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The First Step Act and the Brutal Timidity of Criminal Law Reform

MARK OSLER*

INTRODUCTION

As President Donald Trump signed the First Step Act[1] into law on December 21, 2018,[2] a group of my friends, all veteran criminal justice advocates, threw out alternative names for the legislation: the "Last Step Act," the "Baby Step Act," the "Stutter Step Act." The dark mood even at a time of victory reflected a learned reality: criminal justice reform, even when desperately needed, moves at the pace of a line at the DMV.

Almost unique among political issues, there currently exists a true bipartisan coalition in support of systemic and meaningful criminal law reform—a group so strikingly diverse that it has contained almost unimaginable combinations: both George Soros's Open Society Foundations[3] and Koch Industries,[4] for example, and both Senator Mike Lee[5] and Senator Bernie Sanders.[6] Even President Donald Trump, who had historically shown no affinity for reforming a retributive justice system,[7]

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[1] First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[2] *Trump Signs First Step Act*, WASH. POST (Dec. 21, 2018, 3:21 PM EDT), https://perma.cc/6MBY-LQ27.

[3] Leonard Noisette, *Time to Get Serious About Criminal Justice Reform*, OPEN SOC'Y FOUND. (Apr. 30, 2015), https://perma.cc/KZ2W-6R4A.

[4] *Mark Holden: Collaboration on Criminal Justice Reform Works*, 3BL MEDIA (May 30, 2019, 8:00 AM), https://perma.cc/X8D5-VLXW.

[5] Megan Keller, *Mike Lee: Mandatory Sentencing Forces You to Ask, 'Does This Punishment Fit the Crime?'*, THE HILL (Nov. 27, 2018, 10:19 AM EST), https://perma.cc/FD4T-3Y7X.

[6] Shaun King, *How Bernie Sanders Evolved on Criminal Justice Reform*, THE INTERCEPT (June 14, 2018, 11:16 a.m.), https://perma.cc/XZ4R-SB66.

[7] *See generally* Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty Over Central Park Five*, N.Y. TIMES (June 18, 2019), https://perma.cc/J59G-F72C (explaining how Trump took out newspaper advertisements to promote the death penalty just after five young black men were convicted, but the young men were later exonerated).

used his State of the Union speech in 2019 to introduce clemency recipient Alice Johnson and declare that "Alice's story underscores the disparities and unfairness that can exist in criminal sentencing and the need to remedy this total injustice."[8]

It would seem that criminal law reform should be racing along at a breakneck pace, given these unusual alliances and the opportunities given the new Biden administration. News flash: it is not, either at the federal or state level.[9] Here, I will try to describe the reasons for that languid pace and assess the impact of what President Lincoln called (in referring to military progress) "the slows."[10]

Part I below will describe this lethargic pace of reform. It lies in stark contrast with the flashy dynamic that created the need for such reform: those swift surges in retributive impulses in which tough-on-crime measures pile one on top of the other. The harsh treatment for crack cocaine offenses, which ramped up quickly in the mid-1980s and has been very slowly undone for 30-some years, is the model for this tragic pattern. The attention to crack, however, masks a broad movement across criminal law in the same direction, spanning federal and state systems, and reflecting similar results. In addition to crack, I will take a look here at the bizarre and seemingly intractable placement of marijuana in Schedule I of the federal code and then turn to state examples of legislative lethargy in the face of clear injustice.

Part II, in turn, will look at three interconnected reasons for this case of "the slows." Most obviously, it is a political problem enmeshed in the gears of our democracy. The political incentives of increasing penalties usually outweigh the political payoff for reform, though that may be changing. The consistent and powerful influence of prosecutors in developing policy is part of the problem, and these political questions are tangled up (as so often is true in the United States) with issues of race. Second, an uncoordinated and unfocused group of advocates (of which I am one) has, like Baptists in America,[11] formed dozens of strands rather than one strong rope. Finally, there is the persistent lure of incrementalism, which presents small victories to be celebrated while leaving gaping canyons of injustice unbridged.

Finally, Part III will suggest a path to accelerate the process, by addressing each problem in turn. First, reformers must find a way to coordinate efforts rather than competing for resources and attention. I suggest the funding and formation of a meta-organization that can at least provide some focus and coordination to the dozens of disconnected

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[8] Avery Anapol, *Alice Marie Johnson, Granted Clemency by Trump, Moved to Tears at SOTU*, THE HILL (Feb. 5, 2019, 9:54 PM EST), https://perma.cc/F259-2ETG.

[9] *See generally* John F. Pfaff, *Locked Up*, THE BAFFLER, July 2019, https://perma.cc/F924-23QW.

[10] *E.g.*, Kirk Stange, *Does Your Law Firm Have a Case of "The Slows?"*, JD SUPRA (Mar. 19, 2018), https://perma.cc/4PY7-Z5GK.

[11] *See generally* BILL J. LEONARD, BAPTISTS IN AMERICA 13–30 (2005).

advocacy groups searching for relevance. Politics is difficult, of course, but there are signs of hope emerging even now. Still, there needs to be a higher and more consistent profile for criminal justice reform, so that the rewards of supporting reform at least equal the political benefits of being "tough on crime." At the same time, racial appeals need to be called out as such, and there must be an affirmative restructure of the policy apparatus to dilute the unique power of prosecutors to reify the status quo. Perhaps most importantly, reform proposals need to be marked by boldness, particularly in those narrow windows of time when change is most possible.

I. The Languid Pace of Reform

Despite consistent and principled criticism from across the political spectrum, incarceration rates in the United States have not responded in kind. Between 2007 and 2017, imprisonment went down, but only by 10%.[12] (We are still sorting out the effects of the COVID pandemic on incarceration). Of that decline, only a fraction can be attributed to state or national policy and legislative changes at the state and federal level, since some of the decline is likely to have been caused by more reasonable charging and sentencing practices by local prosecutors and judges as they adjust to these same influences.

Crack cocaine is the exemplar for "the slows," even as it stands alone as a focus of recent reforms in the federal system. Marijuana law has moved on a different trajectory; many states have legalized it while the federal system clings systemically to a 1980s mindset, as what many perceive as the least serious narcotic remains categorized in the most serious category among the federal narcotic schedules. Meanwhile, in the states, experiences have diverged even as they generally reflect the slow pace of change.

A. *Crack*

Even when there is a broad and deep consensus on the negative effects of a sentencing measure, reform moves glacially. Crack cocaine, of course, is the template for this dynamic. Federal crack sentences went through the roof beginning in 1986, driven by a mindless 100-to-1 ratio between powder and crack cocaine weight thresholds.[13] The support for that change was strikingly bipartisan, as the Democratic-majority House of Representatives passed the bill by a vote of 378–16.[14]

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[12] Pete Williams, *U.S. Incarceration Rate Drops 10 Percent Over Decade to Hit Lowest Level in 20 Years*, NBC NEWS (Apr. 25, 2019, 9:01 AM EDT), https://perma.cc/Z5SE-QFHF.

[13] *See* Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (establishing mandatory minimum sentences based on the 100-to-1 ratio); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (U.S. SENTENCING COMM'N 1987) (incorporating the ratio into the then-mandatory federal sentencing guidelines).

[14] NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 133

The 1986 crack law was just one of several developments building on one another in the 1980s to lay the groundwork for retributivism and over-incarceration in the federal system.[15] It is, in retrospect, shocking to see the brief period in which so much harm was done. In 1984 alone, Congress managed to create a sentencing commission to formulate mandatory guidelines,[16] re-instate the federal death penalty,[17] eliminate parole prospectively,[18] *and* amend the bail laws by creating broad presumptions of detention in drug trafficking and other cases.[19] Then, 1986 brought the mandatory minimums of the Anti-Drug Abuse Act,[20] and 1987 saw the arrival of the new, and remarkably harsh, mandatory sentencing guidelines.[21] Finally, Congress piled on even more, passing the Anti-Drug Abuse Act of 1988, which (among other provisions) applied the mandatory minimums in drug cases to co-conspirators.[22]

These federal retributive and prison-stuffing measures passed quickly and overwhelmingly. Many states rapidly followed suit, in what Frank Zimring called "copycat state legislation" resulting in skyrocketing rates of incarceration within both the federal system and in the states.[23] The growth of incarceration came quickly and built on itself, on political opportunism, and on alarmist media accounts focused on the "crack epidemic" and other crime.[24] The new regime landed with a terrifying sound for those who had ears to hear—but too few did.[25]

Even setting aside the racial dynamics for a moment,[26] the crack-powder

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(2014) (quoting Barney Frank (D-Mass.), one of the few dissenters in the House, who astutely observed that the legislation was like crack itself, in that it was "going to give people a short-term high, but is going to be dangerous in the long run and expensive to boot").

[15] *See Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM ET), https://perma.cc/RVU8-C2ZU.

[16] Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1 (1984).

[17] *See id.* § 3559.

[18] *See generally id.* (tying the end of parole with the forthcoming institution of mandatory guidelines on Nov. 1, 1987).

[19] *See generally* The Bail Reform Act of 1984, 18 U.S.C. § 3141–3150 (2019); United States v. Salerno, 481 U.S. 739 (1987) (ruling against the constitutional claims that the Act was unconstitutional because the presumption of detention appeared to run afoul to the presumption of innocence under due process).

[20] Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[21] *See* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 1987).

[22] Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[23] Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 332 (2005).

[24] *See id.* at 329–30.

[25] One of those who failed to think through the consequences of these laws was me—I served as a federal prosecutor in Detroit from 1995–2000 and enforced these statutes in narcotics and other cases.

[26] *See generally U.S. Sentencing Commission Hearing, 2/25/02: Powder Cocaine, Crack Cocaine, and*

disparity never made any sense. Crack is made out of powder cocaine (by cooking it up with water and baking soda),[27] usually by a street-level dealer or a similar low-level player.[28] In other words, it is powder cocaine that is brought into the United States, distributed through the country, wholesaled within a city, and then distributed into neighborhoods. It is only at the lowest rungs of the ladder that crack even *exists*. Thus, the crack-powder disparity was prioritizing the incapacitation of those people who were least important to the whole, the least culpable, and the most easily replaced (and, as it turned out, the least white).[29]

Within a few years, warning bells began to sound. United States District Court Judge J. Lawrence Irving quit the bench in 1990, citing the harsh new drug laws.[30] A Reagan appointee, Irving said he "just can't do it anymore."[31] In 1992, Professor Daniel Freed of Yale, whose writings influenced the creation of sentencing changes of the mid-1980s,[32] decried the "unvarnished cruelty" of mandatory minimum drug sentences.[33] Recognizing the racial outcomes they had created, in 1995 the United States Sentencing Commission[34] itself voted to entirely eliminate the ratio between crack and powder, but the move was thwarted by Congress and what the New York Times properly referred to as "a timid President Clinton."[35]

By that point, in 1995, everyone knew or should have known how wrong crack sentences were. In preparation for its own vote on equalizing crack and powder ratios, the Sentencing Commission produced a staff report

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Race, 14 FED. SENT'G REP. 204, 204–10 (2002) (noting the testimony of Wade Henderson, Executive Director of the Leadership Conference on Civil Rights, who placed the racial injustice of the crack debacle at the forefront of his testimony).

[27] *Crack Cocaine Fast Facts*, NAT'L DRUG INTELLIGENCE CTR., https://perma.cc/4F49-N7FV (last visited June 3, 2021).

[28] *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1288 (1995).

[29] *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 74 (2019) (discussing that in 2013, 83% of the people charged with trafficking crack were Black, but only 5.8% were white—in that same year, in contrast, black defendants comprised only 31.5% of the less-harshly-punished powder cocaine caseload).

[30] *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES (Sept. 30, 1990), https://perma.cc/TTD2-8Q2R.

[31] *Id.*

[32] Neil A. Lewis, *Daniel J. Freed Dies at 82; Shaped Sentencing in U.S.*, N.Y. TIMES (Jan. 22, 2010), https://perma.cc/3GEW-6NLZ.

[33] Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1752 (1992).

[34] In discussing the push for reform, I focus on the Sentencing Commission. While other actors certainly played a role (including advocates, courts, and some members of the legislature) it was the Sentencing Commission that most clearly illustrates the arc of reform across the time period examined.

[35] *Cocaine Sentencing, Still Unjust*, N.Y. TIMES (Nov. 5, 1995), https://perma.cc/Z6N7-DZW9.

examining the assumptions that underlay the original legislation. Among other things, the report set out a central dysfunction that powered the whole mess, concluding that "[d]espite the unprecedented level of public attention focused on crack cocaine, a substantial gap continues to exist between the anecdotal experiences that often prompt a call for action and the empirical knowledge on which to base sound policy."[36] In other words, the legislation was based on stories, not data. The report also exploded the myth of racial neutrality, revealing that Blacks and Hispanics accounted for 95.4% of crack convictions, while over half of crack users were white.[37]

Some may debate whether or not there was clear racist intent at the time the 100-to-1 ratio was implemented.[38] At any rate, by the time that unjustifiable racial disparities were thoroughly quantified, it is hard to imagine a reason other than bias for why the problem was not immediately corrected by those with the power to do so. That correction did not happen.

The Sentencing Commission, even after the failure of its equalization proposal in 1995, stayed on task in seeking a change that Congress would accept. In 1997, they tried again with the same conclusion, reiterating the 1995 report with a more modest reform proposal.[39] In 2002, the Commission released another report on crack sentencing, with both more pointed factual conclusions and more modest policy proposals.[40] This time, the Commission specifically found that the then-current penalties exaggerated the relative harmfulness of crack,[41] that those penalties were too broad and usually were applied to lower-level offenders,[42] that they were disproportional to those applied to other offenses,[43] and that the ratio's severity "mostly impacts minorities."[44] The 2002 report acknowledged that the data was in—and that the facts did not support the 100-to-1 ratio.[45]

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[36] U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY vi (1995), https://perma.cc/L75S-5P3A.

[37] *Id.* at xi.

[38] *See generally* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 164 (2017) (evaluating Congress's role and concluding: "[b]ecause the hundred-to-one ratio had so little to justify it, and because African Americans were more likely to be involved in the crack trade, the law's harsher treatment of crack defendants became one of the most grotesque examples of racial discrimination in the criminal justice system").

[39] *See generally* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), https://perma.cc/ZV3Q-4YF2.

[40] *See generally* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), https://perma.cc/FYA4-SUDP.

[41] *See id.* at 93.

[42] *See id.* at 97.

[43] *See id.* at 100.

[44] *See id.* at 102.

[45] *See id.* at 102, 107 (suggesting that the crack threshold be raised by a factor of five, creating a 20-to-1 ratio).

Still, nothing happened. We knew for certain that the 100-to-1 ratio was racist. We knew it rested on disproven "facts," such as the myth of crack-fueled "child predators."[46] We knew it did not meet the mandate of proportionality. And yet, nothing happened.

In 2007, the Sentencing Commission tried again to convince Congress through a lengthy report,[47] this time in combination with a small reform of its own that survived challenge by the legislature. That modest change dialed down the offense level for crack offenses by two,[48] a change that did allow for lower sentences under the guidelines while not deviating too drastically from the mandatory minimums that remained in the statutes. Finally, after two decades, there was a crack in the 100-to-1 ratio wall.

That crack widened in 2010, when Congress passed (and President Obama eagerly signed) the Fair Sentencing Act, which altered the weight thresholds for mandatory minimums applying to crack and powder to 18-to-1.[49] This was a big change, but the good news was mitigated by two strange facts. First, instead of equalizing crack and powder sentences, an unusual new ratio was employed. The odd ratio of 18-to-1 was reportedly a compromise worked out between Senators Dick Durban and Jeff Sessions.[50] The second unfortunate anomaly was that the reform was not made retroactive[51]—that is, it did not apply to those already sentenced, meaning that those already in prison would continue to suffer under a measure that had been rejected as too harsh.

The second anomaly—the failure to make this important change retroactive to those already sentenced—was not fixed until President Donald Trump signed the First Step Act in December of 2018.[52] Thus, it took over eight years, six years of the Obama administration and two under Trump, to make this right. The other anomaly, the failure to equalize the sentencing of crack and powder cocaine, remains in both the statute and the sentencing guidelines as of July, 2021.

And so, finally, some measure of reform was accomplished in relation to crack after literally decades of everyone knowing that the status quo was wrong. But here is the kicker: crack is the *success story* of criminal justice reform (at least in the federal system)—it is the best that we have done.

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46 *See generally* U.S. SENTENCING COMM'N, *supra* note 39.

47 *See generally* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), https://perma.cc/FM5T-5JR3.

48 *Id.* at 9.

49 Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

50 Gary Fields & Beth Reinhard, *Jeff Sessions, Civil-Rights Groups Find Some Common Ground on Crack Sentencing*, WALL ST. J. (Dec. 7, 2016, 1:57 PM ET), https://perma.cc/2AUC-PNNU.

51 *See Frequently Asked Questions: 2011 Retroactive Crack Cocaine Guideline Amendment*, U.S. SENT'G COMMISSION, https://perma.cc/U3CW-M4RB (last visited June 3, 2021).

52 *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

Outside of the changes relating to crack, there has been virtually no systemic reform at the federal level, and too little at the state level.

B. *Marijuana as a Schedule I Narcotic*

In 1970, Congress tried to create order in narcotics control by organizing problematic[53] drugs into five progressively less harmful "schedules" that were defined by three key metrics:[54] whether or not the substance has an accepted medical use, potential for abuse, and safety of use under medical supervision if there is an accepted medical use.[55] Thus, drugs with a supposed "high potential for abuse,"[56] with "no currently accepted medical use"[57] and "a lack of accepted safety for use . . . under medical supervision"[58] are categorized in Schedule I.[59] Conversely, Schedule V includes drugs that have a "low potential for abuse," relative to those in other schedules,[60] a "currently accepted medical use,"[61] and "limited physical dependence or psychological dependence" relative to other drugs.

As one might expect, Schedule I includes "hard drugs" such as mescaline and heroin.[62] Schedule II, in turn, includes cocaine (which has an accepted medical use).[63] Schedule III contains what are perceived to be less serious drugs like codeine and amphetamine.[64]

Inexplicably, in 1970 Congress put marijuana[65] right in the middle of Schedule I,[66] labeling it a threat equal to heroin and limiting its use to

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[53] I avoid describing the drugs in these schedules as "illegal," as most of them are legal under certain circumstances, such as when prescribed or in authorized research.

[54] *See generally* Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[55] 21 U.S.C. § 812(b) (2018) (codifying Comprehensive Drug Abuse Prevention and Control Act of 1970).

[56] *Id.* § 812(b)(1)(A).

[57] *Id.* § 812(b)(1)(B).

[58] *Id.* § 812(b)(1)(C).

[59] *Id.* § 812(b)(1).

[60] *Id.* § 812(b)(5)(A).

[61] 21 U.S.C. § 812(b)(5)(B).

[62] *Id.* § 812 Schedule I(a)–(c) (2018).

[63] *Id.* § 812 Schedule II (2018); *see Position Statement: Medical Use of Cocaine*, AM. ACAD. OF OTOLARYNGOLOGY–HEAD AND NECK SURGERY (Apr. 21, 2021), https://perma.cc/X2DY-TLEW (stating that cocaine is used medically as an anesthetic).

[64] 21 U.S.C. § 812 Schedule III(a)(1), (d)(1).

[65] *See* David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 184–85 (2018) (explaining that the motivation for this regulation was in part driven by racism and the stereotyping by those who assumed marijuana was a drug used by minorities). *See generally* 26 U.S.C. § 4741 (repealed 1971) (listing marihuana as a taxable commodity).

[66] 21 U.S.C. § 812 Schedule I(c)(10).

research purposes under strict regulation.[67] Here was another instance of a mountainous error, contrary to all logic,[68] that embedded itself within the law despite decades of efforts to supplant it.

From the start, there was push-back against the bizarre placement of marijuana in Schedule I. Contemporaneous with the development of the schedules, President Richard Nixon asked for a report on marijuana from the National Institute of Mental Health. The expert report he got hardly supported the equalization of heroin and marijuana; rather, it recommended that marijuana be decriminalized and was titled "Marijuana: Symbol of Misunderstanding."[69] Both Congress and President Richard Nixon ignored this logic and did nothing, setting a template for all of his successors to date.[70]

In 1972, an advocacy group petitioned for rescheduling of marijuana, which could be accomplished administratively by the Attorney General.[71] The National Organization for the Reform of Marijuana Laws (NORML) asked that marijuana either be shifted to Schedule V or dropped from the listings altogether.[72] That also went nowhere. Similar administrative reviews spurred by petitions in 1986 and 2002 met similar fates, despite growing evidence that undermined the rationale for keeping marijuana in Schedule I.[73]

While the federal government sat on its hands, state governments began to act on their own. Leading the way, in 1996 California legalized marijuana for medical purposes through a ballot initiative and was soon followed by five other states (Alaska, Arizona, Nevada, Oregon, and Washington) in 1998.[74] The way in which the people spoke in those states—declaring explicitly that marijuana did have medical uses—drove a stake through the heart of the stated rationale for placing marijuana in Schedule I. In the ensuing years, of course, the acceptance of medical marijuana reached the overwhelming majority of Americans. As of 2019, only four states (Idaho, Kansas, Nebraska, and South Dakota) barred all forms of marijuana and its active ingredient under state law,[75] while eleven states and the District of

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[67] *See id.* § 823.

[68] *See* National Org. for the Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 134 (D.D.C. 1980) (adding more confusion to the senselessness of the classification is the bare fact that two commonly used legal substances, alcohol and nicotine, meet each of the criteria for Schedule I yet were not included—this point was raised by advocacy groups early on, and ignored).

[69] Katner, *supra* note 65, at 188.

[70] *See* United States v. LaFroscia, 354 F. Supp. 1338, 1340–41 (S.D.N.Y. 1973).

[71] *See* 21 U.S.C. § 811(a) (2015).

[72] National Org. for the Reform of Marijuana Laws v. DEA, 559 F.2d 735, 742 (D.C. Cir. 1977).

[73] Gonzales v. Raich, 545 U.S. 1, 15 n.23 (2005); Katner, *supra* note 65, at 190.

[74] James Brooke, *The 1998 Elections: The States—Drug Policy; 5 States Vote Medical Use of Marijuana*, N.Y. TIMES (Nov. 5, 1998), https://perma.cc/PE7K-7AH2.

[75] *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES, https://perma.cc/E3WZ-

Columbia had legalized marijuana for non-medical recreational use.[76]

The administration of Barack Obama strained to deal with this state-level shift in the law. While the Department of Justice declared in 2013 that it would enforce federal marijuana laws in conflict with state law only in certain conditions,[77] it did nothing to move marijuana out of Schedule I.

The failure of the Obama administration to make this obvious move is especially perplexing. Keeping marijuana on the top schedule had broad impacts, not the least of which was that it hindered research into the effectiveness of the medical marijuana that was flowing through the state systems.[78] Even with a President and Attorney General who held themselves out as progressives and had the power to change the scheduling without the involvement of Congress, nothing happened—the Controlled Substance Act and its nonsensical categorization of marijuana remained in place eight presidents after it was enacted.[79]

In what seems like a cruel jest, Obama-era Attorney General Eric Holder asserted just *after* he left that office that he supported moving marijuana out of Schedule I, saying, "You know, we treat marijuana in the same way that we treat heroin now, and that clearly is not appropriate. So, at a minimum, I think Congress needs to do that."[80] As Holder must have known, the law made re-scheduling his job, not Congress's.[81] As with crack sentencing, the scheduling of marijuana is a problem everyone knows about but no one wants to fix.

C. *State Initiatives*

Even as the federal system struggled to right the most basic wrongs, similar movements were proceeding in the states. While some of the state reforms have been significant, they are limited in significant ways that reflect the difficulty of reversing the harsh-on-crime policy ratchet.

8HFC (last updated May 17, 2021).

[76] *Id.* (listing Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington—since 2019 other additional states have passed adult use measures).

[77] *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Attorneys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), https://perma.cc/9CF3-FS38.

[78] Ariana Eunjung Cha, *Marijuana Research Hampered by Access from Government and Politics, Scientists Say*, WASH. POST (Mar. 21, 2014), https://perma.cc/C7W2-XN7U.

[79] Bill Piper, *There's Something Missing from Our Drug Laws: Science*, WASH. POST (Apr. 28, 2016, 12:09 PM EDT), https://perma.cc/USU7-2JUN; *see* John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why It's Unlikely Anytime Soon*, BROOKINGS INSTITUTION (Feb. 13, 2015), https://perma.cc/9M8D-T2LJ.

[80] Francis X. Clines, *The Might-Have-Beens of Marijuana*, N.Y. TIMES (Feb. 24, 2016, 5:17 PM), https://perma.cc/U578-LPQZ.

[81] 21 U.S.C. § 811(a) (2015).

In the end, state-wide measures may prove to be less significant than the national movement to elect progressive District and County Attorneys,[82] a project that wisely does an end-run around the lethargy of legislatures in enacting reform by going straight to the broad discretion in the hands of prosecutors. The quick and significant success of this initiative is to be applauded, but it also establishes a stark contrast with the slow pace of policy change at the state and national level. It is fair to say that these local actions are at least in part a product of our broader failures and the frustration this produces.

A look at three states offers a glimpse into the variety of changes. In terms of sheer numbers, reforms in California have probably been most significant, while Florida has done little, even though the need for reform has been made evident. Alaska, meanwhile, passed extensive reforms but quickly backtracked in the face of a perceived rise in crime.

1. California

California has been a relative success story, as a series of reform measures (combined with other factors) has reduced incarceration from about 171,000 in 2006[83] to around 115,000 people locked up at the start of 2019.[84] The changes in California were propelled by a number of forces, with finances being a primary incentive. At its peak in 2006, a system designed to house about 85,000 people was stuffed with about double that number,[85] meaning that the state had to either spend a lot of money building prisons or reduce the prison population. When he took office in 2004, Governor Arnold Schwarzenegger immediately faced a crisis, forcing him to release prisoners even as he opened a new prison.[86]

A second driving force came later in that decade, in the form of a federal mandate. In 2009, a three-judge panel, later affirmed by the Supreme Court,[87] decried California's prison overcrowding and required a reduction of at least 40,000 prisoners.[88] California had no choice but to act.

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[82] Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), https://perma.cc/5HMH-3DEA.

[83] *See* Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 908 (E.D. Cal. 2009) (estimating peak population at about 170,000); Susan Turner, *Moving California Corrections from an Offense to Risk-Based System*, 8 U.C. IRVINE L. REV. 97, 99–100 (2018) (stating the overcrowding of California's prisons was spurred by a turn towards determinate sentencing in 1977, which restricted judicial discretion and mandated longer sentences).

[84] Tim Arango, *In California, Criminal Justice Reform Offers a Lesson for the Nation*, N.Y. TIMES (Jan. 21, 2019), https://perma.cc/3E9M-X92Z.

[85] Sacramento Bee & Propublica, *A Brief History of California's Epic Journey Toward Prison Reform*, PAC. STANDARD (May 29, 2019), https://perma.cc/YX6X-RJ5H.

[86] *See id.*

[87] Brown v. Plata, 563 U.S. 493, 502 (2011).

[88] *See id.* at 501.

Beyond Schwarzenegger's reflexive reactions, a series of reforms have made a lasting difference. These have included a 2011 law that shifted many inmates from state prisons to county jails[89] (thus putting a financial burden on the political unit—the county—that makes charging decisions)[90] and the implementation of Proposition 47 in 2014, which reduced some property and drug crimes from felonies to misdemeanors.[91]

The reforms have not been without problems. For example, the shift of prisoners to county jails has exacerbated problems in the jails,[92] and coincided with a 46% rise in killings within the jails by inmates.[93] And predictably, there has been a backlash to the reforms coalescing around a proposition already approved for the 2020 election,[94] classifying more crimes as "violent," and limiting early release on parole.[95]

It is telling that despite consistent effort, California has only gotten close to meeting the 2009 court mandate in large part by shifting prisoners—and their problems—to local jails. Even within success stories, the difficulty of speedy reform leaves its marks in freedom and blood.

2. Florida

Where California has implemented some measure of reform, efforts in Florida have largely failed, with the result that Florida now has a prison population that is close to that of California despite having about half the number of residents.[96] Florida's state prisons currently hold about 99,000 people,[97] which represents (in stark contrast to California) a sharp *increase*

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[89] *See* Jennifer Medina, *California Begins Moving Prison Inmates*, N.Y. TIMES (Oct. 8, 2011), https://perma.cc/99DW-496G.

[90] Notably, the shifting of bodies from prisons to jails in itself should not be considered a reduction in incarceration even as it does reduce the population of state prisons.

[91] *See* Clifton B. Parker, *California's Early Release of Prisoners Proving Effective So Far, Stanford Experts Say*, STAN. NEWS (Nov. 2, 2015), https://perma.cc/SY9W-JS3K ("In 2014, however, state voters approved Prop. 47, which converted six nonviolent offenses related to drug and property offenses from felonies to misdemeanors, which makes early release possible.").

[92] *See generally* Abbie Vansickle & Manuel Villa, *California's Jails Are So Bad Some Inmates Beg to Go to Prison Instead*, L.A. TIMES (May 23, 2019, 3 AM PT), https://perma.cc/3CVC-NEX9.

[93] Jason Pohl & Ryan Gabrielson, *'Hellbent' on Killing: Homicides Surge in Overwhelmed California Jails*, SACRAMENTO BEE (June 13, 2019, 5:00 AM), https://perma.cc/LA94-MESC.

[94] *See generally* Becca Habegger, *Has Criminal Justice Reform Gone Too Far? One California Lawmaker Thinks So*, ABC10, https://perma.cc/763H-APCG (last updated Feb. 21, 2019, 3:47 AM PST).

[95] *Id.*

[96] *See 2018 National and State Population Estimates*, U.S. CENSUS BUREAU, 2018-02: Table 2 (Dec. 19, 2018), https://perma.cc/4VQS-Y5UW.

[97] Dan Sweeney, *Why Is the Prison Population So High in Florida? You Asked, We Answer*, S. FLA. SUN SENTINEL (June 10, 2019), https://perma.cc/LN8N-GU3R (stating Florida's incarcerated population was about 176,000 in 2018 including state prison, local jail, federal prison, youthful offenders, and people involuntarily committed under the Baker Act).

from 2006.[98] While Florida faces some of the same challenges of cost that California did, it has implemented few significant reforms.[99]

A political fight in 2019 offers insight into Florida's failure. In April of 2019, Florida Senate Bill 642 was passed by the full Senate Appropriations Committee.[100] The bill had bipartisan support and promised a raft of reforms: raising the felony theft threshold (from $300 to $750), allowing good time release in non-violent cases after 65% of a sentence is served instead of 85%, and permitting judicial review of juvenile transfers to adult court.[101] Taken together, these changes (particularly the early-release provision) could have made a significant dent in Florida's prison population.

Unfortunately, though, a familiar political dynamic kicked in. Two law enforcement groups, the Florida Sheriffs Association and the Florida Prosecuting Attorneys Association, pushed back.[102] Their claim was that the changes would be unfair to victims and that the reforms would increase crime at a time when crime was declining. As the Sheriffs Association put it, "Allowing criminals to serve only a fraction of their sentence sends the clear message that criminals are more important than victims and that victims' rights do not matter. A major reason we enjoy a low crime rate today is because criminals are serving the time deserved and not getting a 'get out of jail free' card."[103]

The law enforcement lobbying worked. While the legislature did pass a crime bill that was signed by the governor,[104] it was stripped of the major reform pieces.[105] Most significantly, the provisions allowing for early release and tamping down mandatory minimums were gone.[106] With them went the hope for a significant decrease in Florida's prison population.[107]

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[98] *See* Peter Wagner, *State Prison Population in Florida,* PRISON POL'Y INITIATIVE, https://perma.cc/UQ4U-Q7LB (last visited June 4, 2021).

[99] *E.g.*, Shawn Mulcahy, *Advocates Call 'Horse Meat' on Criminal Justice Reform*, WUSF PUB. MEDIA (June 27, 2019, 3:43 PM EDT), https://perma.cc/4RMQ-GMNQ.

[100] *Senate Bill 642 Is on Track to Provide a Real First Step Toward Criminal Justice Reform in Florida*, ACLU FLA. (Apr. 18, 2019), https://perma.cc/DF5D-HLAR.

[101] *Id.*

[102] *See* Sun Sentinel Editorial Bd., *Florida Misses Big Opportunity on Criminal Justice Reform | Editorial*, S. FLA. SUN SENTINEL (May 8, 2019, 3:49 PM), https://perma.cc/Z3R4-GRWB.

[103] Mark Hunter, *Florida Sheriffs Association Statement on Florida First Step Act—SB 642*, FLA. SHERIFFS ASS'N (Apr. 16, 2019), https://perma.cc/TF4Y-U3J8.

[104] Ryan Nicol, *Criminal Justice Reform Package Signed into Law*, FLA. POL. (June 29, 2019), https://perma.cc/5VQC-EHH3.

[105] FN106: *See* Emily L. Mahoney, *Legislature OKs Criminal Justice Reforms but No Change to Mandatory-Minimum Sentencing*, MIAMI HERALD (May 3, 2019, 3:27 PM), https://perma.cc/9BJ2-8F8W.

[106] *Id.*

[107] *See* Times-Union Editorial Bd., *Wednesday Editorial: Reform Florida's Prisons Now*, FLA. TIMES-UNION JACKSONVILLE (July 17, 2019, 2:01 AM), https://perma.cc/2S4H-YCGY (noting the need for reform goes beyond simply reducing prison populations because Florida "has the

3. Alaska

While California embraced significant reforms and Florida rejected them, Alaska made changes rooted in data and social science and then, in the face of backlash, revoked them.

In Alaska, of course, we are dealing with much smaller numbers than California or Florida. Even with a moderate increase since 2006,[108] the state prison population there is about 4,300,[109] and Alaska is slightly below the national average for incarceration rates.[110]

Even with those relatively small numbers, a concern for costs and fairness drove bipartisan support for Senate Bill 91 (SB 91), which was signed into law in July of 2016.[111] Like other proposed reforms, SB 91 was styled as a "justice reinvestment act," which intended to use data to target lesser imprisonment for some offenders and then use the savings from averted prison costs to reduce recidivism.[112] The resulting legislation relied on studies from groups including the Pew Research Center and created four broad changes in Alaska's criminal practice: (1) pretrial practices were changed to incorporate data-driven outcomes; (2) sentencing practices were altered to focus long sentences away from low-level nonviolent offenders; (3) re-entry, parole, and probation practices were reformed to enhance the chances of success for returning citizens; and (4) oversight and accountability features were added to the system as a whole.[113]

Almost immediately, the new laws were tied to a reported uptick in crime. At a forum in Anchorage, a murder victim's mother said that the new law made things "worse," and a former prosecutor in the legislature promised to pursue changes.[114]

In response to these outcries, the governor called for a special session to consider amendments, and just months after SB 91 was implemented it was amended by a new law, SB 54.[115] That law addressed a number of particular

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worst prison system in the nation. It's filled with violence, riddled with scandals and incredibly ineffective in rehabilitating prisoners").

[108] Joshua Aiken, *Alaska's Prison Population*, PRISON POL'Y INITIATIVE, https://perma.cc/8HX9-JQRE (last visited June 4, 2021).

[109] *Alaska Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/B9BZ-KG5M (last visited June 4, 2021).

[110] *Id.*

[111] Brad A. Myrstol & Pamela Cravez, *Crime Rates and Alaska Criminal Justice Reform*, 34 ALASKA JUST. FORUM, No. 2, Fall 2017, at 1, https://perma.cc/8BTV-RLQX.

[112] Michael A. Rosengart, Note, *Justice Reinvestment in Alaska: The Past, Present, and Future of SB 91*, 34 ALASKA L. REV. 237, 238 (2017).

[113] 2016 Alaska Sess. Laws ch. 36; *see* Rosengart, *supra* note 112, at 239.

[114] Zachariah Hughes, *Residents Rail Against SB91 at Rare Anchorage Meeting*, ALASKA PUB. MEDIA (Oct. 9, 2017), https://perma.cc/KXW2-FANE.

[115] S. 54, 30th Leg., 1st Sess. (Alaska 2017); 2017 Alaska Sess. Laws ch. 1.

concerns by allowing jail time for non-aggravated Class C felonies, raising allowable sentences for theft, enhancing the ability to charge sex traffickers, re-criminalizing the violation of conditions of release, and mandating periods of probation for sex offenders.[116]

There were signs that the new law was working. By early 2019, for example, a report showed that more people were successfully completing probation and parole.[117] Significantly, it also seemed that crime overall was going down in the urbanized Anchorage area.[118] Nonetheless, concerns with a surging opioid crisis and increase in some types of crime fueled a cry for repeal. Not surprisingly, figures from within law enforcement and corrections were prominent in the repeal movement. Former Correctional Superintendent Dan Carothers, for example, wrote that because of the reforms there had been a striking increase in Juneau's rate of "vehicle theft, burglarized homes, property damage, theft and assault. These crimes have increased tremendously as a result of Senate Bill 91."[119] More significantly, Attorney General Jahna Lindemuth claimed that by the autumn of 2017, the new bill had resulted in over 7,000 crimes going unprosecuted.[120]

In 2018, Mike Dunleavy ran for governor and promised a full repeal of SB 91's reforms.[121] On July 8, 2019, the newly-elected Governor Dunleavy first announced a "war on criminals"[122] and then made good on his promise to get rid of the reforms, signing the repeal of SB 91[123] in a ceremony held in an airplane hangar.[124] At the time of the repeal, no plan was in place to account for the costs of imprisoning more people due to the repeal. Despite showing signs of success, criminal law reform in Alaska was gone almost before it arrived.

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[116] *Frequently Asked Questions: SB54*, ST. OF ALASKA DEP'T OF LAW (Sept. 26, 2017), https://perma.cc/CR8Z-JURW.

[117] Rebecca Palsha, *Is SB91 Working? A New Report Says It's Helping*, KTUU (Nov. 1, 2018, 7:54 PM EDT), https://perma.cc/HG6D-4Y66.

[118] Tim Bradner, *PROGRESS: Crime Is Going Down and Vilified SB 91 Deserves Some of the Credit*, ANCHORAGE PRESS (Mar. 15, 2019), https://perma.cc/UPB4-JUMN.

[119] Dan Carothers, *Repeal SB 91 Completely*, JUNEAU EMPIRE (July 31, 2018, 1:04 PM), https://perma.cc/T6FK-NEBE.

[120] *ACLU of Alaska Responds to Sen. Costello's Call to Repeal SB 91*, ACLU ALASKA (Sept. 22, 2017, 9:45 AM), https://perma.cc/8TXK-FHKA.

[121] Zachary A. Siegel, *Alaska Passed Sweeping Criminal Justice Reforms. Its New Governor Just Unraveled Them*, THE APPEAL (July 11, 2019), https://perma.cc/SQ3Q-FM27.

[122] James Brooks, *Dunleavy Opens His 'War on Criminals' with Push for Repeal of SB 91*, ANCHORAGE DAILY NEWS (Jan. 23, 2019), https://perma.cc/RSF5-99HB.

[123] *Senate Repeals and Replaces SB 91*, ANCHORAGE PRESS (May 14, 2019), https://perma.cc/2QDA-4YVN.

[124] James Brooks, *Gov. Dunleavy Signs Legislation to Repeal, Replace the Crime-Reform Measure SB 91*, ANCHORAGE DAILY NEWS (July 8, 2019), https://perma.cc/4BTM-NM7B.

II. Causes: Why We Have "The Slows"

Why are we so slow to correct clear injustices?

There certainly is no single cause of our languid reforms, and no proven way to measure and quantify those causes. Some inputs, though, are likely involved, and I discuss three of them here. First, the nature of the contemporary two-party political system in the United States probably has something to do with it. Too often, politicians are rewarded for playing to fear, and there is no easier go-to for fearmongering than crime. Within that context, race cannot be ignored as a historical and continuing tool of fear-mongers. The stay-the-course influence of prosecutors also plays a primary role in both state and federal political systems, working to stymie reforms that would take away their power. Second, even as the group of advocates for criminal justice has grown, they have become fractured and atomized, limiting their effectiveness. Finally, there is a certain allure to an incrementalism that allows us to claim victories despite the slow pace of change. Some might argue that it is the most likely path to success in the end, and that incremental changes necessarily take time to implement and even more time before the benefits are realized. However, incrementalism masks its price and exaggerates success by frequently creating cause for celebration, and the banquets and awards obscure the darker reality of a largely unchanged system.

A. *Politics and the "One-Way Ratchet"*

1. The Nature of Politics in Our Time

In the United States, policy is filtered through politics, and that aspect of democracy has proven to be a brake on reform. It is not the basic mechanizations of democracy that are at fault, of course—the ability of people to choose their representatives can serve to create or solve problems equally—but a distorted dialogue that is fueled by fear and at times has been employed by members of both parties. A corporate mainstream news media, click-bait social media, and fearmongering politicians have turned the mechanics of democracy against the better angels of our policy debates, all of which is exacerbated by the absence from the debate of those most impacted by these policy decisions: people in prison.

i. *The Political Effects of Incarceration*

"You know, Mark," one skeptic of my work once told me, "the crack-dealer demographic is a very small voting bloc." It was a bad joke, but it hits at a core truth: those most directly affected by over-incarceration are the people in our society least able to affect policy through democratic means

because those in prison are almost always denied the ability to vote.[125] In fact, there is no other policy area where American citizens targeted by a government policy are so directly prohibited from addressing that policy through the ballot box. This makes criminal justice unique.[126] In the debate over social security, for example, activists can marshal the voting power of millions of social security recipients.[127] No such ability exists for those who argue against over-sentencing.[128]

ii. *The Media*

Two fundamental and immutable truths drive media coverage—both in the mainstream and in social media—towards exaggerating the effects of crime. First, news media covers what does happen (that is, crime occurring) rather than what does not happen (crime not occurring). Second, all media sources are fundamentally outlets for storytelling, and that favors anecdotes over data.

On the first dynamic, it is simply within the nature of the press that they will report on events rather than non-events. 'Crack epidemic strikes' or 'opioid crisis consumes community' is a headline, while 'no drug crisis, really,' will not be as interesting. A good example of this involves methamphetamine. For years, informal meth labs plagued much of America, and the problem was widely reported, often with a focus on the very real dangers of the labs themselves.[129] The labs were full of toxic chemicals, which endangered current and future occupants.[130] The labs often exploded.[131] And the human cost of obtaining materials (often by theft) and

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[125] *See* German Lopez, *Bernie Sanders Wants to Expand Voting Rights by Letting People in Prison Vote*, VOX (Apr. 8, 2019, 12:20 PM EDT), https://perma.cc/5HLA-KPAR (stating that Vermont and Maine currently allow incarcerated citizens to vote).

[126] *See generally* Dana Liebelson, *In Prison, and Fighting to Vote*, THE ATLANTIC (Sept. 6, 2019), https://perma.cc/Q3QS-CVHX (discussing how there are groups that are working to give prisoners the ability to vote); *supra* Part I(C) (discussing how reform is needed in state laws).

[127] *E.g.*, Phillip Moeller, *Threats to Medicare, Social Security in the Spotlight Ahead of Midterm Elections*, PBS (Sept. 26, 2018, 5:39 PM EDT), https://perma.cc/ST4R-4A8F.

[128] *See Ending Mass Incarceration*, VERA INST. OF JUST., https://perma.cc/MMB2-GJL4 (last visited June 4, 2021); Kevin Keenan & Karina Schroeder, *Jurisdictions Should Embrace Voting Rights for All Americans—Including Those Who Are Incarcerated*, VERA INST. OF JUST. (Nov. 2, 2018), https://perma.cc/X4ZP-W533 (acknowledging that formerly incarcerated people can be an important voting bloc in some communities and have taken a leading role in pushing for reform).

[129] *Timeline*, FRONTLINE PBS, https://perma.cc/GG7P-CQYJ (last visited June 4, 2021) (displaying a timeline of the history and spread of meth).

[130] *See, e.g.*, Josh Anderson, *Meth-Contaminated Home Sickens Family*, N.Y. TIMES (July 13, 2009), https://perma.cc/DKG2-VGYY (showing a series of photo essays); Marilyn Berlin Snell, *Welcome to Meth Country*, SIERRA CLUB MAG., Jan./Feb. 2001, https://perma.cc/3CXM-TWJ9.

[131] *See* Caryn Rousseau, *Meth Lab Injuries Burden Hospitals*, L.A. TIMES (May 18, 2003, 12 AM PT), https://perma.cc/JDY2-SX7S.

running the labs—even apart from the meth use itself—was a big problem, particularly in rural areas. One report from 2002 described a teenage boy who burned down his grandmother's house, two men who climbed over a razor-wire fence into a rail yard to steal a tanker car of ammonia gas, and a father who walked away from his small children, leaving them crawling around in a house full of acidic chemicals strong enough to burn through the floor joists.[132]

But then something worked. Around 2010, many states started restricting access to pseudoephedrine, a key ingredient in home-made methamphetamine, following up on a federal directive in 2006 that required limits on over-the-counter pseudoephedrine sales. For example, Mississippi began requiring a prescription for the drug, and July through February meth-lab seizures dropped from 607 to 203 in one year.[133] Eventually, market forces led cheap imported meth to almost entirely eclipse the home labs, meaning that while the scourge of meth *use* was still with us, the myriad and oft-trumpeted problems of meth-*making* in local communities were largely solved.[134] You probably did not know that—and the reason is that the administrative solution to mom-and-pop meth labs was not widely reported as it happened. Meth labs blowing up are news. Solving the problem through an administrative measure that required no incarceration is not.

A second intrinsic aspect of journalism and social media also skews against reform. The storytelling nature of the media is fundamental to its success, and the seductive nature of narrative has drawn journalism to both good and dangerous places.[135] Broad data—say, the rate of violent crime over time—may be more relevant to policy and perception, but the story of a murder or a bloody weekend in Chicago is going to draw in more readers. That means that most of our stories about crime are going to be anecdotes: the story of a single incident, rather than a reflection on broader trends.

There are problems within the way those anecdotes are told, as well, since the sensationalist aspects are simply more interesting.[136] Rachel Barkow describes this dynamic well:

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[132] Timothy Egan, *Meth Building Its Hell's Kitchen in Rural America*, N.Y. TIMES (Feb. 6, 2002), https://perma.cc/W98T-YGA7.

[133] Abby Goodnough, *States Battling Meth Makers Look to Limit Ingredients*, N.Y. TIMES (Mar. 28, 2011), https://perma.cc/HH8W-HNQC.

[134] *See* Frances Robles, *Meth, the Forgotten Killer, is Back. And It's Everywhere.*, N.Y. TIMES (Feb. 13, 2018), https://perma.cc/335C-8AN9.

[135] *See* Jeff Jarvis, *The Spiegel Scandal and the Seduction of Storytelling*, MEDIUM (Dec. 24, 2018), https://perma.cc/B9WN-4FW6 (noting that a number of scandals have involved false narratives concocted by reporters).

[136] *See id.* The timeline for offender and victim is often differently described. The victim's story often includes what happened before the event (i.e., "a teacher for 13 years") and is likely to happen after the event ("fears returning to work"), but except for criminal history the offender's story in the media is limited to the few moments of the offense.

> Rarely does a news story explore the costs and benefits of criminal justice policies, the underlying demographic statistics of offenders or victims, or the individual background of those who broke the law. Instead, the stories tend to focus on the emotional horror of specific violent crimes that may not represent overall trends.[137]

While some larger institutional media sources have begun using graphics that allow for a much broader and better use of data in stories about crime,[138] local outlets do not often have the same capabilities, leaving crime to be defined in the minds of the public one incident at a time. Because public perceptions of crime are thus largely based on anecdotes, public beliefs often do not align with broader truths and data—what sinks in are the compelling images and stories delivered one-by-one by the media.

As a result, Americans often are not sure what is true, and one of the most striking disconnects between public belief and reality involves understanding crime rates. The Pew Research Center found that the majority of Americans surveyed believed that crime in the United States got worse between 2008 and 2016: 57% thought it had gotten worse, while only 15% thought it had gotten better.[139] Among those who supported Trump in the 2016 election, the results were even more stark, as 78% thought crime was worse and only 5% thought it was better.[140] Truth ran the other way, of course; in that same time period violent crime had fallen 19% and property crime dropped 23%, continuing a downward trend that began in the mid-1990s.

Surprisingly, the impact of media stories and images can be even more important in forming negative impressions than actual lived experiences. As Rachel Barkow has pointed out, there is no statistically significant relationship between punitive beliefs and having been a victim of crime, but there *is* a significant relationship between those beliefs and watching a lot of crime stories on television.[141] In other words, real-life experiences do not strongly affect the way we feel about criminal justice, but the media's interpretation of what is going on—often in communities other than our own—does affect our policy outlooks.

One example of this dynamic was a primary driver of the excessive crack sentences that federal law demanded for far too long. Like any story of narcotics use, crack was used by addicts and non-addicts alike, and not

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[137] *See* BARKOW, *supra* note 29, at 109.

[138] *E.g.*, Kimbriell Kelly & Steven Rich, *For Unsolved Cases Lasting a Year, Finding the Killer Becomes Nearly Impossible*, WASH. POST (Dec. 28, 2018, 2:00 PM UTC), https://perma.cc/42XU-YJCF.

[139] John Gramlich, *Voters' Perceptions of Crime Continue to Conflict with Reality*, PEW RES. CTR. (Nov. 16, 2016), https://perma.cc/DV8X-VGCU.

[140] *Id.*

[141] BARKOW, *supra* note 29, at 108.

everyone who used crack ended up a tragedy.[142] Moreover, as even the United States Sentencing Commission came to realize, crack's active ingredient was simply powder cocaine.[143] Yet, media depictions of crack used charged language and racially-loaded images to describe crack dealers: "thugs,"[144] "crack whores,"[145] and "super-predators."[146] The result was predictable: people concluded that the evil of crack supported the most draconian of sentences, slowing rational reform.

iii. *The Allure of Fear-Mongering and Simplicity in Politics*

The alarmist tendencies of the media are only magnified when politicians like Donald Trump cherry-pick crime stories to create fear in the hopes of electoral success. For example, during the 2016 presidential campaign Donald Trump emphasized shootings in Chicago as that city suffered a temporary and isolated spike in that type of crime.[147] Although Trump asserted that he wanted to "help" Chicago, his audience clearly was not the residents of that city; rather, he was appealing to the suburban and rural conservatives who would define Chicago as a kind of pathological cesspool created by liberals.[148]

Certainly, Trump did not create the tactic of fear-mongering over crime (though his ability to do so at a time of record-low crime is relatively unique). President George H.W. Bush was particularly fond of this technique, as demonstrated by a bizarre display in 1989. Planning for a televised speech, Bush had federal agents manufacture a crack sale across the street from the White House, and then waved the resulting baggie of crack at the cameras as he warned of the dire portents of the crack "epidemic."[149]

Hand-in-hand with the effectiveness of fear-mongering goes another

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[142] *See generally* CARL HART, HIGH PRICE: A NEUROSCIENTIST'S JOURNEY OF SELF-DISCOVERY THAT CHALLENGES EVERYTHING YOU KNOW ABOUT DRUGS AND SOCIETY (2013) (highlighting a fascinating study of the actual effects of crack).

[143] *See* U.S. SENTENCING COMM'N, *supra* note 40, at 16–17, 19.

[144] Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects Are Felt in the Real World*, THE GUARDIAN (Aug. 12, 2015, 12:15 PM EDT), https://perma.cc/H3AY-HHHS; *see* Charles F. Coleman, Jr., *'Thug' is the New N-Word*, EBONY MAG., (May 27, 2015), https://perma.cc/EVX6-YRMN. *See generally* CRAIG REINARMAN & HARRY G. LEVINE, CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 1–17 (1997).

[145] Nakia D. Hansen, *Whitney Houston and the Problem with the 'Crack Whore' Term*, PARLOUR (Feb. 18, 2012), https://perma.cc/9MHV-BF32.

[146] Kirsten West Savali, *For the Record: 'Superpredators' Is Absolutely a Racist Term*, THE ROOT (Sept. 30, 2016, 12:42 PM), https://perma.cc/9KRJ-VDP7.

[147] Safia Samee Ali, *In Discussing Chicago's Violence, Trump Generalizes About Race*, NBC NEWS (October 12, 2016, 7:43 AM EDT), https://perma.cc/3C5Q-CNN5.

[148] *See id.*

[149] Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the "War on Drugs,"* 15 UDC/DCSL L. REV. 59, 61–62 (2011).

political truth: that voters are perceived as responding to simple messages (i.e., "let's get tough on crime with long sentences") rather than complicated ones, and reform platforms require quite a bit of explaining. William Stuntz described this dynamic: "For legislators, pleasing voters might mean producing rules the voters want. But this requires that the rules be simple and understandable, the sort of thing politicians can use in campaign speeches and advertisements."[150] And that sort of thing, of course, is tough-on-crime measures like mandatory minimums and long sentences.[151] It is easy to see how this simplicity versus complexity dynamic played out in the Alaska reforms: complicated reforms rooted in academic studies and data lost out to bullet points about crime and criminals.[152]

As with the media, politicians use episodes of crime to promote success by their own metrics: instead of ratings, they worry about elections.[153] The incentives of their fields are sadly directive against reform.

2. Race and Racism

The pronouncements of politicians described in the preceding section often contain at least an implicit racial appeal: one must assume that it was not lost on Donald Trump that the perpetrators of the gun violence in Chicago would be perceived by his followers as young black males. And just as it is racism that allows too many elected officials to reflexively ratchet up incarceration and keep it there,[154] the same underlying impulse—that it is the threat of black men that requires mass incarceration—serves as a brake on reversing the trend.

What we do know is that black Americans are no more likely to use or sell illegal drugs than whites[155] but are disproportionately arrested and convicted for narcotics crimes.[156] Beyond the simple moral wrong in that kind of differential racial outcome, the fact that drug defendants are so often black also allows racial appeals to work—that is, the prevalence of blacks among the selected group of named and shamed "criminals" reifies the skewed racial views of whites, who conclude incorrectly that black people are more prone to crime.

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150 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001).

151 *Id.* (making the point that politicians often campaign on sentencing issues, but rarely on the definition of crimes, which are much more nuanced questions).

152 *Supra* Part I(C)(3).

153 Laura Bradley, *Donald Trump's All-Consuming Obsession with TV Ratings: A History*, VANITY FAIR (Jan. 20, 2017), https://perma.cc/45S8-LF3A; David Eads, *Too Many Politicians Misuse and Abuse Crime Data*, N.Y. TIMES (Aug. 10, 2018), https://perma.cc/YG5D-FC43.

154 *See* BARKOW, *supra* note 29, at 108.

155 MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 164–76 (2011).

156 THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 58 tbl. 2-2 (Jeremy Travis, Bruce Western & Steve Redburn eds. 2014), https://perma.cc/F79Q-WG79.

Moreover, when white citizens are led to perceive that drug crimes are largely committed by non-whites, they likely conclude that the human costs (imprisonment and other punishments) of the War on Drugs will be borne by people unlike them, and that this is rational. To put it more bluntly, the idea that narcotics are a "black" problem inures other citizens to the broader interests of justice and the need for reform, since the pain exacted by the current system will be extracted from an "other."

3. The Persistent Power of Prosecutors

A few years ago, Rachel Barkow and I raised a hypothetical: imagine that a newly-elected president makes a stunning announcement on the first day of her term—that she is turning criminal law matters over to the Federal Defenders' Office based on the extensive knowledge that the Defenders have in the field.[157] Her primary advisor on criminal justice issues would be the Chief Defender in Washington D.C., and experts from the Defenders' offices would speak for the administration before the Sentencing Commission and Congress. Pending legislation or guideline amendments would be supported only if the Defenders were on board, and they would also be put in charge of federal prisons, forensic labs, and the clemency process.[158]

People would think that the President had gone bonkers. After all, the Defenders have an inherent conflict in all of those duties, since their institutional role is to represent one side of the criminal law equation. There would be no way to root out the bias inherent in that job.

And yet, our reality is a mirror image of that hypothetical: all of those roles (and more) are fulfilled solely by the Department of Justice in our current system.[159] In both the state and federal systems, prosecutors have a unique and outsized role in determining policy, and that often means that they are the ones who stymie reforms in order to maintain their own power—which is institutionalized within the status quo—and to ensure that the tools they use to avoid the risks and effort of trial are not eroded.

i. *Prosecutors in the Federal System*

Career prosecutors in the Department of Justice (DOJ) have traditionally had a functional veto on reforms. Even in an administration that was devoted to addressing endemic problems within criminal justice, this has been true. Of course, there only has been one administration in recent memory that has even expressed such an interest—that of Barack Obama.[160]

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[157] Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 395 (2017).

[158] *Id.*

[159] *Id.* at 396.

[160] *Obama at Howard*, THE ATLANTIC (Sept. 29, 2007), https://perma.cc/XYH9-5D56 (detailing statements from then-candidate Obama that it was "time to seek a new dawn of justice in

On the White House website, the Obama administration laid out a compelling case for reform, asserting that "meaningful sentencing reform, steps to reduce repeat offenders, and support for law enforcement are crucial to improving public safety, reducing runaway incarceration costs, and making our criminal justice system more fair."[161] Obama's commitment seemed to be more than symbolic. When he visited those incarcerated in an Oklahoma federal prison, he seemed genuinely chastened by what he saw and reflected "there but for the grace of God."[162] He took a group of clemency recipients to lunch at Busboys and Poets,[163] a Washington D.C. restaurant, which presents itself as a hub for social change.[164] He even crafted a pro-reform law review article for the Harvard Law Review at the end of his second term.[165]

However, Obama was largely steered away from significant reform by the DOJ. He created a clemency initiative, but left implementation in the hands of the DOJ, which stymied the potential of the project.[166] He vociferously supported the idea of sentencing reform, but advocates from the DOJ consistently opposed or tamped down reform proposals before Congress or the Sentencing Commission.[167] The law allowed for a broad use of compassionate release for elderly and infirm prisoners, but the Bureau of Prisons—a division of the DOJ—almost never used it.[168]

Even when the will for reform is strong in the executive, there is a building full of prosecutors ready and able to mute that desire.

ii. *Prosecutors in State Systems*

Though Attorneys General can have some sway on reform issues, states lack a centralized prosecution hub like the Department of Justice; instead, prosecution is taken up in most states by District or County Attorneys who run for office.[169] These local prosecutors, though, often oppose reform both

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America," and that he would "brave the politics" necessary to fix the system).

161 *Criminal Justice Reform*, WHITE HOUSE BRIEFING ROOM, https://perma.cc/HVP7-PB3D (last visited June 4, 2021).

162 Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), https://perma.cc/SWK7-44H7.

163 Jordan Fabian, *Obama Takes Former Prisoners Out to Lunch*, THE HILL (Mar. 30, 2016, 1:05 PM EDT), https://perma.cc/6WA7-4PHN.

164 *See id.*

165 Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

166 Barkow, *supra* note 157, at 425–40.

167 Barkow, *supra* note 157, at 406–24.

168 Barkow, *supra* note 157, at 441–48.

169 Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199 (2012) (detailing how in 1931, a national commission recommended that states centralize prosecution in the hands of the state attorney general, but this advice was

when they run for office and when they interact with the legislature.[170]

Local prosecutors have particular reasons for opposing reform. One is to be consistent and reaffirm the "tough-on-crime" personas that they too often rely on to be elected and re-elected.[171] Another is to maintain and extend the power that they have, and reform often would limit their ability to charge people and seek long sentences—that is, reform frequently comes in the form of restraints on the discretion of prosecutors.[172]

Notably, this critique of state prosecutors as a force against reform must account for the growing number of elected prosecutors who came to office expressly as reformers.[173] It is no longer fair to assume that an elected prosecutor is an opponent of reform. The progressive prosecutor movement is new enough that it is too early to measure its effect beyond new policies within each new prosecutor's own jurisdiction (though certainly those internal reforms are important), but over time the impact may be significant.

It would be a mistake, too, to only consider the role of elected prosecutors—that is, the heads of the offices—in resisting reform. After surveying a broad array of line prosecutors (the employees who work for the elected prosecutor and take on individual cases), Ronald Wright and Kay Levine cautioned that these line attorneys—particularly those who view prosecution as the only "correct" vehicle to address offenses—might oppose calls for heightened scrutiny and reform.[174] Because they are ultimately the ones who implement policy, these line prosecutors also have the ability to subvert reform propagated at a higher level. Some progressive prosecutors seem to expressly acknowledge this dynamic. For example, Sarah Fair George, the Chittenden County Attorney in Vermont, directed her line prosecutors to visit a prison, citing their "nonchalant" attitude about sending people there.[175] George's move reflects a reality for progressive prosecutors: at least some of their advocacy for reform needs to be directed to the people working for them.

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uniformly rejected).

[170] BARKOW, *supra* note 29, at 51.

[171] Stuntz, *supra* note 150, at 534. This interest converges with that of legislators.

[172] *See generally* 21 U.S.C. § 851 (1970) (showing that the enhancements on federal drug charges, which are a frequent target of reformers, are employed at the discretion of prosecutors).

[173] Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), https://perma.cc/TZF8-KHV5.

[174] Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1709–10 (2018).

[175] Daniel Nichanian, *Prosecutor Sends Staff to Prison, in a Bid to Counter Their Reflex to Incarcerate*, THE APPEAL (Aug. 14, 2019), https://perma.cc/5WZR-DAXA.

B. *The Challenges of Advocacy*

1. The Fragmented World of Advocates

In other realms of advocacy, people know who the leaders are. In support of gun rights, it is (for now)[176] the National Rifle Association (NRA).[177] In the field of protection of older Americans, it is the American Association of Retired Persons (now known just as AARP).[178] Trade groups have combined lobbying groups like the Auto Alliance.[179] Even within the realm of criminal law (as already discussed here) the DOJ acts as an advocate.[180] The benefits of clear leadership in a field of advocacy are plain: such behemoths can leverage a wealth of experience, established relationships, and money to either pursue or retard change.

Within the area of criminal justice reform, there is no such behemoth. Instead, there is a broad diversity of non-profits, which compete for talent, financial support, pro bono help from law firms, and access to power.[181] As a result, it is rare that advocates are well-aligned in their goals and methods, and there is significant overlap of effort by unaffiliated groups. In the face of effective, unified opposition by prosecutors, it should not be surprising that reform groups struggle to get traction.

Certainly, there are long-established groups in the field of criminal justice reform. The issue is that there are so many of them, each working on their own. Families Against Mandatory Minimums,[182] the National Association of Criminal Defense Lawyers,[183] the Brennan Center,[184] the

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[176] *See generally* Jill Filipovic, *The NRA Has a Problem—But It's Not the One Making Headlines*, CNN (Apr. 30, 2019, 11:47 PM EDT), https://perma.cc/Y4QX-8D3F.

[177] Brennan Weiss & Sky Gould, *5 Charts That Show How Powerful the NRA Is*, BUS. INSIDER (Feb. 20, 2018, 5:00 PM), https://perma.cc/A4UA-PGQL.

[178] Tim Carney, *Wealthy AARP: One of the Country's Most Powerful Lobbies*, HUM. EVENTS (Mar. 25, 2010), https://perma.cc/82TC-VRMJ.

[179] *See generally About Us*, ALLIANCE FOR AUTO INNOVATION, https://perma.cc/M7XR-66PM (last visited June 4, 2021).

[180] *Supra* Part II(A)(3)(i).

[181] *See Criminal Justice Reform*, NAMASTE FOUND., https://perma.cc/UGJ6-G4CF (last visited June 4, 2021); *Partner Organizations & Groups*, JUST. POL'Y INST., https://perma.cc/ET3D-DQJQ (last visited June 4, 2021); *Prison Reform Organizations*, CTR. FOR PRISON REFORM, https://perma.cc/NNS5-7S4R (last visited June 4, 2021).

[182] *Our Mission*, FAMS. AGAINST MANDATORY MINIMUMS, https://perma.cc/F635-E4Y4 (last visited June 4, 2021).

[183] *Mission and Vision*, NAT'L ASS'N OF CRIM. DEF. LAW., https://perma.cc/5FJJ-NZ7H (last visited June 4, 2021).

[184] *130 Top Police Chiefs and Prosecutors Urge End to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 21, 2015), https://perma.cc/VQ66-CLWC.

ACLU Drug Law Reform Project,[185] the NAACP,[186] CAN-DO Clemency,[187] and others have been doing good and important work for decades. Recently they have been joined by newer but well-funded and influential groups including Dream Corps. Justice,[188] Right on Crime,[189] and Freedom Partners.[190]

Beneath the larger institutional groups (at least in size), one finds a handful of corporate officers,[191] a larger group of freelancing academics,[192] and a multitude of tiny-to-small advocacy groups that usually serve as the alter-ego for a single advocate or a small group of advocates.[193] This last group has largely been created by two projects specifically designed to train and spin off advocates. One such project is the Soros Justice Fellows, a project of the Open Society Foundations.[194] Another is the "Leading with Conviction" program created by Just Leadership USA, which trains

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[185] *About the ACLU Criminal Law Reform Project*, ACLU, https://perma.cc/JJH3-J4EQ (last visited June 4, 2021).

[186] *Race & Justice*, NAACP, https://perma.cc/2AMM-26FR (last visited June 4, 2021).

[187] *See CAN-DO's Founder—Amy Ralston Povah*, CAN-DO (Oct. 8, 2014), https://perma.cc/3QGR-QZ93 (explaining that CAN-DO was founded by Amy Povah, who was granted clemency by President Clinton); *see also* Mary Elizabeth Williams, *Is There Real Hope for Prison Reform? Nonviolent Offenders and the "Kim Kardashian Moment,"* SALON (June 29, 2018, 7:00 AM EDT), https://perma.cc/6KNR-FXDH.

[188] *Who We Are*, DREAM CORPS JUST., https://perma.cc/8ZHA-TMH3 (last visited June 4, 2021).

[189] *About Right on Crime*, RIGHT ON CRIME, https://perma.cc/L7E5-CVRN (last visited June 4, 2021).

[190] *Koch-Backed Criminal Justice Reform Bill to Reach Senate* NPR (Dec. 16, 2018, 5:37 PM ET), https://perma.cc/824H-RWG8.

[191] *See And Justice for All*, KOCH INDUS., https://perma.cc/VV8W-AKP7 (last visited June 4, 2021) (emphasizing the work of Mark Holden, General Counsel of Koch Industries).

[192] *See Criminal Justice*, NYU LAW, https://perma.cc/A3W2-TQMU (last visited June 4, 2021) (recognizing criminal justice advocates Rachel Barkow and Bryan Stevenson); *Douglas Aaron Berman*, SCHOLARS STRATEGY NETWORK, https://perma.cc/Y8SQ-ZF6S (last visited June 4, 2021) (recognizing criminal justice advocate Douglas A. Berman); Sharon Grigsby, *Non-Violent Drug Sentencing Has Left Thousands of People Buried Alive in Prison*, SMU (Feb. 23, 2018), https://perma.cc/QEH7-G5DU (recognizing criminal justice advocate Brittany K. Barnett); *Michelle Alexander*, N.Y. TIMES, https://perma.cc/2KTB-58L6 (last visited June 4, 2021) (listing the articles of criminal justice advocate Michelle Alexander); *Paul J. Larkin Jr.*, THE HERITAGE FOUND., https://perma.cc/4Y9D-2NZ3 (last visited June 4, 2021) (recognizing criminal justice advocate Paul J. Larkin); *Prisons and Justice Initiative: Faculty Advisory Board*, GEO. U., https://perma.cc/3YWJ-KS5P (last visited June 4, 2021) (recognizing the faculty advisory board for Initiative, including Paul Butler and Shon Hopwood).

[193] *See About Us*, CRACK OPEN THE DOOR, https://perma.cc/T9U4-SCKK (last visited June 4, 2021) (noting that the most effective advocates were formerly incarcerated); *Cannabis Is Not a Crime*, THE WELDON PROJECT, https://perma.cc/58GS-HH8D (last visited June 4, 2021).

[194] *Soros Justice Fellowships*, OPEN SOC'Y FOUND., https://perma.cc/7SRC-MJGF (last visited June 4, 2021).

formerly incarcerated people to become criminal justice advocates.[195]

In a rare attempt to at least connect these disparate bodies, longtime advocate Nkechi Taifa created and continues to lead the Justice Roundtable, a gathering for over 100 of these disparate groups, allowing representatives to compare notes and keep up with recent developments.[196]

It matters, too, that these groups are in an existential competition with one another for limited funding sources. While some level of cooperation is common among these advocates,[197] broad coordination of efforts is more rare, and the duplication of projects is inevitable.

Leading funders have guided the emergence of criminal law advocacy as a field with hundreds of leaders but perhaps not as many followers. The allure of leadership has only been enhanced as celebrities such as Kim Kardashian have joined the fight,[198] creating an illusion of glamour and fame around the task of seeking reform.[199] That illusion masks a reality well-known to veteran reformers: that the work is mostly done in unpaid obscurity, with the sting of defeat a much more common feeling than any kind of glory.

2. The Problem of Crime Control

A continuing challenge for this loose but large band of advocates is to remain sensitive to the voices and interests of crime victims and the interests of crime control. This is not because crime victims are necessarily the enemies of reform—in fact, a significant number of crime victims support reforms, even those that would shorten sentences,[200] and some crime victims have taken a leadership role in reform efforts.[201]

The larger challenge is that unless crime control and victims are taken seriously, allegations that reformers value incarcerated people over crime victims and public safety will hit home. Certainly, many groups have been conscientious about emphasizing the legitimate ability to reduce

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[195] *Leading With Conviction*, JUST LEADERSHIP USA, https://perma.cc/MP8L-ZZ3F (last visited June 4, 2021).

[196] *See Nkechi Taifa to Leave Open Society Foundations, Start Own Firm*, WASH. INFORMER (Oct. 17, 2018), https://perma.cc/N5D4-3DBD (noting that Taifa launched Justice Roundtable, a coalition of more than 100 groups, shortly after joining Open Society).

[197] *See, e.g.*, *Working Groups*, JUST. ROUNDTABLE, https://perma.cc/5T2N-4NQS (last visited June 4, 2021).

[198] *See* Helena Andrews-Dyer, *Kim Kardashian Is Still Fighting for Criminal Justice Reform*, WASH. POST (Jan. 31, 2019, 2:12 PM EST), https://perma.cc/M6W7-PWMB.

[199] Hayley Prokos, *Kim Kardashian Wears $72,000 outfit to White House to Discuss Criminal Justice Reform*, NEWSWEEK (June 14, 2019, 5:34 PM EDT), https://perma.cc/CA4Y-MZYA.

[200] Leigh Courtney & Elizabeth Pelletier, *What Do Victims Want from Criminal Justice Reform?*, URB. INST. (Aug. 5, 2016), https://perma.cc/DQB5-8FHZ.

[201] *Victims' Voices for Reform*, PEW CHARITABLE TR. (Aug. 2015), https://perma.cc/CR4E-RC4A.

incarceration and crime at the same time.[202]

If advocates fail to take into account crime control and victims, their appeals will be particularly vulnerable in the face of an uptick in the crime rate.

C. *The Attractiveness of Incrementalism*

Advocates for reform face a conundrum. They can seek broad systemic changes, which are a low-percentage shot but pay off big if they succeed, or they can focus their efforts on smaller, incremental changes that offer a better chance for victories along the way. A problem with incrementalism, of course, is that inevitably some injustices remain on the table for years or decades even as things get nominally better. For example, consider the incremental approach to the reform of crack laws:[203] first came court rulings that allowed for some discretion by judges to ignore the harsh guidelines.[204] Next came the Fair Sentencing Act of 2010, which reduced the disparity in sentencing between crack and powder cocaine but did not eliminate it or make the changes in the law retroactive.[205] Then, nearly ten years later, the First Step Act finally made those changes retroactive, but did not close the disparity.[206] The cost of this incremental approach to fixing an obvious problem was years of unnecessary incarceration for thousands of people. But, of course, it also allowed for the release of thousands of people from prison,[207] each with their own story of redemption.[208] As Families Against Mandatory Minimums founder Julie Stewart put it in describing her group's support of the Fair Sentencing Act, "Since 1995, when Congress killed the reform of the crack sentencing guidelines, nearly 75,000 people have received federal crack cocaine sentences. We will not allow another 75,000 to be sentenced at the current unjustifiable levels . . . I won't let the perfect

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[202] *E.g.*, *Our Mission*, LAW ENFORCEMENT LEADERS, https://perma.cc/WBW9-XELS (last visited June 5, 2021) (describing how the Law Enforcement Leaders to Reduce Crime and Incarceration, a group of current and former police officers and prosecutors, puts these dual goals at the center of their mission).

[203] *See supra* Part I(A).

[204] *E.g.*, Spears v. United States, 555 U.S. 261, 264 (2009); Kimbrough v. United States, 552 U.S. 85, 110 (2007).

[205] Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2372 (2010).

[206] First Step Act, Pub. L. No. 115–391, 132 Stat. 5194 (2018).

[207] Mola Lenghi, *More Than 3,000 Prisoners Released Under First Step Act*, CBS (July 19, 2019, 6:44 PM), https://perma.cc/C5TZ-V3EB.

[208] *See, e.g.*, Matthew Charles, *I Was Released Under the First Step Act. Here Is What Congress Should Do Next*, WASH. POST (Feb. 1, 2019, 11:19 AM EST), https://perma.cc/972V-YSW6 (noting that some of those stories received more attention than others, and Matthew Charles, who had been released by error then re-incarcerated before being released under the First Step Act and whose story was well-chronicled, used this platform to tell his own story).

be the enemy of the good."[209]

In discussing a pragmatic approach to change in criminal justice, Georgetown Professor Shon Hopwood described the best of the kind of incrementalism that finally brought some level of reform to the crack laws and sentencing guidelines:

> It moves gradually. It trades in compromise. It demands less while crusaders demand more. Still, it has its place in progressive reform in America. If it starts with the feasible, it does so in the hope that the ideal may someday be realized, at least in some measure. If it is modest, it does so with the knowledge that by aiming lower it increases the chances of hitting its target. Pragmatism is not always a panacea but, then again, neither is it a path to nowhere.[210]

One advantage of incrementalism is that it creates victories, however small. That provides the opportunity for non-profit advocacy groups to take credit and celebrate each advance,[211] something that is crucial to fund-raising—after all, there is much more appeal to donors when it is clear that progress is being made. Though hidden, this mechanism is critical to the survival of many advocacy groups. Unfortunately, this creates a tension between ambition for the cause and ambition for the financial success of an individual advocacy group. The financial incentive towards small victories pulls away from the desire for big ones—a tension that is only magnified by the competition between the atomized groups in the field.

There is another factor that promotes a limited ambition when it comes to the reduction of America's prison population: the distinction between violent and non-violent offenders.[212] It is much more politically palatable to seek reduced sentences for non-violent offenders,[213] but to achieve ambitious goals such as cutting the prison population in half we would have to reach into the pool of those convicted of violent offenses to realize success.[214]

Because of the nature of federal jurisdiction, relatively few federal

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209 Douglas A. Berman, *The Many (Opaque) Echoes of Compromise Crack Sentencing Reform*, 23 FED. SENT'G REP. 167, 168 (2011).

210 Shon Hopwood, Book Review, *Caught: The Prison State and the Lockdown of American Politics*, 66 J. LEGAL EDUC. 445, 454 (2017).

211 *See* Van Jones & Jessica Jackson, *Why We're Celebrating a Three-Month-Old Law*, CNN, https://perma.cc/3DSK-46UF (last updated Apr. 21, 2019, 3:34 PM EDT) (explaining that Jones and Jackson were co-founders of the advocacy group #Cut50, now known as Dream Corps Justice).

212 *See generally* Eli Hager, *When "Violent Offenders" Commit Non-Violent Crimes*, THE MARSHALL PROJECT (Apr. 3, 2019, 6:00 AM), https://perma.cc/H39K-G445 (explaining the definition of "violent" and "non-violent" crimes and that they are subject to vigorous debate).

213 Jordan Maglich, *DOJ's New Clemency Program Targets Nonviolent Drug Offenders*, FED. LAW., Sept. 2015, at 4, https://perma.cc/J9L7-9CV8 (explaining that the Obama clemency initiative was expressly directed at "non-violent" offenders).

214 *See* John Pfaff, *What Democrats Get Wrong About Prison Reform*, POLITICO (Aug. 14, 2019), https://perma.cc/9K9T-GBLQ.

prisoners are there for violent offenses.[215] The federal system, though, is only a small (but significant) fraction of the incarceration system in the United States.[216] In the state systems, where most of the action is, 55% of those locked up are there on charges of violent crime.[217] That means that if we are to reach the commonly-proposed goal of cutting incarceration by 50%,[218] we are going to have to consider cutting sentences for those who have committed violent crimes. That does not seem to be something that even progressive Democrats have much of a taste for right now,[219] and even the editorial board of the relatively liberal Washington Post opposed a D.C. proposal to lower sentences for some young violent offenders.[220]

Incrementalism is, right now, the only model of achieved success that we have in the field of criminal law reform. It is not a surprise that it is embraced by advocates and policy-makers.[221] However, incrementalism has played a large role in the slowness of change as politicians are offered a convenient stopping point for reform. There are discrete costs to that choice, measured in the human lives that suffer as justice is delayed.

III. Accelerating the Process

If over-sentencing in the United States is wrong (and it is), then there is an imperative to fix that grave mistake immediately. The cost of not doing so is nothing less than life and freedom, two of the things that Americans hold most dear. Incremental successes do impact lives, but they also leave behind too many for it to be a principled process.

First, we must do a better job as advocates. We should sometimes be willing to be followers and seek out a unifying message. This will require a new role for one or more of the big funders in the area: turning away from creating dozens of new organizations, and turning towards coordinating and growing the ones that we have. In so doing, we need to strengthen our message by including plans to keep crime low and respect the victims of

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[215] *See generally Table 12: Offenders Receiving Sentencing Options in Each Primary Offense Category*, U.S. SENTENCING COMM'N, https://perma.cc/T4LN-QHLM (last visited June 5, 2021) (describing that in 2017 the federal system processed through sentencing over 20,000 drug cases and over 6,000 fraud cases, but only 72 murders, 62 manslaughters, and 783 assaults).

[216] *See generally* German Lopez, *The First Step Act, Congress's Criminal Justice Reform Bill, Explained*, VOX, https://perma.cc/64EW-CQSK (last updated Dec. 11, 2018, 11:54 AM EST).

[217] *See* John Pfaff, *Five Myths About Prisons*, WASH. POST (May 17, 2019, 6:23 AM EDT), https://perma.cc/2ND2-ATZ8.

[218] *See Who We Are*, *supra* note 188 (describing one of the most prominent of these groups: Dream Corps Justice, formerly #cut50).

[219] *See* Pfaff, *supra* note 214.

[220] *See* Editorial Bd., *For Some of D.C.'s Most Violent Criminals, a Get-Out-of-Jail-Soon Card*, WASH. POST (Aug. 18, 2019, 5:50 PM EDT), https://perma.cc/BXW6-TRBG.

[221] In fairness, I should recognize that my own advocacy efforts are fairly described as incrementalist.

crime.

Second, our agenda needs to confront the political barriers that have slowed reform by creating a higher profile for the issue, calling out racist appeals, and by seeking to dilute the power of prosecutors in the policy.

Finally, we must be bold in what we ask for, particularly in those rare times that the stars align and striking change is politically possible. Reducing incarceration is a laudable goal, but achieving real long-term change will require not only changing sentencing laws, but the structure of our policy process and the way that we define crimes. It is a lot to take on, but it is also right and good.

A. *Becoming More Effective Advocates*

1. Unity and Purpose

The criminal justice movement doesn't lack leaders so much as it lacks followers. Leaders—that is, those who have started an organization, set an agenda, and need to raise money—are already there in abundance.[222] The field does not need another organization with another leader and another set of similar goals. Instead, existing advocates and organizations need to consolidate, coordinate, and cooperate. Emerging advocates need to be encouraged to join and support existing groups rather than starting their own competing project.

One way to move towards this goal would involve creating a meta-organization that could direct resources, talent, and connections to existing organizations and help to coordinate their activities. It is unrealistic (and possibly wrongheaded) to think that such a meta-organization would or should control or usurp the independence of existing groups, but a step towards some kind of coordination would be welcome.

Fortunately, two men have the ability to do this: Charles Koch[223] and George Soros. Despite very different political philosophies, Koch[224] and Soros[225] have both been very active in funding and promoting criminal justice reform, and have had some funding or training role in the establishment and success of many of the advocacy groups in the field.[226]

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[222] *See supra* Part II(B)(1).

[223] Robert D. McFadden, *David Koch, Billionaire Who Fueled Right-Wing Movement, Dies at 79*, N.Y. TIMES (Aug. 23, 2019), https://perma.cc/4FLU-7QVK (noting Charles is the surviving member of the Koch brothers, as his brother David died on August 23, 2019.).

[224] *See* Phillip Elliot, *The Koch Brothers are Pushing for Criminal Justice Changes*, TIME (Jan. 29, 2018, 5:09 PM EST), https://perma.cc/833S-X9NX; Vikrant Reddy, *Criminal Justice Reform in 60 Seconds*, CHARLES KOCH INST. (Nov. 7, 2015), https://perma.cc/HP5E-RNM2.

[225] *See* Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM EDT), https://perma.cc/DRB2-CV7A.

[226] *See* Michael Hirsch, *Charles Koch, Liberal Crusader? He's One of the Left's Biggest Bogeymen. Now He's Teaming Up with George Soros*, POLITICO MAG., Mar./Apr. 2015, https://perma.cc/L48B-

And guess what? Koch and Soros have recently begun working together in a different political realm, opposing military interventions.[227]

The pitch to Koch and Soros is simple: Fund a standing organization to lead this fight. Then funnel money to individual groups through that standing organization and begin to coordinate goals and activities. It will free those groups from constant fund-raising and competition with one another and allow for efficiency and effectiveness at a national level.[228] Over time, too, specialization will evolve among the groups both in the goals they address and the constituents they serve. The governing board of the meta-organization can have representatives from these constituent organizations, and the larger body can create active roles for academics and individuals who are deeply invested in this fight including (importantly) those who have been incarcerated themselves.

A thousand bees can be more dangerous than one bear, but only if those bees have coordination and focus. The goal of criminal justice reform is worthy enough and the advocates tenacious enough to become a swarm attacking injustice with common purpose and direction.

2. Taking Crime and Harm Seriously

To accelerate reform, it will be necessary to take the costs of crime seriously. The political pushback against reform, at its best and most valuable, comes from those who argue in the interests of crime victims and those who may be victimized. Their concerns for public safety must be taken seriously. To do that, we must offer something more than just lower sentences, but other ways to control crime, even (and perhaps especially) when crime rates are low. This can and should include proven plans to lower recidivism, including the promotion of education within prisons. It also can and should address root causes of crime, including poverty, as well. But beyond those important points, it must either assign a different role to law enforcement or argue for a reduced role for the police.

For example, in the narcotics field, there are options for addressing drug use other than broad legalization and a war on drugs, the two poles that are sometimes presented as our only options. One would be to attack the cash flow of the illegal narcotics trade rather than the labor of that industry, by forfeiting cash flow as it heads back to the source point of the trafficking.[229]

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[227] Joshua Keating, *Why It Makes Sense That Soros and Koch Are Uniting to Fund a New Anti-War Think Tank*, SLATE (July 3, 2019, 12:42 PM), https://perma.cc/P3VM-3972.

[228] *See supra* Part II(B)(1) (explaining the experience of Nkechi Taifa and her Justice Roundtable, which has come closest to coordinating the many branches of advocacy and to which such an organization would be wise to look).

[229] Mark Osler, *Asset Forfeiture in a New Market-Reality Narcotics Policy*, 52 HARV. J. ON LEGIS. 221, 228 (2015).

Such a tactic would make the business fail, driving up prices of illegal narcotics as supply shrank (at least temporarily).[230]

Listening to crime victims is important but challenging.[231] The striking overlap between crime victims and offenders—they are often simply the same person at different times[232]—complicates the simple narrative that victims want long sentences. Advocates are wise to engage with crime victims in the community[233] rather than strident advocacy groups that focus on pursuing retribution. Listening to victims often means seeking them out.

B. *Confronting Politics*

1. A Higher Profile

Sadly, criminal justice is most often in the public eye when crime rates are high. In 1982, for example, Richard Neely credibly claimed in *The Atlantic* that "[t]hrough at least the past decade, no public problem has worried Americans more persistently than crime. When people are asked in opinion surveys to list the problems that concern them most, the threat of crime typically comes at or near the top of the list."[234] With the threat of crime down—way down—since that time,[235] the very issue of criminal justice also dropped far down the list of issues that the public cares about. In 2021, Gallup found that only 2% of Americans identified crime as "the most important problem facing the nation today."[236]

Clearly, we care most about things we perceive to be threatening our own interests.[237] When crime is not prevalent, it drops from the public discourse because it does not relate directly to our lives. So, predictably, criminal justice policy is rarely, if ever, mentioned in televised debates

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[230] *Id.* at 223–24.

[231] *See* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 410–11 (1999) (explaining that even simple tools like victim impact statements can be problematized).

[232] Caitlin Delong & Jessica Reichert, *The Victim-Offender Overlap: Examining the Relationship Between Victimization and Offending*, ILL. CRIM. JUST. INFO. AUTH. (Jan. 9, 2019), https://perma.cc/8A7L-F57H.

[233] Robert Rooks, *Point of View: Important Solutions on Criminal Justice Reform, and a Turning Point for Florida*, PALM BEACH POST (July 10, 2019, 7:31 AM), https://perma.cc/2KE4-GPP7.

[234] Richard Neely, *The Politics of Crime*, THE ATLANTIC, Aug. 1982.

[235] John Gramlich, *What the Data Says (And Doesn't Say) About Crime in the United States*, PEW RES. CTR. (Nov. 20, 2020), https://perma.cc/LRB2-FPCD.

[236] *Most Important Problem*, GALLUP, https://perma.cc/AUN7-CQQZ (showing that the problem of "drugs," which was listed separately, was only the "most important problem" for less than 0.5% of Americanst) (last visited June 4, 2021).

[237] *See* Julia Carrie Wong, *Trump Referred to Immigration 'Invasion' in 2,000 Facebook Ads, Analysis Reveals*, THE GUARDIAN (Aug. 5, 2019, 17:58 EDT), https://perma.cc/A9QJ-WXTX (describing that the same Gallup poll in 2019 found the most important issue to be immigration—which President Trump had promoted as a threat to American Safety and economic well-being).

leading up to elections.[238]

The cost of this is significant. If candidates do not have to discuss criminal law when seeking election, it is unlikely they will pay it much attention once in office—after all, it was never on the agenda. Moreover, by failing to insist that the topic be addressed, we forfeit the ability to know candidates' positions on crucial issues. For example, clemency—a power employed entirely within the president's discretion[239]—usually only gets into the news when a president uses the pardon power in favor of someone terrible, such as Marc Rich[240] or Sheriff Joe Arpaio.[241] Yet, no president in memory has been asked how he would use the pardon power prior to taking office. That means that there was no statement of principle, no promise of responsibility, before that mighty tool came into the president's grasp. That failure is on us, because collectively we have failed to ask about this policy issue when we have the opportunity.

To remedy this, advocates must demand that candidates stake out positions on important criminal justice issues, lobby media outlets to question those candidates about criminal law, and press our own questions when we have the chance. It is crucial that advocates take their messages to those who will have the power to enact change at the time they are most likely to listen—when they are campaigning. Yes, that may mean going to Iowa,[242] but to avoid this kind of engagement is to court irrelevance.

2. Naming and Shaming Racist Appeals

In 1988, George H.W. Bush was elected president over Democrat Michael Dukakis either because of or despite a racist appeal that became a legend. A group affiliated with his campaign, the National Security Political Action Committee, created an ad titled "Weekend Pass" that featured Willie Horton, an inmate who received a weekend furlough while Dukakis was governor of Massachusetts and used that opportunity to commit rape.[243] Though the Bush campaign did not produce the ad itself, Bush campaign chairman Lee Atwater had said that "if we can make Willie Horton a

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[238] *See* Mark Dent, *Abortion, Reparations, Israel: Topics to Watch for During the Second Democratic Debate*, FORTUNE (July 30, 2019, 9:44 AM EST), https://perma.cc/GSH7-UL6C (demonstrating that discussions of the debate reflect this absence of focus on criminal law).

[239] U.S. CONST. art. II, § 2, cl. 1.

[240] Douglas Martin, *Marc Rich, Financier and Famous Fugitive, Dies at 78*, N.Y. TIMES (June 26, 2013), https://perma.cc/T8G8-N6QL.

[241] Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://perma.cc/8FG4-JRJX.

[242] *See* Mark Osler, *Holding Fourth on Fireworks and Presidential Timber*, WACO TRIB.-HERALD (July 13, 2019), https://perma.cc/X3BB-67JC (conveying that, in fact, going to Iowa during primary season is a fascinating endeavor).

[243] Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), https://perma.cc/2KDH-2589.

household name, we will win the election."[244] The advertisement itself depicts a mug shot of Horton, a black man, as it describes the crimes he committed while on furlough.[245]

The Willie Horton ad is viewed as a template for "dog-whistle" racist appeals that don't explicitly mention race, but which set out an enthymeme sending a clear message to followers with racist and racialized ideas.[246] This technique allowed Bush to deny the racial nature of the appeal while plainly creating the desired effect in the population.[247] The dog-whistle approach isn't relegated to history.[248] In the 2016 presidential election, it was employed to great effect by President Trump, and some assert that he now has moved beyond such shaded messaging into straight-up racism.[249]

President Trump's more controversial comments have not always been directed at criminal law policies, though sometimes they have: in announcing that he would run for president, Trump famously said that, "When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."[250] And with a raft of progressive opponents seeking to oppose him, it is easy to imagine the temptation is great to go back to dog-whistle techniques, or worse.

When that happens (or if a Democratic candidate does the same), it must be clearly labeled as a racist appeal. Advocates, journalists, all of us have the responsibility of calling out such dangerous, divisive, and immoral appeals.

3. Diluting Prosecutor's Influence on Policy

Few of us are good at admitting we were wrong.[251] Prosecutors are

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[244] *Id.*

[245] Nat'l Security PAC, *Willie Horton 1988 Attack Ad*, YOUTUBE (uploaded by llehman84 on Nov. 4, 2008), https://perma.cc/MJ8H-YCZU.

[246] Rachel Withers, *George H.W. Bush's "Willie Horton" Ad Will Always Be the Reference Point for Dog-Whistle Racism*, VOX (Dec. 1, 2018, 4:10 PM EST), https://perma.cc/T8RL-PTT9.

[247] *Id.* (describing one part of a broader campaign involving Horton employed by Bush). *See generally* Paul Waldman, *How George H.W. Bush Exploited Racism to Win the Oval Office*, WASH. POST (Dec. 3, 2018, 4:24 PM EST), https://perma.cc/RB8Q-9TX9.

[248] *See* Carl M. Cannon, *Debunking the Willie Horton Ad Controversy*, REAL CLEAR POL. (Dec. 9, 2018), https://perma.cc/P69B-AX2L (explaining that not everyone agrees that the Willie Horton ad was racist).

[249] Paul Krugman, *Racism Comes Out of the Closet*, N.Y. TIMES (July 15, 2019), https://perma.cc/6X73-5YW2.

[250] Ian Schwartz, *Trump: Mexico Not Sending Us Their Best; Criminals, Drug Dealers and Rapists Are Crossing Border*, REAL CLEAR POL. (June 16, 2015), https://perma.cc/7BJC-57XG.

[251] *See* Susan Krauss Whitbourne, *The Mindset That Makes It Hard to Admit You're Wrong*, PSYCHOL. TODAY (Mar. 21, 2017), https://perma.cc/FFD7-47RN.

particularly bad at it;[252] criminal justice reforms almost always contain an implied but inherent criticism of what prosecutors have done. Too often prosecutors react to reform efforts by staunchly defending the power they have accumulated.[253]

That defensiveness should not surprise us. After all, the sentences we seek to alter are the ones that prosecutors "won" as they stood ten feet away from the person being sentenced. The emotional investment in that exercise is huge; after all, the cost of having been wrong is the knowledge that one has unfairly imprisoned (or, in death penalty states, killed) a fellow citizen.

The influence of prosecutors operates differently in the federal and state systems. In the federal system, the Department of Justice serves as literally the only formal advisors to the President and Congress on criminal justice matters.[254] In the states, the influence of prosecutors runs with the deference they are shown by legislators on policy matters.[255]

i. *The Department of Justice*

Maintaining the top officials of the nation's prosecutorial office as the only advisors to the president on criminal justice reform is ludicrous—the conflict is obvious.[256] Two fixes to the problem are easily available, and can be created by the president through executive order. The first would be to create a single advisor position, similar to the role that the United States Trade Representative plays as an advisor outside of the Department of Commerce,[257] or the National Security Advisor fulfills outside of the national intelligence agencies.[258] Notably, at least one Democratic candidate for president in 2020—former prosecutor Senator Amy Klobuchar—embraced this idea.[259]

A second route would be to create a Presidential Criminal Justice Advisory Commission rather than relying on a single advisor.[260] This

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[252] Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), https://perma.cc/W6ME-JVV8; Ed Brayton, *Why Prosecutors Rarely Admit Mistakes*, PATHEOS, (Feb. 7, 2013), https://perma.cc/28JT-ZURQ.

[253] John Pfaff, *The Perverse Power of the Prosecutor*, DEMOCRACY (Feb. 22, 2018, 5:53 PM), https://perma.cc/6XVG-BYT4.

[254] Barkow, *supra* note 157, at 396.

[255] *See* Julia Shumway, *Prosecutors' Honor Questioned as Criminal Justice Measures Die*, ARIZ. CAP. TIMES (June 14, 2019), https://perma.cc/4RFQ-9LLM.

[256] *Supra* Part II(A)(3)(i).

[257] *Mission of the USTR*, OFF. OF U.S. TRADE REPRESENTATIVE, https://perma.cc/SW3Q-NAWK (last visited June 5, 2021).

[258] *See* Steven J. Hadley, *The Role and Importance of the National Security Advisor*, TEXAS A&M (Apr. 26, 2016), https://perma.cc/N3SP-C4WH.

[259] Amy Klobuchar, *On Criminal Justice Reform, It's Time for a Second Step*, CNN (Apr. 5, 2019, 11:58 AM EDT), https://perma.cc/QJ4Y-KAFA.

[260] Barkow, *supra* note 157, at 459.

broader organization would lack the sharp focus a single advisor can muster, but has the advantage of including a diversity of viewpoints, and could include people with varying expertise, including those from particularly successful state systems.[261]

With either model, it would also allow for a new beginning and capabilities, including establishment of a data hub for metrics such as successful re-entry in support of a mission to promote public safety in the least costly way.[262] At the very least, the DOJ's chokehold on reform would finally be broken.

ii. *Elected Prosecutors and Lawmaking in the States*

In the states, the role of prosecutors in policy formation is more diffuse and obscured than the DOJ's role within the federal government.[263]

Certainly, the election of progressive prosecutors is the most effective way to address the influence of prosecutors on policy; that effectively reverses the anti-reform dynamic.[264] Even if they lose, progressive *candidates* for the office of elected prosecutor are likely to drive the discussion in the right direction and force establishment figures to recognize the problems with over-incarceration, cost, and cash bail, among other issues.[265]

In some states, too, it might be especially effective for faith groups to push for reform and directly press for less retributionist views from elected prosecutors. Some of the most conservative parts of the United States are also the areas where Christians most predominate. Certainly, the commonality of a faith centered on the life of someone who was unfairly tried, denied clemency, and executed (and who taught that "when I was in jail you visited me")[266] is an effective starting point in influencing Christian district attorneys and legislators alike.[267]

C. *Boldness in the Ask*

Finally, we must be bold in what we ask for, particularly in those periods in which reform seems most possible. Between 2009 and 2011, the first two years of the Obama administration, there was a tremendous and lost

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[261] *See* Barkow, *supra* note 157, at 459.

[262] *See* Barkow, *supra* note 157, at 460.

[263] *Supra* Part II(A)(3)(ii).

[264] *See* Del Quentin Wilbur, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug. 5, 2019, 4:00 AM), https://perma.cc/W8QN-LYQC.

[265] Amir Khafagy, *How Tiffany Cabán Lost the Vote but Won the Fight in Queens*, JACOBIN (Aug. 15, 2019), https://perma.cc/7NR9-E488.

[266] *Matthew* 25:36.

[267] MARK OSLER, PROSECUTING JESUS: FINDING CHRIST BY PUTTING HIM ON TRIAL (2016) (My own work on the death penalty has been rooted in this idea, as I went to the most conservative Christian audiences I could find with an anti-death penalty message).

opportunity.[268] Despite a motivated president (Obama) and Democratic majorities in both houses of Congress, the only significant advance in the field of criminal law through legislation was the tepid (yet important) Fair Sentencing Act, that reduced some crack sentences prospectively.[269] Other legislative priorities—most prominently, the Affordable Care Act—took priority while time slipped away.[270] We should have insisted on more.

We must also be more savvy about what we ask for. Too often, advocates seek the most obvious thing—for example, a reduction in the number of incarcerated people through sentencing reform. While that is important, seeking that kind of legislation is not the only thing we should be pursuing. To enact long-term change, we must also challenge decision structures and move to re-examine the very definitions of crimes.

The necessity to create structural change was well-illustrated by the Obama clemency effort. While that effort paired many petitioners with lawyers and managed to commute the sentences of about 1,715 incarcerated people,[271] Obama never changed the unwieldy clemency review process that had hampered any fair use of the pardon power for decades,[272] and the process he did use was hampered by infighting.[273] In other words, instead of replacing a broken-down old machine, they simply cranked it harder. As one might expect, that worked, to a degree, for a while. But any legacy effect—a better process that would reduce incarceration over time—was forfeited by the failure to address structure.

Important structural changes (in addition to the clemency fix Obama did not make) could affect both the structure of advocates and the structure of government; these would include creation of an advocacy meta-organization by top funders and the addition of a non-DOJ criminal justice advisor to the White House. When we change structures, we mold outcomes both seen and unseen.

Good and great work is being done in the field of criminal law. The First Step Act has improved thousands of lives, saved taxpayer money, and offers a bipartisan template for success. But if that is all we hope for, we are leaving far too much on the table when the stakes are measured in lives and freedom. This is not a time for brutal timidity, and it never was.

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[268] Doug Berman, *Obama Hasn't Reformed Criminal Justice—Could Romney Do Better?*, DAILY BEAST (Apr. 13, 2012, 12:00 AM ET), https://perma.cc/WYC8-WMFV.

[269] *See supra* Part I(A).

[270] Elaine Kamarck, *The Fragile Legacy of Barack Obama*, BROOKINGS INST. (Apr. 6, 2018), https://perma.cc/SRC6-N5WQ.

[271] Office of Pardon Attorney, *Obama Administration Clemency Initiative*, U.S. DEP'T OF JUST., https://perma.cc/NCN9-Q59Z (last visited June 5, 2021).

[272] Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 470–84 (2017).

[273] John Fritze & Gregory Korte, *Obama Clemency Program for Drug Offenders Snared by Infighting, Auditors Find*, USA TODAY (Aug. 1, 2018, 3:20 PM ET), https://perma.cc/7RUB-FC6R.

Consensus, Compassion, and Compromise?: The First Step Act and Aging Out of Crime

JALILA JEFFERSON-BULLOCK[*]

INTRODUCTION

The First Step Act (Act) represents an ambitious, bipartisan compromise to commence much-needed, genuine federal sentencing reform by attempting to reduce the prison footprint. However, as its name suggests, it is, in practice, simply one meager stride in what requires a marathon to affect true change. This is particularly evident when considering its two-fold approach to reduction in the sentences of elderly offenders. Since 2013, compassionate release has stood as the exclusive process available for qualifying elderly offenders to be released early from prison. While the Act broadens access to compassionate release, it fails to do so liberally. As before, the Bureau of Prisons (BOP) persists in creating and conserving implementation guidelines that render compassionate release policies virtually impotent. The Act also resurrects the Second Chance Act of 2007 by authorizing aged-based early releases for inmates who are sixty years old and have served at least two-thirds of their sentence. While this revival appears appealing, it, too, fails to result in cognizable evolution. This is so because BOP has again apprehended the system by refusing to include good time credits in release eligibility calculations. In many ways, BOP's unceasing resistance to reform has impeded the Act's potential.

In his article, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, Professor Mark Osler documents many of "the slows" or reasons why criminal justice reform retains a slow, crawling pace. He lists the political pressure that politicians face when casting themselves as "tough on crime" as one reason why reform, despite well-documented research and support, is not advocated for more vigorously and consistently by politicians. Professor Osler also suggests that a more coordinated and consolidated effort by reformists would result in markedly improved

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outcomes. He is correct on both fronts, but there is more to the story.

As a general matter, this country has created laws and policies that express extreme moral condemnation of criminal offenders. Our approach to punishment expresses, rather soundly, clear repugnance of those who have been found guilty of a crime. Before true reform can occur, we must commence the indispensable process of reprogramming our collective view of criminal offenders. Once we begin viewing them as human beings, worthy of dignity and respect, fairer and more humane punishment methods will, in turn, follow.

I. The Truth about Criminal Justice Reform

In his article, Professor Osler asks, "Why are we so slow to correct clear injustices?"[1] He identifies politics, racism, prosecutorial encroachment, and incrementalism as possibly justifying "the slows," or the lack of urgency in crafting novel and impactful criminal justice reforms. He correctly specifies that criminal justice reform is the only U.S. policy arena where the affected are rendered voiceless.[2] He writes, "those most directly affected by over-incarceration are the people in our society least able to affect policy through democratic means because those in prison are almost always denied the ability to vote."[3] He also hearkens to bygone eras' media coverage of the crack epidemic, laments the sensationalist nature of media coverage, and reminds us of the media's power and influence. In his words, "real-life experiences do not strongly affect the way we feel about criminal justice, but the media's interpretation of what is going on—often in communities other than our own—does affect our policy outlooks."[4] Further, he confronts America's original sin by denouncing our race problem and the myth that "the threat of black men . . . requires mass incarceration."[5] Finally, he labels prosecutors as incessantly impeding any reform process. While all of this is true, it still fails to adequately explain the slows. The slows are fueled by something far deeper.

A. *Dignity*

The underlying explanation for "the slows" is that both U.S. society and the criminal justice system overwhelmingly view incarcerated people as less human, and, therefore, undignified.[6] The U.S. criminal justice system

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[1] Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW. ENG. L. REV. 161, 176 (2021).

[2] *Id.*

[3] *Id.* at 176–77.

[4] *Id.* at 179.

[5] *Id.* at 181.

[6] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59 (2010); Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly*

dehumanizes criminal offenders in a manner that is radically dissimilar to similarly situated countries. Professor James Q. Whitman writes, "[t]he relationship between punisher and punished is indeed one of the core, definitional, relationships of inequality in human society, and one of the core, definitional relationships of disrespect."[7] He further characterizes the "intoxication of degradation"[8] as unleashing the worst in the punisher as he attempts to put the prisoner "in his place." [9] Other scholars confirm that U.S. criminal punishment constitutes a series of "degradation ceremonies"[10] that affirm an offender's moral deficiency and "reflects . . . [his] low status."[11] According to Professor Howard Garfinkel, degradation ceremonies are fueled by society's urgent desire to publicly denounce moral indignation. The result is the "ritual destruction of the person being denounced."[12] This is because the "psychology of punishment" is "a psychology of degradation," and "[w]hen human beings punish, they tend, in the very act of punishment, to create a relationship of inequality."[13] Criminal punishment, particularly incarceration, is socially and morally degrading because it permanently extinguishes offenders' social standing and overall acceptance as fully, equally human. We justify our poor treatment of criminal offenders as deserved because they are simply not as "good" as the rest of us. In the words of Professor James Q. Whitman:

> Criminal punishment does not only visit measured retribution on blameworthy offenders. Nor does it only deter. Nor does it only express considered condemnation. It . . . also expresses contempt. We do indeed harbor a strong natural tendency to perceive offenders as "dangerous and vile," and therefore to strike them hard: Human beings are so constituted that they typically want, not to punish in a measured way, but to crush offenders like

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Inmate Population, *Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 244 (2000) (stating that "compassion shown the elderly by family, friends, and caregivers is replaced by the indifferent correction officer"); Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 954 (2018).

[7] James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM L. REV. 85, 106 (2003).

[8] JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 22–23 (2003).

[9] *Id.*

[10] Howard Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420 (1956).

[11] Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 547 (2004) (providing that a degradation ceremony is any communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types); *see* Garfinkel, *supra* note 10, at 420.

[12] Garfinkel, *supra* note 10, at 421.

[13] Whitman, *supra* note 7, at 106.

> cockroaches.[14]

Scholars describe criminal justice as "culture-bearing" because it reveals how society truly views those who inhabit it.[15] Our oppressive treatment of offenders in the criminal justice system exposes precisely what we, as a society, think of them. Professor Joshua Kleinfeld writes:

> American punishment treats an offender who has committed a serious crime or engaged in a pattern of repeat offenses as having exposed the truth about who he is—about his enduring character. The criminal system thus crosses the line separating actor from act, and the crime or series of crimes is taken to justify, not just imposing hard treatment on the offender, but banishing him from social life.[16]

Collateral consequences and the stigma that attaches upon even being accused of a crime indicate who we believe offenders and alleged offenders to be—not worthy of inclusion in our pristine communities. According to Professor Kleinfeld, "[i]mplicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed rather than ordinary people who have committed crimes."[17] Professor Jamila Jefferson-Jones describes stigma as a "'socially inferior attribute' that marks the carrier as one who deviates from prevailing social norms," and "taints the carrier as one possessing weak character,"[18] rendering them somehow less human than those who have never been convicted. Stigmatized offenders are "not quite human," which allows society to exercise varieties of discrimination, "through which we effectively . . . reduce [the offender's] life chances."[19] The truth is that, in practice, the aforementioned stain extends not just to those accused of or engaged in serious or repeat offenses but to all offenders. This stigma is an unavoidable consequence of contact with the criminal justice system. Professor Markus Dubber agrees that "it is not only [the] punishment that degrades. It is the ascription of the label 'offender' that degrades . . . the level of degradation thus increases as the suspect becomes a defendant becomes a convict becomes an inmate."[20]

Scholars note that "human dignity has come to be accepted as a core value of [human rights] jurisprudence"[21] and that an approach focused on

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[14] Whitman, *supra* note 7, at 98.

[15] Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 940 (2016).

[16] *Id.* at 948.

[17] *Id.* at 941.

[18] Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 505 (2013).

[19] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963).

[20] Dubber, *supra* note 11, at 547.

[21] Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 519 (2010).

dignity would seek to "restore the individuals . . . to their prior status," instead of "degrad[ing] and marginaliz[ing] them."[22] Similarly, it provides rules to determine which assets are credited to the entity (under the control of its internal rules) and how they may be spent or encumbered. The human rights model of dignity insists that we "provide robust protections for the dignity of individuals who are incarcerated."[23] Scholars, however, describe the U.S. conception of dignity as "narrow" and specifically rely, almost solely, on Eighth Amendment principles. Professor Michael Pinard pronounces that "the United States asks whether a certain measure, practice, or deprivation violates the personal dignity interests protected by the Constitution, rather than asking whether the overall legislative scheme is consistent with a robust belief in human dignity generally."[24] As a consequence, then, "the concept of dignity is an end point that cannot be passed; it is invoked only in response to the most egregious laws or government conduct."[25] He further notes that in other similarly situated countries, dignity is "the starting point for interpretation, from which rights flow."[26] This constricted vision allows us to label offenders as undignified and stigmatize them. While all prisoners endure degradation, it is especially evident in the case of elderly offenders.

B. *The Indignity of Prison Life*

The prison environment is "crimogenic," stripping inmates of their basic humanity, "[w]hether by introducing petty criminals to more violent offenders, forcing prisoners into racist gangs, or subjecting them to violence and rape . . . ."[27] Among other indignities, inmates experience unreliable medical care, use of excessive force by prison guards, lack of basic sanitation, extreme temperatures, unhealthy food, and a multitude of other experiences that pose risks to prisoner health, safety, and general well-being.[28] Lack of

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[22] *Id*. at 526–27.

[23] *Id*. at 519.

[24] *Id.* at 521.

[25] *Id.*

[26] Pinard, *supra* note 21, at 521.

[27] United States v. Blake, 89 F. Supp. 2d 328, 344 (E.D.N.Y. 2000); *see* Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 87–89 (2014) (stating how in federal prison, lengthy sentences have not decreased recidivism); Richard A. Viguerie, *A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013), https://perma.cc/2KL7-3RY5 (stating how in the state system, over 40 percent of offenders return to prison within three years of release, and this number is close to 60 percent in some states).

[28] Jefferson-Bullock, supra note 27, at 84. S*ee generally* Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153 (2013); Alan Blinder, *In U.S. Jails, a Constitutional Clash Over Air-Conditioning*, N.Y. TIMES (Aug. 15, 2016), https://perma.cc/9686-RCPY; *Cruel, Inhuman, and Degrading*

funding for critical rehabilitation programs render day-to-day life uninspired, as inmates often "simply idly pass the time all day long."[29] Together, these conditions strip inmates of their dignity, regardless of age. For elderly prisoners, however, indignities are far more pronounced.

The overall prison environment is not suited to accommodate aged prisoners. Prisons' physical designs are not fit for the aged, often lacking in facilities critical for safe movement of the elderly and disabled.[30] Further, elderly prisoners experience a higher risk of victimization if housed with much younger, more robust inmates and often fall victim to their whims.[31] Additionally, due to substandard medical and dental care, inadequate diet, frequent engagement in risky behaviors, and other social factors, aged inmates suffer mental and physical deterioration at a shockingly increased rate compared to that of unincarcerated people of the same age.[32] Medical professionals proclaim that "[a] prisoner aged fifty may be classified by society as middle-aged; he may, in fact, already be an elderly person if many of his years have been spent in the prison system."[33] As a result, studies demonstrate that eighty-two percent of elderly inmates suffer chronic illness, requiring consistent care.[34] Despite a clear need for geriatric medical care, prison facilities lack medical staff and services necessary for such care. Further, scarce educational, recreational, and rehabilitative resources are seldom designed to meet the specific needs of older people.[35] Finally, elderly prisoners are often unable to participate in daily inmate life, including basic prisoner work duty, and many must rely on inmate companions, should they be available, to assist in daily living activities.[36]

Conditions, ACLU, https://perma.cc/9BS8-2A7F (last visited June 21, 2021); Michele Deitch & Michael B. Mushlin, *What's Going On in Our Prisons?*, N.Y. TIMES (Jan. 4, 2016), https://perma.cc/T33Y-THRK; Martin Garbus, *Cruel and Unusual Punishment in Jails and Prisons*, L.A. TIMES (Sept. 29, 2014, 5:52 PM PT), https://perma.cc/7V8P-JEGF.

[29] Jefferson-Bullock, *supra* note 27, at 88; *see, e.g.*, *Rehabilitation Programs Can Cut Prisons Cost, Report Says*, ORANGE COUNTY REG. (July 1, 2007, 3:00 AM), https://perma.cc/4BQM-2W8N; *see also, e.g.*, Michael Rothfield, *Cuts Dim Inmates' Hope for New Lives*, L.A. TIMES (Oct. 17, 2009, 12:00 AM PT), https://perma.cc/WB3D-PH8N; Mike Ward, *State Jails Struggle with Lack of Treatment, Rehab Programs*, STATESMAN (Dec. 30, 2012, 12:01 AM), https://perma.cc/6YKS-MYF9.

[30] *See* Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROBATION, June 1994, at 47, 47–48.

[31] *See generally Old Behind Bars: The Aging Prison Population in the United States,* HUM. RTS. WATCH (Jan. 27, 2012), https://perma.cc/QH4X-2HCN [hereinafter *Old Behind Bars*].

[32] *See* Nancy Neveloff Dubler, *The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails*, 26 J.L. MED. & ETHICS 149, 150 (1998); Jean Mikle, *Health Care Costs for Older Inmates Skyrocket*, USA TODAY (Mar. 31, 2013, 12:01 AM PT), https://perma.cc/7KQR-24RC.

[33] Dubler, *supra* note 32, at 150.

[34] *See* Dubler, *supra* note 32, at 150–51.

[35] *See* Dubler, *supra* note 32, at 152.

[36] *See* Kevin Johnson & H. Darr Beiser, *Aging Prisoners' Costs Put Systems Nationwide in a Bind*, USA TODAY (July 10, 2013 6:51 PM ET), https://perma.cc/G7HT-UGNR (describing how

Sadly, prisoner end-of-life care is compromised as well. In previous works, I have written of the indignities suffered by terminally ill prisoners in prison hospitals and hospices, arguing that prison end-of-life care is unconstitutionally inadequate because the objectives of medical care and correction are incongruous.[37] The goal of prison is to punish, while the aim of medical care is to "diagnose, comfort, and cure."[38] The incompatibility of these two purposes is even more obvious at the end of a prisoner-patient's life when the "prisoner-patient's access to health care is controlled completely by prison guards and is 'limited by whether a guard chooses to allow the inmate to seek treatment.'"[39] As a result, end-of-life care fails to "resolve concerns about the dignity of dying in the harsh environment of prison."[40] Plans for a good death, surrounded by loved ones, are thwarted by inflexible visiting hours, unwelcoming visiting venues, and less qualified doctors.[41] This is, perhaps, the epitome of indignity.

> This was never, however, the purpose of prison in the United States. In previous works, I have written that the American prison system was initially born of the rehabilitative model, and that "[t]he concept of rehabilitation [has] decisively determined Western society's preference for incarceration as a mode of punishment."[42] Further, I offer that: Historically, prisons and jails were institutions where offenders could separate from society to reflect on their misdeeds and contemplate return following an improved moral condition. Oddly, the principal purpose of punishment radically changed while the punishment distribution tool remained unaffected. [Sentencing Reform Act or "SRA"] reforms abandoned rehabilitation, thereby promoting retribution and deterrence to punishment purpose prominence. However, this shift in punishment purpose was not accompanied by any contemplated or realized shift in punishment method. The new [Federal] Sentencing Guidelines strongly favored custody over probation for most offenses. Reformers concluded that prisons lacked the capacity to rehabilitate, yet failed to fully consider whether prisons were capable of successfully deterring crime or

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approximately 250,000 state and federal prisoners may be classified as elderly. Warden Burl Cain of the Louisiana State Penitentiary notes that of 1,000 prison field workers, only 600–700 are physically able to complete assigned tasks due to age-related physical decline. One third of Louisiana State Penitentiary inmates are over the age of fifty, and each cost over $100,000 to incarcerate).

[37] *See* Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 540 (2015).

[38] *Id.*; *see* Dubler, *supra* note 32, at 150.

[39] Jefferons-Bullock, *supra* note 37, at 541.

[40] *Old Behind Bars*, *supra* note 31.

[41] Jefferson-Bullock, *supra* note 37, at 547.

[42] Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 389 (2016) (quoting Edwin L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 350 (2001)).

> properly punishing moral blameworthiness.[43]

At its origin, prison was never intended to degrade.

One purpose of the Act is to restore a measure of dignity to offenders. The Act seeks to reduce the prison footprint responsibly in part by facilitating the release from prison of lower risk offenders and transferring greater numbers of prisoners to home confinement.[44] Relying on the aging out of crime theory, the Act hopes to release groups of qualified elderly offenders. The Act, however, does not do much to advance its stated goals. Because it is the product of a system that dehumanizes criminal offenders, the Act is not a major step for criminal justice reform. The treatment of elderly offenders in the Act and its practical applications further demonstrate the dehumanizing stigma that continues to slow down the process of criminal justice reform.

II. Compassionate Release and the First Step Act

Compassionate release theory is grounded in human dignity by declaring that an inmate's altered and unfortunate circumstance may demand early release from incarceration.[45] Compassionate release authorizes judges to review criminal sentences post-sentencing to determine whether, under sufficiently extraordinary and compelling circumstances, they remain appropriate.[46] Compassionate release relies upon both legal and moral justifications. Its legal justification asserts that impending death, sickness, extreme family responsibilities, and age have canceled a prisoner's debt to society, such that release, prior to the completion of the prisoner's sentence, is warranted.[47] Its moral rationale declares that dying prisoners are worthy of a dignified death, indispensable to the fabric of their families as sole caregivers, and/or worthy of experiencing their final living days unconfined by prison walls. In the case of elderly offenders, compassionate release is driven by more than compassion.[48] Research indicates that unsustainable costs and underwhelming public safety benefits support a broadened view of compassionate release of elderly offenders. Congress attempted to account for this by adding novel features to the compassionate release process in the Act but failed to do so. While it is an aspirational first attempt, the Act leaves much to be desired. This is so because the BOP

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[43] *Id.* at 360.

[44] *See* H.R. REP. NO. 115-699, at 15–17 (2018).

[45] Jefferson-Bullock, *supra* note 37, at 523.

[46] *See* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 820 (1994).

[47] *See id.* at 829.

[48] Brie A. Williams, Alex Rothman & Cyrus Ahalt, *For Seriously Ill Prisoners, Consider Evidence-Based Compassionate Release Policies*, HEALTH AFF. (Feb. 6, 2017), https://perma.cc/96SJ-USS9.

remains the strict, less-than-compassionate gatekeeper.

The Act alters the compassionate release policy in two significant ways: (1) by allowing prisoners the autonomy to request compassionate releases instead of relying on their prison warden to do so on their behalf; and (2) by providing prisoners with the option to appeal directly to courts.[49] A prisoner must still submit a compassionate release request to BOP, but may proceed to court if the warden fails to respond to the request within thirty days or if BOP, after its fourth and final stage of review, denies the prisoner's request.[50] While these amendments represent a marked, progressive shift, they are not without severe limitations.

Under the Act, well-deserved allowances are made for the terminally ill, but similar concessions are not granted to the elderly.[51] Certainly, elderly offenders may avail themselves of the novel self-submitted petition and court-appeal provisions, just as any other prisoner may. However, the guiding criteria remains the same. The underlying governing Sentencing Guideline, 1B1.13, is unchanged, and any reduction in sentence must still be consistent with applicable policy statements issued by the Sentencing Commission. Unlike preconditions for terminally ill offenders, then, eligibility requirements for elderly offenders seeking compassionate releases linger undisturbed. An elderly offender convicted of a violent offense must still be seventy years old, must still have served thirty years of his or her sentence, and must still not be deemed a danger to society by BOP.[52] Further, the "extraordinary and compelling circumstance" criteria remains unmodified as well.[53] For an elderly offender's altered circumstance to be deemed "extraordinary and compelling," that offender must still be at least sixty-five years old, must be experiencing an age-related serious decline in physical or mental health, and must still have served ten years or 75% of his or her sentence.[54] These are the identical, limiting guidelines that BOP has relied upon since the enactment of the aforementioned 2013 program "revisions." As before, elderly offenders receive no discernible relief from

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[49] *First Step Act - Frequently Asked Questions*, FED. BUREAU OF PRISONS, https://perma.cc/DTW5-LVS5 (last visited June 21, 2021).

[50] Annie Wilt, *The Answer Can Be Yes: The First Step Act and Compassionate Release*, HARV. C.R.-C.L. L. REV. (Oct. 23, 2019), https://perma.cc/X7P8-GZD5.

[51] *See id.*

[52] *Program Statement: Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 (c)(1)(a) and 4205(g)*, FED. BUREAU OF PRISONS 4, n.1 (Mar. 25, 2015), https://perma.cc/DGP2-F9Z4.

[53] *Id.* at 1.

[54] AMENDMENTS TO THE U.S. SENTENCING GUIDELINES § 1B1.13, 2 (U.S. SENTENCING COMM'N 2016), https://perma.cc/J8RC-U9PW. *But see* 18 U.S.C. § 3582 (c), (d) (2018) (listing criteria for modification of imprisonment for those whose offenses occurred after November 1, 1987, as being at least seventy years old and having served at least thirty years in prison or being diagnosed with a terminal disease).

federal compassionate release policies. Though § 403(b) is entitled, "Increasing the Use and Transparency of Compassionate Release,"[55] the Act does nothing to fulfill its titular claims.

BOP continues its stranglehold on release policies by misaligning with broad Sentencing Guidelines. Enormous disparities persist between controlling Sentencing Guidelines and BOP's Program Statement, rendering statutory changes unsettled. BOP's Program Statement insists that elderly inmates with medical conditions requesting release meet five specific criteria: (1) be sixty-five years old or older; (2) suffer from a chronic or serious medical condition related to age; (3) experience deteriorating physical or mental health that substantially diminishes their ability to function in prison; (4) have exhausted conventional treatments; and (5) have served at least fifty percent of their sentence. Sentencing Guidelines, however, treat these same prisoners completely differently. Sentencing Guidelines require that elderly inmates with medical conditions requesting release must: (1) be sixty-five years or older; (2) experience serious physical or mental health deterioration due to age; and (3) have served the lesser of ten years or seventy-five percent of their sentence.[56] In its role as jailer, BOP has constructed a release policy that is more exclusive in both application and practice than that of the Sentencing Commission. BOP's authority in this arena is baffling, especially since Congress' goal in releasing low-risk offenders is clear and the Sentencing Commission has publicly stated that it believes BOP's authority should be limited to determining whether inmates meet eligibility criteria only and that release decisions should be made solely by judges. In refusing to comply with Congress and Sentencing Commission directives, BOP manifests the culturally-enmeshed attitude that prisoners, even low-risk offenders, are not worthy of early release. BOP's steadfast refusal demonstrates the undignified position held by all prisoners. This is further evident in the practical application of the Act's reauthorization of the Second Chance Act of 2007.

III. Early Release to Home Confinement and the First Step Act

Likewise, in practice, § 403 of the First Step Act is extraordinarily restrictive. Section 403 reauthorizes and broadly expands the Second Chance Act of 2007, a federal prisoner reentry initiative, to provide for an increased number of elderly offenders to finish more of their sentences through home confinement. Under the Act, an elderly offender is now eligible for release to serve his or her remaining term of imprisonment in home detention if he or she has reached sixty years of age and has served two-thirds of his or her sentence. Though Congress clearly instructs that one purpose of the Act is

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[55] H.R. REP. NO. 115-699, at 16 (2018).

[56] *Compassionate Release and the First Step Act: Then and Now,* FAMM 2–3, https://perma.cc/S655-46FM (last visited June 21, 2021).

to reduce the prison footprint by releasing low-risk offenders, BOP chooses to defy congressional directives by refusing to include good time credits in the release eligibility formula. Several provisions of the Act plainly indicate congressional intent to reduce the prison footprint while simultaneously ensuring community safety through appropriate, cost-effective punishments. For example, § 402 provides that "[t]he Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph."[57] Notably, Congress chose the word "shall" in drafting the Act, indicating a mandatory directive to BOP.[58] Further, § 403 adds "eligible terminally ill offenders" as eligible for release to home detention, thereby expanding the category of possible candidates.[59] In its plain terms, § 101 creates a risk and needs assessment system, creates evidence-based recidivism reduction programs, crafts program incentives to welcome participation, and encourages accelerated prison and pre-release custody release.[60] Section 101 provides that "[a] prisoner shall earn 10 days of time credits for every 30 days of successful participation" and "shall earn an additional 5 days of time credits for every successful participation in evidence-based recidivism reduction programming" if certain criteria are met.[61] Finally, § 102 defines, in clear language, pre-release custody categories, eligibility, types, and effectively broadens its use.[62] The unambiguous language of the Act and its legislative history demonstrate that Congress intended to increase eligibility for release to home confinement and other alternatives to federal prison.

In determining inmate eligibility under the original 2007 version of this provision, BOP determined that good time credits should not be included in eligibility calculations. Today, BOP continues to resist decarceration by employing the identical narrow practice that favors confinement. In so doing, BOP disregards both congressional intent and statutory language of the Act. BOP's position inappropriately and functionally deprives elderly inmates of the grant of good time credit that they receive upon reporting to prison. It bears noting that federal good time credit differs greatly from credit for time served. Good time credit in the federal system is granted *upon* reporting to prison and becomes part of a prisoner's term of sentence. Although this portion of the Act is specifically aimed at easing prisons' burdens on low-risk offenders, such as certain elderly offenders, BOP continues to deny release to eligible elderly prisoners by failing to calculate

[57] H.R. REP. NO. 115–699, at 15.

[58] *Id.*

[59] *Id.* at 15–16.

[60] *Id.* at 2–9.

[61] *Id.* at 4, 52.

[62] *Id.* at 10–12, 28–29.

good time credit in release eligibility determinations.

CONCLUSION

While lawmakers achieved a bipartisan compromise to accomplish a small step in federal sentencing reform through the passage of the First Step Act, Congress' vision of release for scores of low-risk offenders remains unrealized. Through intentional strides, this can be remedied. True reform, however, requires a deliberate and intentional cultural shift. To remedy "the slows," we must remember that offenders, by their very humanness, are deserving of dignity.

Before the Cell Door Shuts: Justice Reform Efforts Should Focus on Steps Besides Sentencing

BARBARA MCQUADE*

INTRODUCTION

Mark Osler writes that criminal justice reform efforts have been hampered by what he calls "the slows."[1] He explains that despite bipartisan support, which resulted in the First Step Act of 2018,[2] criminal justice reform remains elusive. He then offers some insightful suggestions for how to increase the pace.

Professor Osler focuses primarily on reducing the length of sentences and releasing inmates early. While he offers plausible theories for the lethargic pace of change in sentencing reform, one additional theory for the slow pace is that sentencing is the wrong place to focus. By the time someone gets to sentencing, a crime has been committed, a victim has been harmed, and a suspect has been arrested and convicted at trial or by guilty plea. A better place to focus may be earlier in the process, before harms to society have occurred and offenders have spent time in prison. While reducing the prison population alone is a laudable goal in a nation that values liberty, reform should be done for other reasons as well: to make communities safer, to improve the participation of citizens in society, to keep families together, and to reduce costs so that funds can be reallocated to better uses.

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[1] Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161 (2020).

[2] First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (reducing the length of certain mandatory minimum sentences, among other reforms).

Cost alone is a factor that makes criminal justice reform attractive to members of both political parties. According to the Bureau of Justice Statistics, we spend $81 billion per year on corrections in America,[3] as the inmate population has grown from about 300,000 prisoners in 1980 to close to 1,400,000 prisoners in 2019[4]

If we instead invested in education, social services, infrastructure, and additional police officers, the commission of crimes would likely go down. In the long term, such efforts would be more effective than simply reducing and commuting sentences, and likely would enjoy more public support. Consequently, such efforts might also avoid "the slows."

This Article examines criminal justice reform beyond the sentencing context. Part I will focus on prevention initiatives relating to drug and mental health treatment. Part II will focus on diversion programs. Finally, Part III will focus on prisoner reentry, which is itself a prevention strategy.

I. Prevention

When I worked as a prosecutor, I observed that a significant number of crimes are driven by drug addiction and mental illness. While addiction to drugs or mental illness does not excuse most crimes, many individuals suffering from these problems need treatment rather than punishment. Punishment is designed to protect the public, deter crime, promote respect for the rule of law, and rehabilitate offenders.[5] Other than rehabilitation, these goals do not match up well with an offender who is driven to commit his crime by a drug addiction or mental illness. As a result, imprisonment may be less just and less effective in such cases. Instead, treatment programs are more effective for helping offenders to rejoin society as productive members.

A. *Drug Treatment*

Large-scale drug trafficking often goes hand-in-hand with violence. Strong drug laws are needed to protect communities from the harmful effects of illegal drugs and the gunfire that can accompany turf battles and drug deals gone bad. But in some instances, drug addiction causes people to commit crimes to obtain cash to feed their addiction. The connection between substance abuse and crime has been documented, with 52% of violent offenders reporting that they were under the influence of alcohol or other substances when they committed crimes, and 39% of property

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[3] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://perma.cc/5Z5H-QTRD.

[4] *Fact Sheet: Trends in U.S. Corrections*, THE SENT'G PROJECT 1, https://perma.cc/83VR-R8VC (last updated May 2021).

[5] *See* 18 U.S.C. § 3553(a) (2018).

offenders reporting the same.[6] For individuals whose crimes are driven by drug addiction, we would be wise to consider treatment as a more effective alternative to incarceration. Not only would treatment give offenders a second chance, but it would also be more effective in reducing recidivism by solving the underlying problem that led to the criminal behavior.

One form of treatment is medication-assisted treatment, or MAT. MAT has been successful in helping opioid addicts overcome their dependencies. MAT is the use of medications approved by the Food and Drug Administration, such as methadone or buprenorphine, in combination with counseling and behavioral therapies[7] to relieve withdrawal symptoms that cause chemical imbalances in recovering addicts. MAT programs have been used to help opioid users overcome addiction by providing a safe level of medication to overcome the physical urge to abuse an opioid.[8] According to the FDA, MAT "is effective in the treatment of opioid use disorders (OUD) and can help some people to sustain recovery."[9]

For offenders whose crimes were fueled by a desire to support their addictions, MAT may be a useful strategy to reduce their drug dependencies and motives to commit further crimes. Making MAT or other kinds of drug treatment a condition of probation or supervision for offenders can help them to overcome their addictions and their desires to commit crimes.

We can wind the clock back even further by preventing drug abuse among the population at large. Drug takeback programs, public education about the addictive properties of opioids and other drugs, and limits on the amount of drugs that doctors can prescribe can all help prevent addiction that can lead to crime. The success of such efforts may be difficult to measure, but they would likely make a significant impact on crime and the prison population.

B. *Mental Health Treatment*

People with mental illness often end up in the criminal justice system. According to a Brennan Center report, "America's largest psychiatric facilities are not hospitals, but jails and prisons."[10] Mentally ill offenders are

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[6] Adrianna McIntyre, *Treatment for Substance Use Disorders May Pay for Itself Through Reduced Crime Rates*, THE INCIDENTAL ECONOMIST (Oct. 6, 2014), https://perma.cc/GPG3-F8FG.

[7] Substance Abuse and Mental Health Serv. Admin., *Medication-Assisted Treatment (MAT)*, SAMHSA, https://perma.cc/GJ75-VGBU (last updated Jan. 4, 2021).

[8] Substance Abuse and Mental Health Serv. Admin., *MAT Medication, Counseling, and Related Conditions*, SAMHSA, https://perma.cc/A3BA-XEYT (last updated Aug. 19, 2020).

[9] *Information About Medication-Assisted Treatment (MAT)*, FDA, https://perma.cc/JV5S-LBC6 (last updated Feb. 14, 2019).

[10] Fair and Just Prosecution et al., *21 Principles for the 21st Century Prosecutor*, BRENNAN CENTER FOR JUST. 7 (Dec. 3, 2018), https://perma.cc/4JYR-PMNJ.

less likely to make bail and more likely to face longer sentences.[11] While at least 50% of U.S. prisoners have some mental health issues, 10% to 25% suffer from serious mental illnesses, compared to about 5% in the general population.[12]

Like individuals addicted to drugs, people with mental illness are not well-suited for prison. The need to punish and deter them is minimized by their relative lack of true culpability for their crimes. And incarceration is unlikely to provide them with the mental health treatment that is needed to prevent recidivism.

Instead of prosecution and incarceration, some proposed solutions for dealing with offenders with mental illness include providing community-based mental health services,[13] so that people can get the mental health diagnoses and treatment they need before engaging in criminal behavior. Police officers should also receive sufficient training to equip them to de-escalate situations involving individuals with mental illness, so that officers can reduce the likelihood of arrest or use of force.[14] Before charging decisions are made, prosecutors should conduct mental health assessments in appropriate cases to determine whether the offender and society would be better off with mental health treatment rather than with criminal prosecution.[15] Rather than incarcerating individuals with mental illness, we can offer better rehabilitation to offenders through treatment.

II. Diversion Programs

Another way to reduce the number of people who are going to prison is to offer diversion programs. Drug courts, veterans' courts, and other so-called "problem-solving courts" are becoming more and more popular. In these specialty courts, offenders are offered opportunities to have their prosecutions deferred if they agree to comply with certain conditions, such as drug treatment, alcohol treatment, or cognitive behavioral therapy.

One example of a successful diversion strategy is the drug court program in Michigan. Offenders with addictions who participate in the program agree to treatment, drug testing, and intensive supervision. They appear at frequent hearings before designated judges who take a "carrot and stick" approach by providing incentives for success, such as early termination, and sanctions for violations, such as short periods in jail. By receiving assistance coupled with accountability, offenders have been able

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[11] *Id.*

[12] Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCHOL., Oct. 2014, at 56, https://perma.cc/AM6R-VSU5.

[13] *See* Fair and Just Prosecution, *supra* note 10, at 4, 7.

[14] *See* Fair and Just Prosecution, *supra* note 10, at 4, 7.

[15] Fair and Just Prosecution, *supra* note 10, at 7.

to overcome their addictions and avoid becoming repeat offenders. The success of the program has been measured in its reduced recidivism rate for offenders who have completed it. The rate at which participants in Michigan's drug courts re-offend after two years is 6.8%, compared to 30.9% for offenders prosecuted in the traditional criminal justice system.[16] After four years, the recidivist rate for drug court graduates was 17.6%, compared to 51.2% for other offenders.[17]

These problem-solving courts are often resource-intensive, but the investment in helping offenders overcome addiction or obtain treatment for mental health pays dividends in the long term by keeping people out of prison and preventing recidivism.

III. Reentry

One other strategy that can reduce the prison population is prisoner reentry programs. While helping citizens successfully reenter society after serving a prison sentence is an initiative that occurs after the sentencing stage, it is an effective prevention strategy as well because it reduces the likelihood that they will commit new crimes. Recidivism accounts for a large portion of crime, as about two-thirds of all offenders are arrested for new crimes within three years.[18] A 2018 Bureau of Justice Statistics study showed that recidivism was even worse than previously thought.[19] While 68% of prisoners were arrested within three years of release, 83% of prisoners were arrested within nine years of release.[20] Reentry programs designed to help returning citizens succeed in society are an important reform effort that can reduce crime and save costs.

Large numbers of citizens return to their communities from prison each year with a felony conviction, making it more difficult for them to obtain employment. During my work in the U.S. Attorney's Office in Detroit, I frequently met with returning citizens, who said that their greatest obstacle to success was their inability to find work. Without a job, it is difficult for a person to make ends meet without violating the law. The lure of the drug trade beckons on a regular basis. For that reason, finding jobs for returning citizens is an important crime prevention strategy.

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[16] Kahryn Riley, *Detroit a Model When it Comes to Solving the Opioid Epidemic*, THE HILL (Feb. 7, 2018, 7:45 AM EST), https://perma.cc/UJ9E-GV32.

[17] *Id.*

[18] Andrea Fox, *Top 5 Recidivism Reducing Programs*, GOV1 (Jan. 27, 2017), https://www.gov1.com/public-safety/articles/top-5-recidivism-reducing-programs-Y0Qm03jLSadTwD38/

[19] *See* Mariel Alper, Matthew R. Durose & Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014)*, BUREAU OF JUST. STAT. 4 (May 2018), https://perma.cc/YW9E-4PKN.

[20] *Id.*

Some of the most successful reentry programs focus on employment. One program, the Prison Entrepreneurship Program (PEP), is a non-government organization in Texas that connects returning citizens with executives as mentors to teach business and leadership skills.[21] PEP services include case management, housing, social services, and assistance finding employment. The recidivism rate for graduates of the program is below 7%. Another successful program is the Delancey Street Foundation, a residential program that began in San Francisco and helps returning citizens and other at-risk individuals obtain college degrees and find employment as truck drivers, movers, furniture makers, and employees in its café and bookstore.[22] The Last Mile, out of San Quentin State Prison in California, provides training to prisoners in digital communication and technology, including computer coding, leading to jobs in coding upon release.[23] All three programs were noted as recidivism programs with the highest rates of success and as models for communities that need help with offender re-entry.[24]

During my time as a federal prosecutor, I saw a successful reentry program called the Help Offenders Positively Excel (HOPE) Initiative in the U.S. District Court for the Eastern District of Michigan. Individuals who were on supervised release following the completion of their prison sentences and who scored at the highest risk for recidivism based on various factors were eligible to participate in the program. Participants were required to submit to intensive supervision along with any recommended treatment, such as substance abuse treatment or cognitive behavioral therapy. The incentive to participate and succeed was early termination of supervision. A team consisting of a judge, probation officer, federal defender, prosecutor, and a treatment provider met with each participant every month to help set goals in education or employment, and to monitor progress. The rates of success were very high, with most participants "graduating" from the program and ending their supervision early.

Various models for reentry exist and can be replicated around the country if adequately funded. While reentry programs can be costly, they might be the most effective way to reduce crime and ultimately save costs because they are narrowly tailored to a target population that is at substantial risk to re-offend.

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[21] *Empowering Innovation*, PRISON ENTREPRENEURSHIP PROGRAM, https://perma.cc/3CYD-9YH6 (last visited July 6, 2021).

[22] *How We Work*, DELANCEY STREET FOUND., https://perma.cc/H7SZ-QCNK (last visited July 6, 2021).

[23] Andrea Fox, *supra* note 18.

[24] Andrea Fox, *supra* note 18.

CONCLUSION

Professor Osler has identified some causes for slow progress in achieving criminal sentencing reform and offers ideas to hasten the process. One reason that progress may be slow for sentencing reform is that it may be perceived by some as inconsistent with the purposes of the criminal justice system of public safety, deterrence, punishment, and respect for the rule of law. Moreover, commutation of sentences on a large scale is inconsistent with our policy preference for finality in judgments.

Instead, reform efforts might be more widely accepted if we focus on the front end of the criminal justice process. If we want to promote liberty, protect public safety, keep families together, and reduce prison costs, we should focus on prevention rather than simply shortening sentences. By investing in drug treatment, mental health treatment, diversion programs, and prisoner reentry, we can achieve far more than we could by just reducing sentences and releasing prisoners early. If we can prevent crimes from occurring in the first place, then no social harm will have occurred, no victim will have been injured, and no one has to go to prison at all. Isn't it better for a citizen to have stayed out of prison altogether than to be released from prison early?

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Slow and Steady May Win This Race: Lasting Criminal Justice Reform in a Time of Broad, but Shallow, Bipartisan Consensus

ADAM STEVENSON*

This is still a country that is less revolutionary than it is interested in improvement. Americans like seeing things improved, but the average American doesn't think we have to completely "tear down the system and remake it."[1]

In my day-to-day work, I supervise law school clinical students working with inmates at a medium security federal prison. For over ten years, I have met with countless individuals, and after talking about their cases, many often ask some form of the same questions: "Is something going to change? Are sentences going to come down? Is there anything going on to change things?" Occasionally there may be small, longshot items or minor changes I get to reference that are at some stage of the legislative process. However, inevitably, my answer is something along the lines of "not at the moment, nothing significant, and not for the foreseeable future."

I welcomed the chance to respond to Professor Osler's article on criminal justice reform and the First Step Act. His thoughtful work on clemency has helped numerous people and was an integral part to my own work during President Obama's clemency initiative. That we have similar views on the need for reform likely does not need to be said, but when I considered Professor Osler's article, I was brought back to those many conversations I have had with incarcerated individuals. Whether it was in 2010 as a new clinician, or even just this past summer, my answer to their questions has largely remained the same. Where, then, does there seem to be a disconnect between my thinking and Professor Osler's hope for faster, fuller, and more

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1 Grace Segers, *Obama Says Average American Doesn't Think We Have to "Tear Down the System and Remake It,"* CBS NEWS (Nov. 16, 2019, 10:13 AM), https://perma.cc/XY45-6YCE (quoting former President Barack Obama).

effective reform, rather than the "brutal timidity" he identifies?[2]

Upon further reflection on Professor Osler's work, I believe there are two premises to which I continue to return that give me pause. I believe they are where our reasoned difference of perspective may lie. First, Professor Osler's article opens by positing "there currently exists a true bipartisan coalition in support of systemic and meaningful criminal law reform."[3] I do not disagree that there are some from both sides of our political divide that have united for the criminal justice cause. The question I return to is just what this group has united to do, and whether perhaps even the coalition itself truly agrees on anything concrete. Second, the underlying premise of the article appears to be that significant reform, in whichever form that may take, can be achieved through legislative efforts or broad, systemic changes.[4] However, while it is true that there were significant events in the creation of the present carceral state, even the rise of America's prison population is a story of a number of changes that have gained steam over time. This same gradual change is most likely to lead to the lasting changes of opinion necessary for significant reform. In the end, I do not believe either premise is wrong or a true barrier to the significant and meaningful reform Professor Osler and I seek. However, we must all wrestle with these questions in order to achieve significant improvements.

Many sources point to a bipartisan consensus or growing discussion between liberals and conservatives in the realm of criminal justice reform.[5] However, when one pulls back the layers of any such consensus, a few questions arise. First among them is just what any coalition may actually agree on. The safest statement on the nature of what such a group agrees on is "too many Americans go to too many prisons for far too long."[6] However, the two primary concepts often discussed alongside this belief—mass

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[2] *See generally* Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161 (2020).

[3] *Id.*

[4] *See id.* (discussing the incrementalism of federal legislation and the potential for more rapid reform).

[5] *See, e.g.*, Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791, 793 (2019); Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), https://perma.cc/U7T3-2PHN (discussing continued bipartisan agreement on criminal justice issues); Rachael Bade, *Criminal Justice Reform Gains Bipartisan Momentum*, POLITICO (July 15, 2015, 5:15 AM EDT), https://perma.cc/W5XC-HJKW (noting that even in 2015, Democrats and Republicans "never agree on anything but 'a lot of them agree on [criminal justice reform]'"); Mark Holden, *Criminal Justice Reform Is Ripe for Bipartisan Achievement*, THE HILL (Jan. 3, 2017, 2:26 PM EST), https://perma.cc/TT6J-V5WT (discussing six key areas of reform).

[6] *See* Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), https://perma.cc/4E48-SGE5 (quoting Attorney General Eric Holder at the annual meeting of the American Bar Association).

incarceration and overcriminalization—are rarely, if ever, defined.[7] Yet, beyond the agreement that "something has to change," the "something" that is often described is one or both of these concepts. In fact, the organizations that are often identified as being a part of the consensus use these terms. "As descriptive terms (i.e., 'mass incarceration' and 'overcriminalization') that carry significant normative weight, their definitions matter. Uncertainty as to the nature of the phenomena poses significant real-world problems—fixing either of these problems requires an accurate understanding of the problem itself, and definitional differences yield vastly different policy solutions."[8] However, when you begin to dig deeper, you see that the coalition may very well just be at the "too many, too many, and too long" level, rather than on anything more concrete.

Looking at a few of the identified liberal or conservative groups draws sharper focus to the differences between them. Some organizations, such as the Vera Institute of Justice, the Sentencing Project, and the Brennan Center for Justice, appear to focus on mass incarceration, alongside equal and social justice and eliminating racial disparities.[9] The organizations speak to alternatives to arrest or confinement, along with sentencing policies.[10] However, even when there may be a national consensus on a slightly more particular issue, such as race in the criminal justice system, there is no actionable agreement on what the problem is or how to correct it.[11] Instead, the agreement seems to be on systemic inequities more broadly and that jail and prison populations are too high (without saying what the "right" population may be).

Other more conservative organizations, such as Right on Crime, appear to prioritize a focus on overcriminalization.[12] This is also true of the Koch Institute.[13] Diving deeper, the primary focus of overcriminalization appears

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[7] Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262 (2018) (noting it is not uncommon for the same article to use the terms with a fair amount of slippage).

[8] *Id.*

[9] *End Mass Incarceration*, BRENNAN CENTER FOR JUST., https://perma.cc/PL8F-ZH7G (last visited Aug. 2, 2021); *Issues*, VERA INST. OF JUST., https://perma.cc/8XRH-4S6D (last visited Aug. 2, 2021) *Sentencing Policy*, SENT'G PROJECT, https://perma.cc/NAN2-976P (last visited Aug. 2, 2021).

[10] *See, e.g.*, *Ending Mass Incarceration*, VERA INST. OF JUST., https://perma.cc/TK5S-CCFV (last visited Aug. 2, 2021).

[11] Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

[12] *See Priority Issues*, RIGHT ON CRIME, https://perma.cc/PJK8-MTG5 (last visited Aug. 2, 2021) (listing overcriminalization first among a list that does not, at top level, appear to speak to sentencing).

[13] *See Criminal Justice Reform*, CHARLES KOCH INST., https://perma.cc/3RLZ-XPUJ (last visited Aug. 2, 2021).

to be business and regulatory offenses.[14] Members of the Heritage Foundation seem to speak more to "overincarceration" rather than mass incarceration.[15] Incarceration is seen as a potential positive, but the "inputs" into the system seem to be the larger concern. However, these views appear if not at odds, then at least starkly different from the articulated aims of the organizations concerned primarily with mass incarceration.

Notably, in all cases I reviewed, neither side mentions the other term. Rather, each appears to agree that the system must change, but even what to generally call that change is a point of disagreement between leading organizations on both sides. This is not to say that either side is right or "more right," but rather identifying a foundational problem with any consensus: there may not be real, actionable consensus at all. This may be true now, and it has been true before. Many have pointed to past times as the moment when there was a bipartisan consensus, and the time was right for significant and meaningful criminal justice reform. However, the end results have often been limited, like how Professor Osler characterizes the First Step Act as having been timid and incremental.

There is no doubt that many conservatives, often and historically viewed as endorsing the political position of retributivist policies, have started to talk about criminal justice reform. And there have been times when liberal groups have coalesced around improvements in the criminal justice system alongside conservative voices. However, others have pointed to a similar bipartisan consensus as meaning the time was right for significant reform, only for smaller, but lasting, reforms to result.

For example, 2010 was seen as a time of bipartisan consensus when longtime conservative legislators, such as Rep. James Sensenbrenner (WI) and Rep. Dan Lungren (CA), joined members of the Congressional Black Caucus (CBC) to support criminal justice reform.[16] This was the Fair Sentencing Act, the change from a statutory 100 to 1 crack to powder cocaine ratio to 18 to 1.[17] This change was narrow (applying only to crack cocaine sentences) and less than ideal (not a 1 to 1 ratio), but it has endured and been furthered by subsequent change, such as the First Step Act.

Before that, in the early 2000s, a coalition formed between liberal members of the CBC and conservative Republican Representatives Rob Portman, Chris Cannon, Lamar Smith, and Howard Coble. Eventually, Senator Sam Brownback was the lead sponsor of the legislation to come out

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[14] *See Overcriminalization*, RIGHT ON CRIME, https://perma.cc/6FJE-FWME (last visited Aug. 2, 2021).

[15] *See, e.g.*, John-Michael Seibler, *A Toast to Criminal Justice Reform*, HERITAGE FOUND. (Jan. 28, 2019), https://perma.cc/ZM24-WL3P (noting the value of early release mechanisms while beginning by stating that "[i]ncarceration has a clear upside").

[16] Kara Gotsch, *Bipartisan Justice*, AM. PROSPECT (Dec. 6, 2010), https://perma.cc/NL7D-SS4N.

[17] *Id.*

of this combination, the Second Chance Act. The Act provided additional reentry funds, but no great sentencing reform, reduction in the number of criminal offenses, and other more significant changes.[18] These changes have also endured, with lengthened halfway house placements still available to federal inmates. The First Step Act builds on some of this work.

While the general tone of bipartisan consensus has shifted from "tough on crime" to "too many, too many, and too long," even in recent years these same moments of consensus have existed, and the results have been lackluster. One explanation is that there was the same high-level agreement, but underlying disagreements stymied results. The other potential reason for the limited nature of the impact is the issue that our government and political system is slow by design, and lasting change is slow in arriving, slow in correction, but lasting as a result.

Regarding the speed of reform, the backdrop of the speed of the creation of the problem bears mentioning. While it is true that there are a few items of note that individuals can point to as key moments in the ballooning of our prison population and criminal justice system, that creates the impression that it was created in a year or two. Rather, the increase in the prison population is a story of nearly three decades.[19] In addition to the War on Drugs, there were also changes to societal views on crime and the way in which we craft our system. Recently, scholars have pushed back on the idea that the current state of the criminal justice system was entirely attributable to tough on crime strategies employed by both parties in the 1980s and 1990s.[20] The shift toward increased penalties, more crimes, and a race to be the toughest was brought about through a renewed interest in and use of the victim as a political constituency and tool.[21] Legislators, prosecutors, and police set themselves as the champions of victims, rather than broad representatives of the community, which includes the accused.[22] Even if the rise of criminalization and incarceration was, at least, in part a response to the increase in violent crime in the 1980s and 1990s,[23] the feelings of the

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[18] *See President Bush Signs H.R. 1593, the Second Chance Act of 2007*, THE WHITE HOUSE (Apr. 9, 2008, 10:31 AM EDT), https://perma.cc/H8FT-QAGA.

[19] *See* John F. Pfaff, *Locked Up*, THE BAFFLER, July 2019, https://perma.cc/5S2K-JX9V (explaining that "[i]t was in the middle of the 1970s that U.S. prison populations started to rise steadily," then noting that "the prison boom peaked about ten years ago").

[20] *See* Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 36–37 (2018) (noting that recent scholarship discusses how fault for the state of the system can be attributed to tough on crime policies but also more progressive policies relating to poverty and other subjects).

[21] *See* Jonathan Simon, *Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 BUFF. CRIM. L. REV. 247, 267 (2003).

[22] *Id.*

[23] *See* Nathan James, *Recent Violent Crime Trends in the United States, R45236*, CONG. RESEARCH SERV. 2, fig. 1 (June 20, 2018), https://perma.cc/N2WW-L4Q6; *see also* John Gramlich, *What the*

population remained inelastic, tied to the fear that violence was still high or would return quickly if the ratcheting up of the system stopped.[24] That fear led to further increases in incarceration and criminalization, while also likely undermining the direction of any reform efforts.[25] Public sentiment is shifting, but it shifts slowly.

This is the backdrop against which any reform would arise. This leads to the likelihood that any reform would be slow and incremental, like the First Step Act. For example, the most popular form of criminal justice reform seems to avoid the issues of the victim and violence by pointing to the "first time," "low level," or "non-violent" drug offender.[26] However, even if there were significant reforms to our drug laws, whether it be the rescheduling of marijuana or dramatic changes to the enforcement and sentencing of other controlled substances, only approximately 20% of individuals incarcerated at any given time are incarcerated for a drug offense.[27] That number is for an offense, not necessarily a conviction. However, for many, their present offense is most likely not their first, especially for those in federal custody, approximately 12% of that total.[28] Those individuals would not fit the "first time" or perhaps "non-violent" mold, or perhaps even the "low level" designation. However, no one would suggest that reform impacting these individuals, whatever the percentage, would not be significant. But in order to make a significant impact on at least the incarceration side of the equation, changes need to be focused on offenses involving "violence" or property crimes.[29] However, there does not appear to be a bipartisan consensus for that type of reform.[30]

This example shows the problem and nature of our increase in incarceration and reform. The process of our rising prison populations and the rapid growth of our criminal justice system were slow and complex. It took nearly three decades to peak. That process changed the nature of our understanding of criminal law, or at least its perception, and that has become inelastic. While there are strong calls for "reform," that reform is nuanced

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Data Says (And Doesn't Say) About Crime in the United States, PEW RES. CENTER (Nov. 20, 2020), https://perma.cc/7UM2-NUKU (noting that there have been "dramatic declines in U.S. violent and property crime rates since the early 1990s, when crime spiked across much of the nation").

[24] *See* Pfaff, *supra* note 19.

[25] *See* Pfaff, *supra* note 19.

[26] *See* Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change*, TIME (Dec. 20, 2018, 4:21 PM EST), https://perma.cc/MH7W-255B.

[27] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://perma.cc/4SE4-NKQY.

[28] *See generally id.*

[29] *See* Pfaff, *supra* note 19.

[30] Pfaff, *supra* note 19 (noting that 68% of conservatives and 55% of liberals were against reduced sentences for "violent offenders").

and limited. However, one less person incarcerated is a victory, one less crime could be a success, and each causes a sense of inertia that seems to have a lasting effect. There would be reason to expect that as reforms are passed, such as the 2010 Fair Sentencing Act, they will have staying power and beget more reforms, such as the First Step Act. The reforms will grow, slowly, but surely, and change things. Clearly, delay means that individuals will continue to be arrested, prosecuted, and incarcerated in ways that we deem unjust, but more and more will not, and any change may be better than none.[31]

While the legislative premise of Professor Osler's article struck me as an area for further exploration, he did identify one area in which dramatic reform, both in speed and breadth, was possible. However, while this reform provides contrast with 'timid' but systemic reform, it also comes with a steep cost.

In recent years, we have seen a wave of "progressive prosecutors" elected to offices large and small.[32] These individuals come from diverse backgrounds, and often from outside of the prosecutorial establishment. Their rise to power can potentially solve two issues with criminal justice reform. First, as Professor Osler notes, and as others have described, prosecutors have often been staunch opponents of decriminalization or decarceration movements.[33] New voices in that movement may break that significant opposition. Second, the discretion of prosecutors is often unchecked and unparalleled, so any changes these prosecutors make will be direct, swift, and often significant. For example, DA Larry Krasner of Philadelphia has worked to change bail practices and has reduced prosecutions of marijuana and prostitution offenses, resulting in $82 million in savings in city and state funds per quarter.[34] Similar prosecutors have been elected in Chicago, St. Louis, and other major cities, as well as in smaller communities.[35] While these individuals need enough consensus to be elected to office, and reelected, the details of what to change, when to do it, and how are left to that individual while in office.

Similarly, another actor that can be the sole force in some aspects of reform is the chief executive. As Professor Osler has written in the past, a proper functioning clemency system can act as a dramatic check and safety

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[31] *See* Hopwood, *supra* note 5 (noting that holding out for "comprehensive reform, or the perfect bill" may be detrimental when the system and politics of the moment will only allow for incremental reform).

[32] Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy.*, NBC NEWS (Aug. 19. 2019, 4:47 AM EDT), https://perma.cc/9WY5-QPDE.

[33] Osler, *supra* note 2; *see* Simon, *supra* note 21, at 267.

[34] Steve Volk, *Larry Krasner Vs. Everybody: Inside the Philly DA's Crusade to Revolutionize Criminal Justice*, PHILA. MAG. (Nov. 23, 2019, 9:00 PM), https://perma.cc/3DA7-MT5B.

[35] Daniel Nichanian, *Voters Beyond Big Cities Rejected Mass Incarceration in Tuesday's Elections*, THE APPEAL (Nov. 7, 2019), https://perma.cc/5VZE-G4NA.

valve on our criminal justice system.[36] In recent years, this has been a path to notable changes, at least in several individual cases. President Obama was able to give effect to a range of prospective sentencing changes by commuting the sentences of over 1,700 federal inmates.[37] This same work has been done by governors in Kentucky,[38] Oklahoma,[39] California, and Pennsylvania,[40] just to name a few. This power, perhaps the most significant and unilateral privilege of our chief executives, can very quickly, dramatically, and single-handedly change a given case, or, like in President Obama's example or that in Oklahoma, give effect to broader reform through mass commutations.

However, while both examples show how there may be ways around the unclear and shifting bipartisan consensus and the glacial pace of reform at a broad/legislative level, they also show that there is volatility in both directions with this approach. Regarding the "progressive prosecutor," we have seen states push back against this approach. In Philadelphia, the federal and state government have started to introduce checks on the traditional prosecutorial discretion local prosecutors have enjoyed. Increased federal intervention,[41] state-based prosecution of some crimes, and increased mandatory minimums control the local discretion of prosecutors.[42]

Likewise, the blowback against clemency actions has been strong and, at least to this author, surprisingly bipartisan. President Obama's clemency work, aimed largely at individuals serving sentences for non-violent drug offenses, was criticized as usurping legislative power.[43] More recently, outgoing Kentucky Governor Matt Bevin's hundreds of pardons and clemencies received significant negative response from many liberal groups, decrying "the decision to release 'violent criminals.'"[44] This was also the case

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[36] *See, e.g.*, Rachel Barkow, Mark Holden & Mark Osler, *The Clemency Process Is Broken. Trump Can Fix It.*, THE ATLANTIC (Jan. 15, 2019), https://perma.cc/94XN-MK78.

[37] Charlie Smart, *Obama Granted Clemency Unlike Any Other President in History*, FIVETHIRTYEIGHT (Jan. 19, 2017, 4:40 PM), https://perma.cc/4HEL-38YF.

[38] Sarah Mervosh, *Matt Bevin, Ousted in Kentucky, Sets Off Furor with 'Extreme Pardons,'* N.Y. TIMES (Dec. 13, 2019), https://perma.cc/4ZAP-L7R9.

[39] Katie Rose Quandt, *The Largest Commutation in U.S. History*, SLATE (Nov. 8, 2019, 3:51 PM), https://perma.cc/7FAC-SD3V.

[40] *Id.* (discussing California and Pennsylvania clemencies).

[41] *See* German Lopez, *The Trump Justice Department's War on Progressive Prosecutors, Explained*, VOX (Aug. 16, 2019, 1:10 PM EDT), https://perma.cc/MHV2-2RFQ.

[42] *See* Chris Palmer & Samantha Melamed, *Could a New Pa. Law Strip Control over Gun Prosecutions from Philly DA Larry Krasner?*, PHILA. INQUIRER, https://perma.cc/9APE-DH9J (last updated July 8, 2019).

[43] Steven T. Dennis, *GOP Cries Foul on Obama's Commutations of Drug Offenses*, ROLL CALL (July 14, 2015, 7:40 PM), https://perma.cc/9GLZ-HU3M.

[44] Adam H. Johnson, *Misplaced Outrage over Kentucky Governor's Pardons Harms Criminal Justice Reform*, THE APPEAL (Dec. 20, 2019), https://perma.cc/EQD2-T2FH.

with outgoing Mississippi Governor Haley Barbour's pardons, which included a small number of individuals convicted of homicide.[45]

Both situations show the high cost of speedy action. With all credit to Sir Isaac Newton, these situations show the current physics of criminal justice reform: for every (dramatic) action, there is an equal and opposite reaction. While the use of prosecutorial discretion or executive authority has the ability to have the quick and direct impact many may seek, if that work does not have real, explicit bipartisan support, it can have dramatic negative implications that can, like new mandatory minimums or a stigmatization of the clemency power, have lasting effect.

Despite these areas for further contemplation, the fact remains that Professor Osler, myself, and many others of all political leanings appear to now realize that something needs to be done about our criminal justice system. Whether it is because of the ballooning costs of incarceration, the generational impact on people of color, the shifting of medical and mental health issues to criminal justice concerns, or other reasons, many favor a change to the way we are doing things. The First Step Act, though perhaps small in relative impact, still moves us forward toward fewer people in the system and prisons and for shorter periods of time. However, in order to successfully implement change, lasting and meaningful change, the question remains about just how to accomplish it. Reasonable people can and do disagree on these issues. The important part is that we have the conversations at the root of the issue, so that when the time is right, we can move forward with solving the goals we all have when we identify them. I believe Professor Osler's article can be the jumping point to just such conversations.

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[45] Julia Dahl, *8 of the Murderers Haley Barbour Pardoned Killed Their Wives, Girlfriends*, CBS NEWS (Jan. 13, 2012, 2:36 PM), https://perma.cc/XT7L-FVW9.

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Don’t Reject Federal Prosecutors’ Role in Criminal Justice Reform

JOYCE WHITE VANCE*

INTRODUCTION

There are a lot of things that are easy to reject out of hand. Peanut butter and mayonnaise sandwiches are an abomination.[1] Orange juice does not belong in your cereal.[2] And, as we have recently learned, Tito’s Vodka cannot be used to make hand sanitizer.[3]

All too often, stakeholders in the criminal justice system have had the same reaction to the notion of prosecutors being involved with criminal justice reform. After all, prosecutors are charged with putting people in jail, not advocating for them. How could they possibly play a meaningful role in reform?

Professor Osler argues that criminal justice reform is glacial and offers meaningful suggestions for picking up the pace. In the face of overwhelming evidence of the system’s malfunction—from mass incarceration, to bias, to unnecessary and excessive cost that fails to produce a reduction in crime—it impossible to refute the need for reform. And with bipartisan clamor for change, it is difficult to understand why more progress is not being made. Osler suggests structural factors keep federal prosecutors from playing a role[4] and diagnoses some of the dysfunction that has prevented stakeholders

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[1] *See* Lyn Mettler, *A Peanut Butter and Mayo Sandwich? This Polarizing Combo Is Shocking the Internet*, TODAY (Sept. 24, 2018, 5:28 PM EDT), https://perma.cc/52DH-SFK3.

[2] Scotty Smalls, *People Who Put Orange Juice in Their Cereal Must Be Stopped*, VICE (Sept. 18, 2015, 11:30 AM), https://perma.cc/S82D-J5W4.

[3] Bethany Biron, *Tito’s Vodka Is Warning Consumers That It Can’t Be Used as a Hand-Sanitizer Replacement as the Coronavirus Spreads Across the US*, BUS. INSIDER (Mar. 5, 2020, 1:43 PM), https://perma.cc/9VRF-URDV.

[4] *See* Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161 (2020)

from working together effectively. But despite his excellent analysis, I part company with him on the value federal prosecutors could bring to this work, particularly if their partnership is properly valued, they are mobilized, and they are incentivized to do the work.

Little appeals more to advocates of criminal justice reform than being heretical about common wisdom. They have successfully moved a conversation that was once relegated to the far reaches of the left and reserved for liberals and civil rights lawyers into the bipartisan mainstream. Unusual alliances formed to work on reform, like the partnership between Obama administration officials and Koch Industries executives, suggest the possibilities.[5] If the ACLU and the Faith and Freedom Coalition can work together, one might hope that even such estranged bedfellows as prosecutors and defense lawyers could form alliances to further justice and fairness.

An emerging generation of elected reformer district attorneys in state systems have begun to change the narrative about prosecutors.[6] These progressive attorneys have created conviction integrity review units.[7] In states from Indiana to Virginia to Michigan, they have announced plans to stop charging low-level, non-violent offenses like simple marijuana possession.[8] Although there has been some criticism of the success of reformer district attorneys, and there have been arguments that structural components of the criminal justice system prevent them from bringing about meaningful change,[9] in practice, their work has been effective enough to draw criticism from law enforcement, including former-Attorney General William Barr.[10]

In this piece, I turn my attention to the role of federal prosecutors. Federal prosecutors differ from their state counterparts in at least one significant way—they are not elected and need not curry favor or temper their prosecutive decisions to suit the perceptions of voters. This frees them

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[5] *Nonpartisan Council on Criminal Justice Launched*, PND (July 24, 2019), https://perma.cc/V6EM-PGE9.

[6] *See* Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), https://perma.cc/5HMH-3DEA.

[7] *See* Richard A. Oppel Jr. & Farah Stockman, *Prosecutors Usually Send People to Prison. These Are Getting Them Out.*, N.Y. TIMES (Nov. 28, 2019), https://perma.cc/A2Y4-BL28.

[8] Jess Arnold & Nick Boykin, *New Fairfax Co. Prosecutor Will No Longer Pursue Charges for Simple Marijuana Possession*, WUSA9 (Jan. 2, 2020, 4:26 PM EST), https://perma.cc/C2X5-3TAV; Trace Christenson, *Prosecutor: Simple Possession of Pot No Longer Prosecuted*, BATTLE CREEK ENQUIRER (Nov. 19, 2018, 4:32 PM ET), https://perma.cc/UM4W-5QAN; Katie Cox & Matt McKinney, *Marion County Will No Longer Prosecute Simple Marijuana Possession Cases*, WRTV INDIANAPOLIS (Sept. 30, 2019, 10:39 AM), https://perma.cc/4LEK-9R3E .

[9] *See generally* Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748 (2018).

[10] Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy.*, NBC NEWS (Aug. 19, 2019, 4:47 AM EDT), https://perma.cc/9WY5-QPDE.

from concerns that they will be subject to claims of being "soft on crime" that are often lodged against district attorneys when the run for reelection if they have any sort of reformer bent. It permits federal prosecutors to make charging and sentencing decisions based solely on the facts and the law. They need not concern themselves with political repercussions in the next election cycle if they choose, for instance, to send first-time, non-violent drug offenders to rehabilitation programs, deferring prosecution. This freedom gives federal prosecutors a baseline of flexibility to adopt reform measures.

I. Criminal Justice Reform at DOJ During the Obama Administration

In fact, DOJ's leadership did just that during the Obama Administration. In May of 2010, Attorney General Eric Holder issued a memo that directed prosecutors to depart from the long-standing DOJ practice of charging the most serious readily provable crime in every case. He instructed them to make charging decisions:

> in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime" [USAM 9-27.300]. In all cases, the charges should fairly represent the defendant's criminal conduct, and due consideration should be given to the defendant's substantial assistance in an investigation or prosecution. As a general matter, the decision whether to seek a statutory sentencing enhancement should be guided by these same principles.[11]

This guidance was a sea change for federal prosecutors. Holder followed up in 2013 with guidance that directed prosecutors to reserve mandatory minimums and § 851 enhancements for the most serious and dangerous offenses, rather than routinely applying the enhancements whenever possible.[12] Along with other work begun in the federal system during President Obama's tenure—including the Fair Sentencing Act of 2010, the retroactive relief amendments implemented by the U.S. Sentencing Commission,[13] and the DOJ's Clemency Initiative[14]—by 2014, the Bureau of

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[11] Memorandum from Eric H. Holder, Jr., Attorney Gen., Dep't of Justice, to All Federal Prosecutors, *Department Policy on Charging and Sentencing* (May 19, 2010), https://perma.cc/ZS72-GVRK.

[12] Memorandum from Eric H. Holder, Jr., Attorney Gen., Dep't of Justice, to The United States Attorneys and Assistant Attorney General for the Criminal Division, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (Aug. 12, 2013), https://perma.cc/2J69-CK4Y.

[13] *See* Mark Osler, *The Problem with the Justice Department*, THE MARSHALL PROJECT (May 30, 2017, 10:00 PM), https://perma.cc/6DYA-KZ4Y.

[14] Brandon Sample, *Clemency Project and Clemency Initiative*, CLEMENCY.COM (Dec. 4, 2018), https://perma.cc/UA4V-DVHQ.

Prisons was experiencing its first reduction in prison population after almost forty years of steady growth.[15] These policies came to be known as "smart on crime" in contrast to the "tough on crime" policies that had characterized earlier administrations and the War on Drugs.

II. The Fate of Criminal Justice Reform When Administrations Change

Eight years was not enough to eradicate the mass incarceration that resulted from decades of sustained growth in federal prison populations due to tough on crime charging and sentencing requirements for Department of Justice prosecutors.[16] The lack of permanence to Obama-era changes became readily apparent when President Trump's first Attorney General, former-Southern District of Alabama U.S. Attorney Jeff Sessions, promptly rescinded Holder's charging guidance and returned to the traditional tough on crime approach.[17]

In contrast to his predecessors in the Obama Administration, Sessions arrived at DOJ having played a major role in defeating a bill that would have reduced prison sentences for low level drug offenders, roundly criticized policing reforms implemented by the Obama Administration during a Senate hearing called "The War on Police", and opined that "good people don't smoke marijuana."[18] He reinstated the requirement that prosecutors charge the most serious, readily provable offenses and propose sentences based on those charges that include stacking mandatory minimums and filing § 851 enhancements, which result in lengthy sentences.[19] That policy directive remained in place under Attorney General Barr, who made no secret of his distaste for reformer district attorneys.[20] The number of cases federal prosecutors brought ticked upwards as a result of this guidance, fueled by low-level immigration and firearm cases.[21]

Although some aspects of criminal justice reform remained in vogue after President Trump took office, with the President advocating for passage

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[15] Philip Bump, *The Federal Prison Population Dropped for the First Time in 30 Years. It May Have Been Inevitable.*, WASH. POST (Sept. 23, 2014), https://perma.cc/S9H2-MFB2; *see* NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 33 (2014).

[16] *See* Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, SENT'G PROJECT (Nov. 5, 2018), https://perma.cc/L574-RB52.

[17] German Lopez, *The Trump Administration Just Took Its First Big Step to Escalate the War on Drugs*, VOX, https://perma.cc/L36K-URNU (last updated May 12, 2017, 9:41 AM EDT).

[18] *Id.*

[19] *Id.*

[20] *See* Michael Brice-Saddler, *41 Prosecutors Blast Attorney General Barr for 'Dangerous and Failed' Approach to Criminal Justice*, WASH. POST (Feb. 13, 2020), https://perma.cc/5G5Z-2PHE.

[21] *See Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019*, U.S. DEP'T OF JUST. (Oct. 17, 2019https://perma.cc/3BBT-PDE4; *Federal Gun Prosecutions Up 23 Percent After Sessions Memo*, U.S. DEP'T OF JUST. (July 28, 2017), https://perma.cc/767Q-88YJ.

of the First Step Act[22] and promoting the use of pardons and commutations,[23] the commitment of leadership to a full range of reforms designed to impact meaningful change in the system—at a minimum, crime prevention, charging reform, sentencing reform, prison reform and reentry work—dissipated. Prison reform, though much vaunted, was not fully funded in President Trump's proposed 2020 budget.[24] The commitment to reform did not manifest as advertised.[25]

On balance, DOJ's ability to alter its approach to criminal justice reform in response to the views of a new president or attorney general is undoubtedly disconcerting for would-be partners. Stability and reliability are necessary in any relationship, and even criminal justice stakeholders who fully expect and prepare for change at DOJ as administrations put their own imprimatur on policy must find an abrupt about-face raises questions about whether DOJ can be counted on as a long-term partner in progress. So, why, in the face of this institutional uncertainty, should prosecutors still be considered good partners?

In the next two sections, I attempt to answer those questions, discussing why federal prosecutors are key partners if reform goals are to be achieved and what could be done to create a more sustained commitment to the bipartisan goal of criminal justice reform.

III. Prosecutors Are Essential Partners in Criminal Justice Reform as the System Is Currently Configured Because They Are the Gatekeepers for Many Key Decisions

Should prosecutors be involved in reform? It is a truism that in any effort to reform policy, you can go fast alone or far together. Prosecutors are an essential stakeholder in the criminal justice system, along with judges, defense lawyers, probation officers, prison officials, victims, defendants' families, communities, and others. Prosecutors exercise broad and unique discretion to make decisions regarding who gets investigated, what for, who gets charged, what plea deals are offered, what sentence is recommended, and even what sorts of pretrial diversion and reentry programs exist and who gets to participate in them.

Absent an overhaul of the criminal justice system that statutorily

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[22] Justin George, *First Step Act Comes Up Short in Trump's 2020 Budget*, THE MARSHALL PROJECT (Mar. 12, 2019, 6:00 AM), https://perma.cc/2KHL-YKBA (explaining that despite passage, the First Step Act was not close to fully funded in the 2020 budget).

[23] *See* John Kruzel, *Trump Flexes Pardon Power with High-Profile Clemencies*, THE HILL (Feb. 18, 2020, 6:40 PM EST), https://perma.cc/V9VH-NRQF.

[24] *See* Scott Shackford, *Trump's Budget Shortchanges the Prison Reform Bill He Signed*, REASON (Mar. 12, 2019, 12:30 PM), https://perma.cc/47MR-8JPB.

[25] *See* Samantha Michaels, *Trump Just Bragged About Criminal Justice Reform. Look Closer at How His Administration Is Undoing It.*, MOTHER JONES (Feb. 4, 2020), https://perma.cc/JN83-4E7J.

transforms decision-making authority, prosecutors uniquely control many of the stages in investigations and prosecutions that most impact outcomes for individuals and the system itself. Other than at sentencing where judges (although they may be constrained by the charges brought) have the ultimate say, prosecutors exercise near-exclusive control, and their decisions can only be upended in rare, exceptional cases.[26]

Some scholars have argued federal prosecutors have too much power.[27] They argue that the system should be overhauled rather than tweaked.[28] Be that as it may, because federal prosecutors, now and for the foreseeable future with Congress in gridlock, have the ability to make decisions that determine who gets charged and what type of sentences they are eligible for, prosecutors' engagement in reform is highly desirable. In fact, it is essential precisely because of the decisions they are entrusted with. Criminal justice policy is at its best when it is made on the basis of data, not ideology. It would be transformative if prosecution guidelines were updated to reflect what decades of data tells us about the criminal justice system. We can have safer communities and less crime, while spending fewer taxpayer dollars on prison systems, if prosecutors focus on prosecuting the most serious crimes and seeking shorter sentences. Prosecutors who understand that the transfer of resources from prisons to communities, with an emphasis on prevention and support for people reentering their communities after serving sentences in prison, could play an essential role in making our communities safer and achieving reform.[29]

Although Osler believes prosecutors are unlikely to be a force for change, or at least suggests there are serious systemic impediments to their participation, their engaged participation could move the work forward dramatically, as it began to do during the Obama Administration.[30] That is not to say it would generate the complete transformation of the system that many see as the goal, but, because of the decisions prosecutors control, their involvement has the potential to be more transformative than any changes, absent statutory ones, can be.

Policy updates on the federal level that enable prosecutors to take on the role of criminal justice reformers would have nationwide impact. Of course,

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[26] *See, e.g.*, United States v. Ammidown, 497 F.2d 615, 635 (D.C. Cir. 1973).

[27] Angela J. Davis, *Federal Pros[e]cutors Have Way Too Much Power*, N.Y. TIMES (Jan. 14, 2015, 11:57 AM), https://perma.cc/M5G6-C8H7.

[28] *The Paradox of "Progressive Prosecution," supra* note 9, at 758–60.

[29] *See, e.g.*, Sheridan Watson, *Pennsylvania Sees Steady Decline in Crime Rate over Last 20 Years*, CSG JUST. CENTER (Dec. 18, 2019), https://perma.cc/7TBD-YSUA.

[30] *See Department of Justice to Launch Inaugural National Reentry Week*, U.S. DEP'T OF JUST. (Apr. 22, 2016), https://perma.cc/PRP3-MY88 (describing how prosecutors in virtually all of the 94 federal districts sponsored events during "reentry week" to focus attention on and educate communities about the work they were doing to help people who were reentering communities after serving prison sentences).

a new direction can only succeed if it is built on a solid foundation of buy-in from DOJ prosecutors across the country. Exposure to data that confirms the benefits of reform is essential. Prosecutors must be educated about the merit of the smart on crime approach, as contrasted to the failures and waste of tough on crime strategies, if they are to become committed to exercising prosecutorial discretion in a fashion that achieves the goals of reform. Simply put, once in progress and accepted by prosecutors, a generational culture change would have long-lasting effects.

Osler sees "[t]he consistent and powerful influence of prosecutors in developing policy"[31] as part of the problem. Imagine if that "consistent and powerful influence" could be used to effect change. Prosecutors can have a profound impact if their north star is keeping their communities safe and enhancing justice, guided by data about where the criminal justice system has succeeded and where it has failed. Their day-to-day decisions have an enormous impact and can transform the system.[32]

IV. What Are the Conditions That Make It Possible for Prosecutors to Be Good Partners?

DOJ's leadership sets criminal justice policy. But it is implemented by line prosecutors and supervisors across the country as they investigate, charge, and prosecute criminal matters. Their exercise of prosecutorial discretion is informed by the guidance set forth in the Principles of Federal Prosecution.[33]

So implementing criminal justice reform in the federal system at charging, plea, and sentencing should be as easy as rewriting those policies and principles, right? Of course, we know it is not that easy. DOJ, like any other institution, can be as agile as a battleship when it comes to changing direction. But, with the right conditions and incentives, progress is possible. Given all of the gatekeeping prosecutors do for key decisions in the system, the question that we should be asking is, what changes and conditions need to be made to make it possible for prosecutors to be full partners in criminal justice reform?

I would argue three key conditions need to be met for prosecutors to be successful criminal-justice reformers:

There must be a commitment to criminal justice reform from leadership.

There must be education for prosecutors that focuses on data supporting the shift from a tough on crime approach to a smart on crime one, demonstrating that it makes communities safer while reducing costs in the

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[31] Osler, *supra* note 4, at 162.

[32] *See* Lucy Lang, *Prosecutors Need to Take the Lead in Reforming Prisons*, THE ATLANTIC (Aug. 27, 2019), https://perma.cc/M5D9-TNB6.

[33] *9-27.000 - Principles of Federal Prosecution*, U.S. DEP'T OF JUST., https://perma.cc/X8Y4-EJ7G (last updated Feb. 2018).

system and restoring people to their lives and families.

There must be a change in the metrics DOJ and communities use to evaluate prosecutors' "success" that supports criminal justice reform goals.

It is not possible to turn a battleship unless the captain is fully committed to the maneuver. An essential element for success is a top down commitment to reform. But what does reform mean? It should be comprehensive and include planning for different stages in the criminal justice life cycle. During the Obama administration, some of my U.S. Attorney colleagues and I argued that prosecutors had to do more than just change how they prosecuted their cases—they had to be committed to prevention and reentry work as well as to traditional prosecutions. We believed that these three aspects of the criminal justice system had to come together to form a three-legged stool and that if these priorities were pursued in a balanced fashion, prosecutors could help to transform the system.

Traditionally, prosecutors' primary role has been limited to prosecuting cases. They have not been involved in other aspects of the criminal justice system. But federal prosecutors are deeply committed to public safety and to justice and fairness. It is what attracts most of them to the work in the first place. When they are engaged in their work prosecuting cases, they are involved in making their communities safer. They exercise their discretion in a way they have been trained to believe will make their communities safer. If their leadership helps redefine their role into an expanded one that involves more than prosecuting cases, most of them will approach the work with enthusiasm. For instance, during the Obama administration, prosecutors embraced the mandate to implement reform-minded programs and strategies.[34]

The question is not just how to create new policy directives. For long-term success, the need for criminal justice reform must be widely accepted by prosecutors. They must be convinced, which can only happen if data that supports the view that criminal justice reform policies offer the best results for the communities that they serve is socialized across the Department. It will require a significant commitment of time and resources to educate prosecutors. But culture change across an organization whose leadership has more often focused on the rhetoric of tough on crime than on the data-driven rationale for smart on crime approaches is essential for permanence. Experience has shown that when a change in policy is explained by underlying data that supports its objectives, education achieves results. In 2016, Deputy Attorney General Sally Yates discussed the impact of the

[34] *See generally* NYU Center on the Administration of Criminal Law, *Disrupting the Cycle: Reimagining the Prosecutor's Role in Reentry*, NYU LAW (2017), https://perma.cc/T2KU-3UDE (discussing how, under the Obama Administration's Smart on Crime initiative, several U.S. Attorneys' Offices assisted those reentering society with securing employment and educated employers about hiring the formerly incarcerated).

changes Attorney General Holder implemented:

> I'm not going to tell you that every single prosecutor out there would have written the Smart on Crime policy him or herself, but what I can tell you is we know they're doing it. The stats show that . . . particularly for prosecutors who've been doing this for a long time, we've seen that mandatory minimums done the old way cast too broad a net because they focus just on one feature—drug quantity—and doing so doesn't distinguish between the drug kingpin and the courier. Prosecutors who have been doing this for a long time have recognized that.[35]

Education works. Osler uses the example of disparate sentencing for crack and powder cocaine and points out that greater fairness for crack sentencing only happened when there was data available that "exploded the myth of racial neutrality," showing that Blacks and Hispanics were prosecuted at disparate rates.[36] All too often, as with the initial sentencing regime that treated crack and cocaine cases differently, criminal justice policy is made on the basis of ideology, not data. Introducing data and educating prosecutors about policies that have failed and beliefs that are outmoded is the path forward.

But setting priorities and educating prosecutors alone will not be sufficient. The metrics that are used to define federal prosecutors' success at their jobs must change. Both internally and externally, prosecutors are evaluated based on the numbers: number of cases indicted and tried, number of defendants prosecuted, and so forth. These metrics incentivize prosecutors to work on the cases that are the easiest and the quickest to move forward. Not only are these numerical metrics used internally at DOJ to measure the work of both individual prosecutors and the overall success of U.S. Attorneys' offices, but the public and the press evaluate prosecutors based on them too.

It is simple to understand the impact: if prosecutors are criticized for prosecuting fewer cases, if they lose resources because of it, they will tend to pursue the kinds of cases that result in greater numbers of prosecutions. We see that now with the dramatic increase in numbers of low-level immigration and gun possession prosecutions referred to in Part II. It is more difficult and far more time consuming to investigate and prosecute a long-term public corruption case or a civil rights matter than it is to prosecute a person for being a felon in possession of a firearm. If our goal is to make our communities safer, we should encourage prosecutors to prosecute fewer—but more serious—crimes and reward them when they do. We need new and better metrics to do that.

Prosecutors ultimately put themselves out of business if they are

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[35] Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC (May 18, 2016), https://perma.cc/TZG8-6ZP2.

[36] Osler, *supra* note 4, at 166.

successful—less crime, fewer cases. But if the metric for success is how many cases an office prosecutes, then success means failure. We need metrics that evaluate whether prosecutors are creating better community outcomes and that incentivize prosecutors to do what they would prefer to do absent the tyranny of raw statistical evaluation: prosecute the most serious, significant cases, even if they take more time and have less certain outcomes.

Metrics that consider community engagement and safety promote the ability of prosecutors to engage in programs that focus on criminal justice reform: for instance, Birmingham, Alabama's Reconciliation and Listening Sessions as part of the National Initiative for Building Community Trust—which sought to improve community-police relations by focusing on procedural justice, implicit bias, and restorative justice[37]—or High Point, North Carolina's domestic violence initiative.[38] Freed of the gravitational pull of numbers of cases as the only metric for success, prosecutors could play an important role in reform, both in their prosecution practices and, more generally, as they expand their notion of their responsibilities to include prevention, reentry, and other work in the community.[39]

CONCLUSION

Prosecutors should be, the linchpin in successful criminal justice reform because of their unique decision-making responsibilities and their ability to reinvent their role to better serve their communities. Given an administration with leadership that is committed to a full scope of reform, education and updated metrics for evaluating prosecutors could be used to create a culture change that would make prosecutors true partners and leaders in reforming the criminal justice system.

Osler suggests we "must be bold in what we ask for"[40] when it comes to criminal justice reform, and this is true. What could be bolder than to ask that prosecutors, those the system charges with prosecuting people accused of crimes, also become advocates for them?

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[37] National Initiative for Building Community Trust & Justice, *Case Study: Integrating Community Members into Reconciliation Listening Sessions in Birmingham*, NAT'L NETWORK FOR SAFE COMMUNITIES 1 (Mar. 2019), https://perma.cc/2NVJ-AWNX.

[38] *See Domestic Violence Initiative*, CITY OF HIGH POINT POLICE DEP'T., https://perma.cc/8LDX-LSTR (last visited July 16, 2021).

[39] *See, e.g.*, Angela J. Davis, *Meet the Criminal Justice System's Most Powerful Actors*, THE APPEAL (May 29, 2018), https://perma.cc/Q75C-TYTZ.

[40] Osler, *supra* note 4, at 197.

The Clock Stops Here: A Call for a Resolution of the Circuit Split on Plea Bargain Exclusions Within the Speedy Trial Act

Nicholas Babaian[*]

INTRODUCTION

After a long and demanding day of work, John walks to his car and begins his drive home.[1] Unbeknownst to John, a broken taillight on his car catches the attention of the local police, and he is subsequently pulled over. Two officers walk to either window of the car and mistake John, as a suspect they have been looking for in a recent drug trafficking scandal. The police arrest John and take him to the local jail where federal prosecutors soon indict him for the crime of drug trafficking. Due to an extraordinarily high bail and John's low income, he is unable to secure a bond for release and awaits his distant trial from the cold jailhouse cell. In the interim, the government begins to recognize its futile case against John but decides to offer him a plea deal to buy some time to secure a better case. John begs the prosecutor to acknowledge that they have charged the wrong person, but the prosecutor persists. Negotiations for a plea deal last about three months, all while John maintains his innocence. John's federal public defender continues to entertain the agreement, knowing he does not have the resources to bring John's case to trial. Because John will not admit to something he did not do, a plea agreement is not reached. It has now been

* J.D., New England Law | Boston (2020); B.A. Legal Studies, California State University, Chico (2017). The author is indebted to his family and friends for their ever-lasting support. To my parents, Lisa and Gregory, thank you for always believing in my dreams and aspirations. To my brothers, Matthew and Tristan, thank you for always knowing what was possible. To my amazing wife, Mallory, thank you for your everlasting support, patience, and encouragement.

1 This scenario is fictional and solely the work of the author to illustrate a potential issue presented in this Note.

four months since John's indictment, four months of sitting in a jail cell for a crime that he did not commit.

The U.S. Constitution provides all criminal defendants the right to a speedy trial.[2] This right, developed from English law, establishes one of the most fundamental rights preserved by the Constitution.[3] Legal scholars for generations have equated the delay of a criminal trial with a denial of "fundamental justice."[4] The Speedy Trial Act of 1974 provides mandated timelines that qualify as a criminal defendant's Sixth Amendment right to a speedy trial.[5] The Speedy Trial Act requires that an information or indictment charging a defendant with an offense must be filed within thirty days from an individual's arrest in connection with the crime.[6] The Speedy Trial Act also provides that a criminal defendant's trial must commence within seventy days of the indictment.[7] Of course, this timeline is not entirely rigid and provides for reasonable delays such as those "resulting from other proceedings concerning the defendant," which are automatically excludable from the speedy trial clock.[8] A delay, however, can also be excluded under other provisions in the Speedy Trial Act; for example, a delay will be automatically excluded when it results from a continuance granted to serve "the ends of justice."[9] For this exclusion, the reason for the delay must serve "the ends of justice" and must be set in the record.[10] Consequently, the various federal circuit courts have split as to whether criminal plea negotiations are automatically excludable as "resulting from other proceedings concerning the defendant" or under the "ends of justice" exclusion.[11]

A circuit split on such an important issue effectively creates disparate

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[2] U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

[3] *The Right to a Speedy Trial*, ABA, https://perma.cc/56LZ-QJPF (last visited May 24, 2021).

[4] *See* Jayanth K. Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 GEO. J. INT'L L. 747, 748–49 (2011) (stating that the current state of criminal justice forces defendants in custody to wait exceedingly long periods of time before having their cases brought to trial).

[5] 18 U.S.C. § 3161 (1996).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* (stating that the "ends of justice" delay is proper where the delay would serve the administration of justice and fairness in the trial).

[11] 18 U.S.C. § 3161; *see* Courtney E. Bailey, Comment, United States v. Huete-Sandoval*: Is the Plea Bargaining Process an Excludable Delay from a Defendant's Speedy Trial Act Calculation?*, 36 AM. J. TRIAL ADVOC. 395, 395–96 (2012).

treatment for individuals facing criminal charges around the country.[12] Defendants in some jurisdictions will have their cases dismissed after a violation of the Speedy Trial Act, where others will encounter the prejudices of a delayed trial.[13] The Supreme Court of the United States avoided resolving the circuit split in early 2018, further delaying a remedy to this critical problem.[14] This Note stands on the proposition that the Supreme Court must recognize this discrepancy and present a resolution for the circuit split, ultimately in favor of a criminal defendant's rights.[15] Conversely, this Note will also propose an alternative solution through a legislative amendment by Congress.[16]

In John's hypothetical case, the majority of circuit courts would likely exclude the timeframe of plea negotiations from his speedy trial calculus.[17] John will be incarcerated long after the seventy-day requirement under the Speedy Trial Act has lapsed, essentially allowing plea negotiations to bypass his constitutional right to a speedy trial. After four months behind bars and no sign of justice coming to help, John's employment, family, and defense strategy are all in grave jeopardy.

Part I of this Note will provide a brief history of the Sixth Amendment right to a speedy trial, the Speedy Trial Act of 1974, the plea-bargaining process as it relates to the speedy trial calculus, and the circuit split on plea negotiations' excludability within the speedy trial calculus. Part II addresses the importance of a resolution to the circuit split. Part III argues that the Supreme Court should resolve the split in favor of excluding plea negotiations from the speedy trial clock. Lastly, Part IV will alternatively argue that Congress has the authority to address the split and should do so if the Supreme Court continues to elude this issue.

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[12] *See* Evan D. Bernick, *The Circuit Splits Are Out There—And the Court Should Resolve Them*, FEDERALIST SOC'Y (Aug. 13, 2015), https://perma.cc/7NMD-B96W; *see also* Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), https://perma.cc/L2GB-9FMZ.

[13] 18 U.S.C. § 3162(a)(1) (stating that if an indictment is not returned within the prescribed time, "such charge against that individual contained in such complaint shall be dismissed or otherwise dropped"). *See generally* Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 710–15 (2014) (discussing the shortcomings of the Speedy Trial Act. Shon Hopwood, the author, is a convicted bank robber who now teaches at Georgetown Law); Brooks Holland, *The Two-Sided Speedy Trial Problem*, 90 WASH. L. REV. ONLINE 31, 31 (2015) https://perma.cc/BE9G-SPFM (discussing the issues with the Speedy Trial Act from the perspective of a public official).

[14] *See* White v. United States, 138 S. Ct. 641, 641 (2018).

[15] *See infra* Part III.

[16] *See infra* Part VI.

[17] *See supra* note 1.

I. Background

A. *Speedy Trial, a Constitutional Right*

The right to a speedy trial was built into the foundation of the United States after originally being introduced by the American colonies' first bill of rights, the Virginia Declaration of Rights of 1776.[18] Sir Edward Coke, who authored influential treatises that the American colonies frequently relied upon, argued that the right to a speedy trial had been fundamental to English law since the issuance of the Magna Carta in 1215.[19] Accordingly, the principle of a criminal defendant's speedy trial was not novel as it was a simple extension of a right that had existed in English law for generations.[20]

Although important, the U.S. Supreme Court did not evolve the jurisprudence surrounding the right to a speedy trial until well into the twentieth century.[21] The right to a speedy trial was finally determined to apply to the states through the Fourteenth Amendment in the 1967 case of *Klopfer v. North Carolina*.[22] In that case, Peter Klopfer was criminally charged with trespass while participating in a civil rights protest.[23] The trial court continued the case twice after the state moved for a *nolle prosequi* with leave, allowing the state to suspend prosecution until returning to a future docket.[24] After the Supreme Court granted certiorari on Klopfer's case, Chief Justice Earl Warren, writing for the majority, held that the Due Process Clause of the Fourteenth Amendment applied the Sixth Amendment right to a speedy trial to the individual states.[25] Essentially, the Court ruled that the prosecution's delay of the trial was a violation of Mr. Klopfer's right to a

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[18] Klopfer v. North Carolina, 386 U.S. 213, 223–25 (1967) (holding that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" and that "[t]hat right has its roots at the very foundation of [the United States'] English law heritage").

[19] *Id.* at 224–25; Lewis LeNaire, Comment, Vermont v. Brillon*: Public Defense and the Sixth Amendment Right to a Speedy Trial*, 35 OKLA. CITY U. L. REV. 219, 220–21 (2010); *see* SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 161 (2006).

[20] LeNaire, *supra* note 19, at 220.

[21] *See Klopfer*, 386 U.S. at 223–26.

[22] *Id.* at 222–23; *see* Barker v. Wingo, 407 U.S. 514, 515 (1972) ("*Klop[f]er v. North Carolina* . . . established that the right to a speedy trial is 'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States.").

[23] *Klopfer*, 386 U.S. at 217.

[24] *Id. See generally Nolle Prosequi*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *nolle prosequi* as a "formal entry upon the record, by the plaintiff in a civil suit or the prosecuting officer in a criminal action, by which he declares that he 'will no further prosecute' the case, either as to some of the counts, or some of the defendants, or altogether").

[25] *Klopfer*, 386 U.S. at 222–24.

speedy trial.[26]

Four years later, the Supreme Court established the timing for when the right to a speedy trial attached to a criminal defendant.[27] In *United States v. Marion*, the defendant filed a motion to dismiss the criminal indictments against him because of a three-year delay between the government's discovery of the crime and the receipt of the indictment.[28] After the district court dismissed the indictments due to the government's failure to timely prosecute, the Supreme Court granted certiorari to determine the correct timing of the Sixth Amendment's protection.[29] Looking to the language of the Sixth Amendment, the Court concluded that the speedy trial clause protects those accused of a crime, effectively establishing that the speedy trial calculus begins at the time the prosecution starts.[30]

B. *The History of the Speedy Trial Act*

By the time *Klopfer* rolled around, all fifty states had already prescribed speedy trial protections for the citizens of their respective state.[31] Congress, however, stepped in and created the Speedy Trial Act to implement and enforce the protections of the Sixth Amendment right to a speedy trial and to ensure uniformity of the application of the right throughout the nation.[32] The Speedy Trial Act systematically regulates the timeline within which the criminally accused must be heard.[33] The Act was designed to broaden "the speedy trial protections afforded to both the individual and society by the Sixth Amendment" by setting "fixed time limits" for criminal cases.[34] Accordingly, a criminal indictment against a defendant must be filed within thirty days of the arrest or the service of a summons on the defendant.[35] Further, the Speedy Trial Act requires that the criminal defendant's trial must begin within seventy days of the filing of the indictment, or within

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[26] *Id.*

[27] *See generally* United States v. Marion, 404 U.S. 307, 310–13 (1971).

[28] *Id.* at 310.

[29] *Id.* at 308, 310.

[30] *Id.* at 313. *See generally* Seth Osnowitz, Note, *Demanding a Speedy Trial: Re-Evaluating the Assertion Factor in the* Barker v. Wingo *Test*, 67 CASE W. RES. L. REV. 273, 282 (2016) (noting other important evolutions of the speedy trial act established by the United States Supreme Court).

[31] *See* Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 476 (1968); *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 847 (1957).

[32] *See* Randall S. Susskind, *Right to a Speedy Trial*, 30 AM. CRIM. L. REV. 1239, 1246 (1993).

[33] *See generally* Zedner v. United States, 547 U.S. 489, 490 (2006) (noting the legislative history of the Speedy Trial Act and the application of its principles).

[34] SPEEDY TRIAL ACT AMENDMENTS ACT OF 1979, S. REP. NO. 96-212, at 9 (1979) [hereinafter *S. Rep. on Public Law 96-43*].

[35] 18 U.S.C. § 3161 (1996); *see Speedy Trial*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 448, 458–59 (2017).

seventy days of the date the defendant first appears before a judicial officer, whichever is later.[36]

Although the Speedy Trial Act sets strict timing requirements for the criminally accused to be heard, numerous pre-trial delays are automatically excluded from the Speedy Trial Act's calculus.[37] For example, the Speedy Trial Act unambiguously excludes delays that are caused by the unavailability or absence of the charged defendant or essential witness.[38] The excludability of other pretrial delays, such as the complexity of the case or the Speedy Trial Act deadlines of codefendants, is subject to judicial discretion.[39]

C. *The Speedy Trial Act, the Relevant Part*

In relevant part, the following portion of the Speedy Trial Act demonstrates where circuits have voiced split interpretations.[40] The periods of delay outlined below are not excluded in calculating the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> > (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
> >
> > (B) delay resulting from trial with respect to other charges against the defendant;
> >
> > (C) delay resulting from any interlocutory appeal;
> >
> > (D) delay resulting from any pretrial motion, from the filing

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[36] 18 U.S.C. § 3161(c) (2019).

[37] *Id.* §§ 3161(h)(1)–(5) (listing the available exclusions under the Speedy Trial Act that are automatic and do not require a showing of reasonableness or actual delay, which include include pre-trial motions, delays by the defendant, delays caused by unavailable witnesses, and others).

[38] *Id.* § 3161(h)(3); *see, e.g.*, United States v. Patterson, 277 F.3d 709, 710–12 (4th Cir. 2002) (holding a delay was properly excludable because an essential witness was charged with homicide and was therefore unavailable).

[39] *See* § 3161(h)(6); Zedner v. United States, 547 U.S. 489, 497–99 (2006) (noting that a court could grant a continuance under the "ends of justice" exclusion based on whether the case is unusually complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, and it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by the Speedy Trial Act).

[40] *See generally* Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, FED. JUDICIAL CTR. (Aug. 1980), https://perma.cc/N4QX-L8ST.

> of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
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> (E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;
>
> (F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;
>
> (G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and
>
> (H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.[41]

Despite its lengthy legislative history, the Speedy Trial Act contains a large number of ambiguities and unresolved policy issues.[42] Some of these ambiguities have been addressed by the federal courts, whereas others have not.[43]

D. *How Plea Bargaining Factors into the Equation*

Justice Neil Gorsuch recently noted that "those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'"[44] When considering the various effects of the different circuits' positions on plea bargaining and the speedy trial clock, it is essential to

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[41] § 3161(h)(1)(A)—(H).

[42] *See* Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 677 (1976) (noting that in addition to the usual problems that arise from revisions and compromises, the Speedy Trial Act faced major difficulties in defining excludable time periods, interim provisions, and allowable sanctions).

[43] *See, e.g.*, United States v. Adedoyin, 369 F.3d 337, 341–42 (3d Cir. 2004) (finding that the denial of an "ends of justice" extension requested after the September 11, 2001, terrorist attacks was proper, despite major disruptions in the region and the concerns about the jurors' states of mind following the attack); United States v. Ospina, 485 F. Supp. 2d 1357, 1360 (S.D. Fla. 2007) (holding that the Sixth Amendment right to a speedy trial attaches at indictment, arrest, or when the defendant is otherwise officially accused and continues until the date of trial).

[44] United States v. Haymond, 139 S. Ct. 2369, 2375 (2019); *The Earl of Clarendon to William Pym*, EWING TOWNSHIP BOARD OF EDUCATION, https://perma.cc/P4LK-GEJL (last visited May 24, 2021).

understand the function of plea negotiations in a criminal trial.[45] Most people in the United States believe that when a person is accused of a crime they will subsequently have some form of a trial to determine their culpability.[46] This is, however, not the case for the vast majority of criminal defendants.[47] Approximately ninety-five percent of criminal cases are resolved before trial, usually after a plea agreement has been issued.[48] In *Lafler v. Cooper*, Justice Kennedy, writing for the majority of the court, stated that "criminal justice today is, for the most part, a system of pleas, not a system of trials."[49]

Unbeknownst to some, the plea bargaining process can be relatively straightforward.[50] A prosecutor will evaluate a case and generally offer the criminally accused a reduced punishment in exchange for a guilty plea.[51] The defendant then receives the benefit of knowing the outcome of their case, eluding the uncertainty of a trial, and the prosecutor benefits by quickly disposing of the case and assuring a conviction.[52] Currently, § 3161(h)(1)(G) of the Speedy Trial Act allows exclusions for "delay[s] resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government."[53] This section, however, does not reference whether delays resulting from the actual plea negotiation process are to be excluded from the speedy trial clock.[54] Circuits have split on this ambiguity, questioning whether plea negotiations are excludable as "resulting from other proceedings concerning the defendant" or the "ends of justice" exclusion, also provided for under the Speedy Trial Act.[55] Therefore, if a jury trial is the "heart and lungs of liberty" than a plea

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[45] *See generally* Tim Lynch, *The Devil's Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice,* CATO INST. (June 24, 2011), https://perma.cc/F3CS-WNTB.

[46] *See id.*

[47] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 (2004).

[48] *See* Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 561 (2013); David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1539 (2011); Markus Surratt, Comment, *Incentivized Informants,* Brady, Ruiz, *and Wrongful Imprisonment: Requiring Pre-Plea Disclosure of Material Exculpatory Evidence*, 93 WASH. L. REV. 523, 571 (2018) (citing to the same, well known statistic that defendants enter plea agreements far more often than seeking their constitutional rights to a jury trial).

[49] 566 U.S. 156, 170 (2012).

[50] *See* Klein, *supra* note 48, at 560.

[51] *See* Klein, *supra* note 48, at 561.

[52] *See* Anne R. Traum, *Fairly Pricing Guilty Pleas*, 58 HOW. L.J. 437, 448–49 (2015) (noting that a fair plea deal is much like a "socially fair price" for a consumer product—both are "not exploitative of consumer demand, and [don't] result in outsized profit or benefit to the seller").

[53] 18 U.S.C. § 3161(h)(1)(G) (1996).

[54] *See id.*

[55] *See generally* United States v. Huete-Sandoval, 668 F.3d 1, 5–6 (1st Cir. 2011) (referencing

bargain is the knife that viciously removes it from the body of justice.[56]

II. The Circuit Split

The various circuits have continually acknowledged the split over whether plea negotiations are automatically excluded under § 3161(h)(1).[57] The question of whether plea negotiations that fail to reach a finalized plea agreement are "automatically excludable from the Speedy Trial Act calculation as 'other proceedings' or 'serve the ends of justice' pursuant to [the Speedy Trial Act]" has resulted in a four-to-four split amongst the circuits.[58]

A. *On the One Side: Automatic Exclusion as "Other Proceedings Concerning the Defendant"*[59]

The Seventh Circuit was first to weigh in on plea negotiations as they relate to the excludable time within the speedy trial calculus.[60] In *United States v. Montoya*, the defendant, William Montoya, was charged with distribution and possession of cocaine.[61] Montoya was arrested on August 5, 1985, starting the thirty-day speedy trial clock running from the period between arrest and indictment.[62] Montoya, however, was not indicted on the charges until November 14, 1985, a total of 101 days from his arrest.[63] Montoya moved to dismiss the indictment, arguing that his right to a speedy trial was violated because of the undue delay of his indictment.[64] The government, however, claimed that almost the entirety of the delay, all 101 days, were excludable under the Speedy Trial Act due to pretrial plea negotiations that took place during that time.[65] The Court seemingly agreed

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the circuit split on plea negotiations and the speedy trial clock).

[56] *See* United States v. Haymond, 139 S. Ct. 2369, 2375 (2019) (noting that without a jury trial, there is no liberty remaining, and although this case dealt with a bench trial, not a plea bargain, the principle is the same where a jury is not called to determine guilt).

[57] *See Huete-Sandoval*, 668 F.3d. at 7 n.8.

[58] *Id.*

[59] *See generally* United States v. Leftenant, 341 F.3d 338 (4th Cir. 2003); United States v. Van Someren, 118 F.3d 1214 (8th Cir. 1997); United States v. Fields, 39 F.3d 439 (3d Cir. 1994); United States v. Bowers, 834 F.2d 607 (6th Cir. 1987); United States v. Montoya, 827 F.2d 143 (7th Cir. 1987) (comprising one side of the position is the Fourth, Sixth, Seventh, and Eighth Circuit Courts of Appeals).

[60] *See Montoya*, 827 F.2d at 150.

[61] *Id.* at 145 (among others, Montoya challenged his convictions on the basis of alleged violations of the Speedy Trial Act).

[62] *Id.* at 146.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 147–48 (noting there never was a trial on Montoya's Texas charges because he entered

with this argument and held that the Speedy Trial Act was not violated where delay caused by Montoya's plea negotiations qualified as "other proceedings" and were, therefore, excludable from the speedy trial calculus.[66] The Court noted that the plea bargaining process qualifies as one of the "*many* other proceedings" under the generic exclusion section of the Speedy Trial Act, explaining that the "ten listed proceedings are inclusive, not exclusive" and that "negotiating a plea bargain could be considered a proceeding."[67]

The Eighth Circuit also supports the position that plea negotiations are excludable under the Speedy Trial Act.[68] In *United States v. Goodwin*, the Eighth Circuit held that plea negotiations fall squarely within the automatically excludable category of the Speedy Trial Act.[69] The Court's decision effectively placed delays related to plea negotiations that do not reach a final judgment into the non-enumerated "other proceedings" group under the Speedy Trial Act, therefore making plea negotiations automatically excludable.[70]

B. *On the Other Side: Excluded but Not Automatic as "Serving the Ends of Justice"*

The Second Circuit's holding in *United States v. Lucky* widely illustrates the point of view held by the other group of circuits on the issue of plea bargaining and the speedy trial clock.[71] In *Lucky*, the defendant was indicted for possessing a firearm as a felon.[72] He was arraigned in January 2005 and a magistrate judge ordered a period of excludable delay until the date of the initial status conference in February 2005.[73] At a subsequent status conference in June of 2005, defense counsel reported that a plea bargain was unlikely, and noted that "it appears . . . this case is headed towards trial."[74]

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into plea negotiations with the government and pled guilty to one of the two counts brought against him).

66 *Montoya*, 827 F.2d at 148–49 (noting that other circuits have also reached this conclusion); *see* United States v. Goodwin, 612 F.2d 1103, 1105 (8th Cir. 1980) (holding exclusion under generic "other proceedings" of the Speedy Trial Act).

67 *Montoya*, 827 F.2d at 150 (finding direct support for its ruling in the language of the statute, the Seventh Circuit has on numerous occasions upheld this holding).

68 *Goodwin*, 612 F.2d at 1105 (explaining that the defendant in this case was arraigned on April 3, 1979; his trial commenced eighty-six days later, on June 29, 1979, although at the time, the time limit with respect to the period between arraignment and trial was eighty days).

69 *Id.*

70 *Id.*

71 Bailey, *supra* note 11, at 407.

72 United States v. Lucky, 569 F.3d 101, 103 (2d Cir. 2009).

73 *Id.*

74 *Id.* at 104.

After the defendant's conviction at trial, the defendant appealed, arguing a violation of the Speedy Trial Act when the District Court failed to include the period of time for plea bargaining in the speedy trial calculus.[75] The Court ultimately concluded that plea negotiations that fail to reach an agreement are not *automatically* excluded under the Speedy Trial Act.[76] The Court noted that if such time is to be excluded from the Speedy Trial Act's calculus, a judge must first, on-the-record, decide that a continuance would serve the "ends of justice."[77]

The Eleventh Circuit has similarly acknowledged the decision of the Second Circuit in *Lucky* and held that the *automatic* exclusion of plea negotiations would conflict with the function of the Speedy Trial Act.[78] In *United States v. Mathurin,* the government argued that a thirty-day period was tolled because the parties were engaged in plea negotiations.[79] The Court, however, rejected this argument after finding that the Speedy Trial Act tolls the period during which a court considers a plea agreement but does not automatically exclude time for plea negotiations.[80] The Court added that plea negotiations are not included in the plea agreement exception because the parties, not the court, control the plea negotiation process and this exception is aimed at delays attributable to court inaction.[81] The Court did, however, find a placement for plea negotiations within the Speedy Trial Act.[82] Looking at § 3161(h)(1), the Court stated that plea negotiations would fall under the provision which allows for delays that serve the "ends of justice."[83]

III. Why Resolve the Circuit Split in Favor of Defendants' Rights?

The Sixth Amendment right to a speedy trial is designed to minimize the possibility of lengthy incarcerations before trial, to reduce the impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of

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75 *See id.* at 105–07.

76 *See id.* at 107.

77 *Id.* at 106.

78 United States v. Mathurin, 690 F.3d 1236, 1240–41 (11th Cir. 2012).

79 *Id.* at 1240.

80 *Id.* at 1242.

81 *Id.*

82 *See id.*

83 *Id.* (noting that this "method of tolling the speedy-indictment clock for plea negotiations is more consistent with the structure and purpose of the statute because it avoids creating the kind of loophole that would exist under the government's [position of automatic exclusion as 'other proceedings concerning the defendant']"); *see* Bloate v. United States, 559 U.S. 196, 197 (2010).

unresolved criminal charges.[84] This right dates back to the creation of the United States, forever grounding its importance on the criminal justice system.[85] Essentially, the right to a speedy trial protects both those charged with a crime from "undue and oppressive incarceration prior to trial" and the public's interest in the prompt disposition of criminal cases.[86]

The Speedy Trial Act implements the principles of the right to a speedy trial by requiring that an indictment charging a criminal defendant with an offense be filed within thirty-days from an individual's arrest and that the defendant's trial commence within seventy days from the date that the indictment is filed.[87] The Speedy Trial Act provides for an enumerated list of excludable delays that will toll the speedy trial calculus; however, the various circuits have found ambiguity in the reading of these exclusions.[88] One position held by the various circuit courts, including the Fourth, Sixth, Seventh, and Eighth Circuits, is that delays resulting from plea negotiations are automatically excludable under the provision allowing delays "resulting from other proceedings concerning the defendant."[89] The Sixth Circuit, in *United States v. White*, held that "[a]lthough the plea bargaining process is not expressly specified in § 3161(h)(1), the listed proceedings 'are only examples of delay "resulting from other proceedings concerning the defendant" and are not intended to be exclusive.'"[90] The First, Second, Fifth, and Eleventh Circuits, on the other hand, hold that delays resulting from plea negotiations are only excludable under the Speedy Trial Act when the judge makes findings *on the record* that the delay serves "the ends of justice."[91] This group of circuit courts reason that automatic exclusions are only appropriate for delays connected to official judicial proceedings

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[84] United States v. MacDonald, 456 U.S. 1, 8 (1982); *Id.* at 21 (Marshall, J., dissenting) (discussing that the consideration of whether a defendant was denied a speedy trial is based on the length of the delay, the reason for it, the defendant's assertion of the right, and the possibility of prejudice).

[85] *See generally* Krishnan & Kumar, *supra* note 4.

[86] United States v. Loud Hawk, 474 U.S. 302, 312 (1986) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

[87] *See* 18 U.S.C. § 3161(h)(1)(6) (1996); *see also* Knut Johnson, *Speedy Trial 18 USC Section 3161*, L. OFFICE OF KNUT JOHNSON, https://perma.cc/7TRN-LK6R (last visited May 24, 2021).

[88] United States v. Huete-Sandoval, 668 F.3d 1, 5 (1st Cir. 2011) (stating that there is a well-recognized split between the circuits on the issue of excludability of plea negotiations within the speedy trial calculus).

[89] *See, e.g.*, United States v. Leftenant, 341 F.3d 338, 344 (4th Cir. 2003); United States v. Bowers, 834 F.2d 607, 610 (6th Cir. 1987); United States v. Montoya, 827 F.2d 143, 150 (7th Cir. 1987); United States v. Van Someren, 118 F.3d 1214, 1217–18 (8th Cir. 1997).

[90] 679 F. App'x 426, 431 (6th Cir. 2017).

[91] *See, e.g.*, United States v. Williams, 314 F.3d 552, 556 (11th Cir. 2002); United States v. Lopez-Osuna, 242 F.3d 1191, 1197 (9th Cir. 2000); United States v. Velasquez, 890 F.2d 717, 719 (5th Cir. 1989).

because the enumerated exclusions provided for under § 3161(h)(1) of the Speedy Trial Act all relate to formal judicial proceedings.[92]

The Speedy Trial Act was enacted in order to ensure all criminal defendants uniformly receive a speedy trial as prescribed by the Sixth Amendment.[93] Where there is a split in the interpretation of key provisions of the Speedy Trial Act, however, defendants are left wondering when they will be charged or indicted or how the Speedy Trial Act will apply to their specific case.[94] The legislative intent to treat everyone under the Speedy Trial Act with uniformity and consistency is ineffective where the various circuits have created a disparate treatment for defendants in their respective jurisdictions.[95] The circuit split should be resolved by allowing plea negotiations to continue the speedy trial clock, forcing prosecutors to offer fair and just deals without tolling the defendant's right to a speedy trial.[96] The injustices of plea bargaining should not delay the right to a speedy trial, and there should be greater efficiency in the presentation of potential plea bargains.[97] Because the prosecutor holds the key to arrange plea agreements, exempting plea negotiations from the speedy trial clock could result in the strategic use of plea negotiations to reserve the time prescribed under the Speedy Trial Act.[98] This circumvention of a constitutional right needs to be prevented by a uniform resolution of the circuit split.[99]

If the Supreme Court does not resolve the circuit split, however, Congress must take action and amend the Speedy Trial Act.[100] Congress enacted the Speedy Trial Act to create uniformity in the application of speedy trial timings, and it necessarily follows that Congress should amend the Speedy Trial Act to solidify this uniformity.[101] Congress would also be in the position to best project the Speedy Trial Act's original intent on the resolution of the circuit split, focusing on both the defendant's right to a speedy trial and the public's interest in a quick resolution of criminal trials.[102]

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[92] *See* United States v. Lucky, 569 F.3d 101, 107 (2d Cir. 2009).

[93] *See* 18 U.S.C. § 3161 (1996).

[94] *See generally* Partridge, *supra* note 40.

[95] *See* Petition for a Writ of Certiorari at 2–4, White v. United States, 138 S. Ct. 641 (2018) (No. 17-270) [hereinafter White's Cert. Petition]. *See generally* Partridge, *supra* note 40.

[96] Osnowitz, *supra* note 30, at 280.

[97] Osnowitz, *supra* note 30, at 280.

[98] Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 306–07 (2011) (commenting that "judges, defense counsel, and prosecutors all have enormous incentive to pursue early guilty pleas—as early as the initial arraignment in some jurisdictions").

[99] *See generally* Melanie D. Wilson, *Anti-Justice*, 81 TENN. L. REV. 699, 748 (2014).

[100] *See infra* Part IV.

[101] *See infra* Part IV.

[102] *See* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and*

ANALYSIS

IV. The Supreme Court Must Resolve the Circuit Split

A. United States v. White*, an Illustration of the Dangers of the Circuit Split and a Missed Opportunity by the Court*

The Supreme Court recently dodged an opportunity in *United States v. White* to resolve the circuit split on the excludability of plea negotiations and the Speedy Trial Act.[103] In this case, the Detroit Drug Enforcement Agency (DEA) arrested Jimmie White for possession of illegal drugs and a firearm.[104] Instead of being charged, White was asked to be a cooperating witness for the DEA.[105] About two years later, in April of 2013, however, White's cooperation agreement failed, and he was subsequently charged for the various crimes.[106] In May of 2013, he began plea negotiations with the government and together they filed a stipulation agreeing to exclude two weeks for plea negotiations.[107] The negotiations, however, were unsuccessful and an agreement was not reached, leaving the government to indict White for the charges in June of 2013.[108] White subsequently moved for dismissal of the indictment on grounds that he was prejudiced by the three-year delay between his arrest in May 2010, the filing of the criminal complaint in April 2013, and his arrest and initial appearance in May 2013.[109] The motion, however, was dismissed, and he was found guilty of the crimes charged.[110]

On appeal, the Sixth Circuit held that the time spent during plea negotiations that ultimately do not end in an agreement is automatically excludable as "other proceedings" under the Speedy Trial Act.[111] The Sixth Circuit appeared confident in holding that the plea negotiation process is

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the Congress, 77 OR. L. REV. 405, 427 (1998) (arguing, with regard to a different circuit split, that Congress should fix splits when the Supreme Court fails to do so).

[103] *See* United States v. White, 679 F. App'x 426, 428 (6th Cir. 2017) (leaving the circuit split open after certiorari was granted by the Supreme Court and the judgment vacated); *see also* John Simon, *Should Plea Bargaining Toll the "Speedy Trial Clock?"*, U. CIN. L. REV., (Jan. 28, 2019), https://perma.cc/6H5R-QB7K.

[104] *White*, 679 F. App'x at 428; *see also* Simon, *supra* note 103.

[105] *White*, 679 F. App'x at 429.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 430.

[109] *Id.*

[110] *Id.* (noting that in his motion to dismiss, White argued that he was prejudiced by the three-year delay between his arrest and initial appearance in court).

[111] *See* 18 U.S.C. § 3161(h)(1) (1996) (including "other proceedings concerning the defendant" as an exception for excludability of time).

automatically excluded, noting that while plea negotiations are not explicitly listed within the eight enumerated categories of excludable periods, the enumerated provisions constitute only examples of excludable periods and the list should not be considered exhaustive.[112]

In January of 2018, the Supreme Court granted certiorari in *White v. United States*.[113] The issue presented to the Supreme Court was:

> [w]hether (as four circuits hold), time engaged in plea negotiation that does not result in a finalized plea agreement is automatically excludable as "other proceedings concerning the defendant" under 18 U.S.C. § 3161(h)(1), or whether (as four other circuits hold) such time is excludable only if the district court makes case-specific "ends of justice" findings under 18 U.S.C. § 3161(h)(7).[114]

White claimed that it was a violation of the Speedy Trial Act when more than thirty non-excludable days elapsed between his arrest and indictment, explicitly noting that a fourteen-day continuance to engage in plea negotiations should not be automatically excludable under the exception allowing for "period[s] of delay resulting from other proceedings concerning the defendant."[115] Oddly, the government also acknowledged that this time for plea negotiations should not be automatically excluded and that the court below erred in holding to the contrary.[116] Nonetheless, the government pursued a theory that the indictment remained timely because the lower court did not abuse its discretion in excluding the fourteen-day continuance under § 3161(h)(7), which permits the exclusion of time when the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."[117]

The Supreme Court, after granting certiorari, failed to address the circuit split presented by this case and remanded the case back to the Sixth Circuit after learning of errors that the Attorney General made in his brief to the Court.[118] As of March 2019, the Sixth Circuit has yet to rule on the matter.[119] This case presented the perfect opportunity for the Supreme Court to resolve the circuit split, but instead, it kicked the case back down for what will likely

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112 *White*, 679 F. App'x at 432; *see* Simon, *supra* note 103.

113 White v. United States, 138 S. Ct. 641, 641 (2018).

114 White's Cert. Petition, *supra* note 95, at I.

115 Brief for the United States in Opposition at 7–8, White v. United States, 138 S. Ct. 641 (2018) (No. 17-270) [hereinafter United States' Opposition].

116 *White*, 679 F. App'x at 431; *see* White's Cert. Petition, *supra* note 95, at 6; United States' Opposition, *supra* note 115, at 7.

117 18 U.S.C. § 3161(h)(7)(A) (1982); White's Cert. Petition, *supra* note 95, at 6; *see* United States' Opposition, *supra* note 115, at 7.

118 *White*, 138 S. Ct. at 641.

119 *White*, 679 F. App'x at 427; Simon, *supra* note 103; *see* Martha L. Wood, Note, *Determination of Dismissal Sanctions Under the Speedy Trial Act of 1974*, 56 FORDHAM L. REV. 509, 533 (1987).

be another holding that drives a wedge into the already divisive split on plea negotiation excludability within the Speedy Trial Act.[120] The right to a speedy trial is a fundamental right, secured by the Sixth Amendment.[121] Because the Speedy Trial Act is the application of this right, without a resolution to the circuit split, millions of criminal defendants will be held in the uncertain balance.[122] In answering the question presented to the Supreme Court in *White v. United States*, the Justices could have either affirmed the Sixth Circuit's interpretation of the Speedy Trial Act or could have defined the exact contours of enumerated exclusions.[123] In failing to resolve this issue, the Court left open a divisive question, prejudicing both criminal defendants and the attached societal interest.[124]

V. The Supreme Court Should Rule in Favor of a Defendant's Rights

A. *The Significance of Determining Excludability*

When the government violates the timing requirements of the Speedy Trial Act, there is a mandatory dismissal of the case or complaint against the defendant.[125] Congress included dismissal of the case for the government's violation of the Speedy Trial Act as an incentive for the prosecution to stay within the bounds of the Act.[126] When enacting the Speedy Trial Act, many members of the Senate and House opposed the dismissal sanction because of the possibility of a windfall for the defendant if the government could not

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[120] *Supreme Court Avoids Resolving Circuit Split on Speedy Trial Act by Issuing GVR Following Government Confession of Error*, FD.ORG (Jan. 10, 2018), https://perma.cc/69DL-H2WK; *see* United States' Opposition, *supra* note 115, at 7 (noting that the Supreme Court remanded the *White* case back down to the Sixth Circuit Court of Appeals after discovering a discrepancy in the Solicitor General's statements).

[121] U.S. CONST. amend. VI.

[122] Bernick, *supra* note 12 (arguing by analogy that when the circuits split on decisions involving rights protected by amendments such as the Second Amendment, millions risk losing fundamental rights, and that perhaps it is the court's own plummeting docket that is to blame for the various circuit splits); Liptak, *supra* note 12.

[123] *See* Bailey, *supra* note 11, at 396 (fitting a recent case out of the First Circuit into the circuit split).

[124] *See generally* Bailey, *supra* note 11, at 396.

[125] 18 U.S.C. § 3162(a)(2) (allowing for claims to be dismissed with prejudice or without prejudice, depending largely on court discretion); *see* United States v. Caparella, 716 F.2d 976, 979 (2d Cir. 1983) (noting the Speedy Trial Act's legislative history states that the intention and expectation of using the dismissal without prejudice sanction is that it will be the exception and not the rule, making dismissal with prejudice the proper sanction).

[126] *See* Kurtis A. Kemper, Annotation, *Excludable Periods of Delay Under Speedy Trial Act (18 U.S.C.A. § 3161-3174)*, 46 A.L.R. FED. 358, § 4(c) (1980) (collecting cases that apply the excludable grounds of the Speedy Trial Act).

keep to its schedule.[127] The American Bar Association (ABA), however, strongly approved of dismissal for all speedy trial violations, arguing that without dismissal, "the right to a speedy trial was largely meaningless."[128] Because a charge against a defendant must be dismissed after a violation of the Speedy Trial Act, it is imperative to carefully evaluate the timeline of events in any given case.[129] The accused may therefore walk free if the government violates the Speedy Trial Act.[130] Likewise, the prosecution faces the injustice of allowing a potential criminal to escape the charges against him.[131]

Since violations of the Speedy Trial Act can lead to a complete dismissal of a case, there is a potential to use excludable delays as a strategy to acquire more time to prepare for trial.[132] A 1985 report by the Department of Justice noted that excludable time provisions had been used frequently to gain more time in complex cases or cases involving unusual circumstances.[133] This report also indicated that exclusions were recorded in roughly two out of every five cases, with about fourteen percent of all continuances granted under the "ends of justice" provision.[134] Allowing courts to apply delay exclusions from plea negotiations under either the "resulting from other proceedings concerning the defendant" or the "ends of justice" provision would be contrary to the Supreme Court's directive that the plain language of the Speedy Trial Act does not "apply to a matter specifically dealt with in another part of the same enactment."[135] Under the plea agreement exclusion, Congress specifically limited its application to the time that the court takes a proposed plea under advisement.[136] Allowing for a strategic use of

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[127] *See* Wood, *supra* note 119.

[128] *See* Wood, *supra* note 119.

[129] *See* Barker v. