

DECARCERAL PATHWAYS

Lawyerless No More

Once a person is imprisoned, indigent defense stops. But the gravity of mass incarceration demands legal representation to the very end.

By **Jennifer Soble**

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Vincent Boggan fell in love with the law in a prison cell. Over time, he came to love the law's malleability, the space for creativity, the promise—if not reality—of hope. Over thirty-two years in prison, Vincent wrote dozens of legal briefs, sued the Department of Corrections for violations of his civil rights, and helped countless other incarcerated people with creative and often successful legal challenges. Vincent began studying the law for the same reason as most people in prison: to find a way home.

Vincent was sentenced to seventy-five years in prison—essentially a life sentence—for robbing several fast food restaurants when he was just twenty-one years old. His brutally long sentence did not reflect the fact that no one was hurt in any of the incidents, or that he had no prior criminal record, or that just before the robberies he had slid into drug-addled despair after losing both his parents. As the decades ticked by, Vincent overcame his addiction, developed his extraordinary legal mind as well as his artistic talent as a painter, and grew from a lost child into a leader in his community.

But none of these achievements mattered in a system that views incarcerated people as incapable of change. Outraged by the injustice of a seventy-five-year sentence for decisions he made as a young adult, Vincent set out to learn the law to fight for his own freedom.

Vincent learned the law because during most of the thirty-two years he spent in prison, he did not have an attorney, even though we commonly think of access to counsel as a fundamental part of our criminal legal system. As flawed as our system of public defense may be, Americans believe that people trapped in the criminal legal system will not be asked to navigate that horror alone. Under the Sixth Amendment, the government provides counsel to people who are pretrial, and continues to represent them if they face a trial, sentencing, and appeal.

But, as those who are more deeply enmeshed in the criminal legal process quickly learn, assistance of counsel has an expiration date. Although almost everyone in the legal system starts with a lawyer, most people trapped in the system are entirely on their own after their first appeal, which generally ends within the first year or two after conviction. Except for the very rich, anyone with a prison sentence of more than a couple of years will spend most of their incarceration without an attorney. In most places, that means people filing post-conviction claims—which challenge a conviction or sentence based on constitutional violations—must start that process on their own. As a result, an incarcerated person who was convicted after prosecutorial misconduct or ineffective assistance of counsel at trial, for example, must not only secure evidence that their conviction or sentence violated the Constitution, but must also put together legal paperwork that properly and convincingly makes that case. Worse, they must successfully navigate a set of procedural rules so intentionally complicated and confusing that most licensed criminal defense practitioners avoid post-conviction litigation altogether.

It's no accident that incarcerated people face significant barriers to legal representation once in prison. Far from providing a path to rehabilitation or meaningful justice, the

U.S. criminal legal system is designed to entrap and isolate people convicted of crimes, who are disproportionately people of color. The United Nations has called our prison system “a manifestation of the entrenched systemic racism against people of African descent in the United States” and “a legacy of slavery.” If the point is to keep people in cages for as long as possible, providing incarcerated people with legal support becomes as superfluous as providing them with cars. The U.S. criminal legal and prison systems are designed to keep incarcerated people in prison, no matter what. They work exactly as they were intended to.

It is time for that to change. The prison system is an ongoing humanitarian crisis. We can no longer expect incarcerated people to navigate that crisis alone. We must provide incarcerated people with the legal support they need to challenge their ongoing confinement wherever possible.

Some of the most vulnerable incarcerated people are denied counsel even in proceedings explicitly designed to help them *because* of their vulnerability. For example, although most states have a process for releasing incarcerated people who are terminally ill or disabled, almost no state provides lawyers to people who are eligible for this relief. Under these schemes, people eligible for medical release—many of whom are actively dying, or who live with paralysis, or who are experiencing severe cognitive decline—are expected to not only draft compelling legal filings, but are also expected to find their own housing and outside medical care, all from behind prison walls. Nursing homes often have long waiting times and severe restrictions on who they will accept, even though restrictions based on criminal history make little sense for a person so ill that they need nursing home care. Even the most experienced social workers struggle to secure placements for people eligible for medical release. Expecting sick and dying incarcerated people to represent themselves undermines the very existence of these laws.

People who have suffered some of the most extreme harms of the criminal legal system—such as unconstitutional conviction or a sentence that is punctuated by a serious medical diagnosis—need improved access to legal assistance. But so do people who have been harmed in quieter, more common ways. Few people outside the system know that departments of corrections have enormous power to both lengthen *and* reduce sentences. Prison systems can award sentencing credit for participation in programs, in work assignments, and sometimes for no reason at all. Conversely, and perniciously, prison systems can take that sentencing credit away. Prison officials use this power capriciously, sometimes for significant incidents of misconduct, sometimes for technical rule violations, and sometimes for seemingly no reason at all. In an extreme example, the Illinois Department of Corrections revoked sentencing credit for seriously mentally ill people who deteriorate while in solitary confinement, leading to sentences that were years—even decades—longer than they should have been. Legal advocates can significantly move up an incarcerated person’s release date simply by advocating to ensure that they get the sentencing credit that they deserve, while ensuring that credit is not taken away illegally or unjustly.

