in the D.C. population.²⁸⁵ The struggle for criminal justice reform thus remains a vital part of the larger civil rights struggles in which the Committee has been engaged since its founding.

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²⁸⁰ Class Action Complaint at 1, *Doe v. Shenandoah Valley Juvenile Ctr. Comm'n*, No. 5:17-cv-00097 (W.D. Va. Oct. 4, 2017).

²⁸¹ *Id.* at 1.

²⁸² *Id.* at 9.

²⁸³ See Wash. Law. Comm., *supra* note 219, at 12.

²⁸⁴ See Fornaci, *supra* note 237, at 3.

²⁸⁵ See Collateral Consequences Report, *supra* note 259, at 3.