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Perhaps those most in need of legal assistance are the hundreds of thousands of people, like Vincent, who are serving life or virtual life sentences with no hope of being released from prison. As is so often the case, Vincent was serving a sentence that was manifestly unfair but not necessarily illegal under Illinois laws. Even if a seventy-five-year sentence made sense to Vincent's judge at the time, few could argue that after thirty years Vincent's continued incarceration served a valid penological purpose. After more than three decades in prison, Vincent was an elder, an undeniable asset to his community. He had become a prolific painter, creating gorgeous, hyperrealistic pieces. He worked with a prominent local journalist to expose some of the most egregious harms in Chicago's criminal legal system. He was a source of emotional support for his large family, with whom he talked almost every day. And, although institutional disciplinary history is often a poor measure of rehabilitation, Vincent had not had a single disciplinary infraction in decades.

For Vincent, the only hope of freedom was clemency, an act of "grace" that is usually

held exclusively by state governors or, for those in the federal system, the president. Unencumbered by the burdensome rules that govern other forms of post-conviction relief, clemency has historically been a nimble vehicle to correct excessive sentences, unjust prosecutions, or criminal legal events that feel unjust years or decades after the fact. Governors and presidents used to grant clemency routinely, but it has become extremely rare since the 1950s.

However, while the use of clemency has plummeted, the number of people for whom clemency is the only possible avenue for freedom has skyrocketed. Before the 1970s, only seven states authorized life-without-parole sentences, and even those states rarely imposed them. Today every state allows life or virtual life sentences, and more than 200,000 people are currently serving these draconian prison terms. For them, clemency is the most probable path out of prison, and it is generally the only way for an incarcerated person to ask for release from prison based on their rehabilitation and personal growth.

There are many reasons that clemency applicants *should* have representation. Clemency is a slow process, subject to rules that feel both pointless and burdensome. Successfully navigating it often depends on receiving help from someone with experience in clemency. Still, the right to counsel does not extend to clemency, leaving most incarcerated people to pursue their only hope for freedom on their own.

Despite being an exceptionally skilled legal worker, Vincent wasn't able to successfully secure his own freedom because of the restrictions attendant to incarceration. He could not call the prosecutor on his case, track down missing case files, or ring up social service providers to put together a release plan. Legal research was time-consuming and the resources he had access to were woefully incomplete, at best. Vincent had the skills and aptitude to secure his own freedom, but he did not have access to the basic tools to effectively do so.

Having a lawyer changed that: within six months of starting to work with Vincent, the

Illinois Prison Project—the organization I work for, which provides freedom-oriented legal services and support to incarcerated people in Illinois—was able to file a clemency petition for him, resulting in his immediate release.

In other areas of the law where access to counsel is critical but not directly funded by the government—immigration defense, eviction defense, benefits litigation—civil legal aid organizations have worked to provide necessary and often life-saving support. But that has not been true for the representation of incarcerated people seeking their own freedom, leaving a gaping hole in the indigent law landscape. This is true for several reasons, the most important of which is that people generally associate any legal services around liberation as “criminal defense,” which should be funded by the government. Even funders who support organizations that work with incarcerated people are wary of funding work to free people from prison—not because of an ideological disagreement, but because of confusion about the limits of government-funded representation. Sometimes the restriction is more nefarious: The largest civil legal aid organizations are often prohibited by their funders from representing incarcerated people, a funding restriction that feels like a racist and regressive remnant of another era, whatever its intent.

At the heart of the legal underrepresentation incarcerated people face after conviction is the fact that the government continues to put incarcerated people through a cruel and often arbitrary legal system. Only a complete reimagining of our approach to justice will fully alleviate that problem. However, as we work toward that broader goal, we must ensure that incarcerated people have access to the legal tools and assistance they need to contest the system.

Right now, there are no states where all, most, or even a sizable portion of incarcerated people have access to legal support. To meet that need, we must build an infrastructure

for lawyers and legal workers to provide legal support to incarcerated people, which will require time, energy, and dollars from the legal community, private foundations, and governments.

My organization, the Illinois Prison Project, is doing just that in Illinois. In just over five years, our small but growing team has freed more than 144 people, saving thousands of years of prison time and hundreds of millions of dollars for taxpayers. The work that we have done on behalf of our individual clients is crucial, but the mere presence of more watchful eyes in the carceral system in Illinois has, to some degree, defanged the system as a whole. With some nudging from attorneys, rusty mechanisms for release have been revived and expanded, and new ones have been created.

Those who rightly worry about legitimizing an inherently illegitimate criminal legal system will likely resist any call for more stakeholders or systems players to engage with that system, even a call to organize routine legal resources to help incarcerated people navigate the carceral state. It is true that bringing lawyers—even well-resourced public defenders—into the criminal legal system has not stopped the drumbeat of mass incarceration and the harm it has caused, especially to poor communities. In “Poor People Lose,” Paul Butler compellingly argues that the right to counsel focuses on the individual impacted by the system rather than the system as a whole. Because the criminal legal and prison systems are intentionally designed to oppress poor people, providing them with attorneys has not only failed to change that system, but serves to legitimize it. Butler states that securing, promoting, and celebrating the right to counsel has harmed the larger fight for abolition by “obscur[ing] this reality, and in this sense stand[ing] in the way of the political mobilization that will be required to transform criminal justice.” Angélica Cházaro makes similar arguments against the fight for federally funded access to counsel in immigration proceedings. There, too, the right to counsel will not fundamentally change the nature, size, or scope of the immigration system, even while being truly transformative for some individuals trapped within it.

Sitting in tension with Butler’s and Cházaro’s critique is the undeniable fact that access

to counsel for people facing the monstrous criminal legal system is life-changing (perhaps even lifesaving) for many, even though it does not change the system as a whole.

It is true that the representation of incarcerated people will not result in all—or even most—of their freedom, but it will help some. Yet we must invest our time, energy, and dollars from the legal community, private foundations, and even governments to build an infrastructure for lawyers and legal workers to provide legal support to incarcerated people—even if in the short term this appears to run counter to a shared ultimate goal of shrinking the carceral state. Refusing legal support to a person facing criminal charges in the context of our racist, outrageously punitive, and shockingly arbitrary criminal legal system is simply unimaginable, especially given the immense power disparity between almost everyone facing charges and the state. That power disparity and the harm it produces increases exponentially once a person is incarcerated. We can no longer look away.

That answer is unsatisfying, and it should be. Both activists and those of us working to build systems of legal support for incarcerated people and providing direct legal services must constantly engage with the tension that will inevitably arise between the direct representation of a single person and broader abolitionist goals. That does not mean that every decision an individual lawyer makes will actively advance the long-term goal of abolition, as opposed to the short- or mid-term goal of decarceration. Instead, legal workers fighting on behalf of individual clients must identify when and how their work can contribute to the larger goal of dismantling the prison system, even while they work within its confines to free individual clients.

One powerful way that attorneys representing incarcerated people can further the goal of abolition is by supporting incarcerated people who want to add their voices and stories to the abolitionist movement. Incarcerated people are at the center of abolition, but structural, geographic, and technical barriers make it nearly impossible for them to participate in that movement in a sustained way. For many, incarcerated people—their

accomplishments, their passions, the fulsome lives they have forged despite constant abuse from their captors, to say nothing of the harms they suffer at the hands of the state—are too abstract, distant, and unknown. This silencing helps no one but the system itself; strengthening the connection between an incarcerated person and the larger community usually has the dual benefits of helping their legal case *and* the fight for radical change to the system.

Many incarcerated people want to share their stories, and share them widely, but are simply unable to do so because of the severe restrictions on their ability to communicate with the outside world. Every phone call, letter, and email between an incarcerated person and the outside world is read by prison officials. Communications are often delayed, and in some cases denied, interrupting vital relationships between incarcerated people and their loved ones and also movement-sustaining communications between incarcerated people and the organizers, educators, and journalists. Lawyers can help here. Even when cut off from everyone else, incarcerated people have a right to communicate privately with their attorney. Through that relationship, lawyers can be an introduction or a conduit between incarcerated people and journalists and scholars, who can publish and publicize their work. They can share incarcerated people's stories with judges and parole boards, but also with legislators and policymakers considering broader reform. And, of course, lawyers can connect their incarcerated clients to organizations working toward abolition, so that they can add their voices to the call for the end of prisons.

Finally, like public defenders, lawyers representing incarcerated people are uniquely situated to educate the wider community about the nefarious apparatus operating just out of sight. Fairly quickly, lawyers or legal organizations working within a prison system will be able to identify not only singular stories of abuse or system failures, but the kind of systemic patterns that make it impossible to write off individual harms as isolated instances. With their clients' consent and the full recognition that incarcerated people remain trapped in the system when lawyering fails, lawyers can work in concert with incarcerated people and abolitionists to gather and organize the widespread

evidence of prisons' failure that has been accumulating for decades. Lawyers working for incarcerated people can explicitly make themselves of use to organizers and activists working for abolition while they fight for their individual clients' liberation.

Since his release three years ago, Vincent has gotten married, bought a home, and is helping to raise his niece. But his passion is still the law, and he is using his vast legal skill to help those still trapped in Illinois prisons to fight for their own freedom as a legal worker at the Illinois Prison Project. His story shows that, for incarcerated people, the conditions and restrictions of prison prevent even the sharpest legal minds from prevailing in a criminal legal system that is often pointless, burdensome, and arbitrary.

Years and even decades of freedom are too easily lost to machinations of an imperfect and cruel legal system that is designed to silence those it harms. Providing legal support to incarcerated people can help disrupt that system and can directly result in freedom. The stakes are too high for us to continue to ask incarcerated people to fight their oppressors alone.

Image: [Tricia Poledna/Unsplash](#)

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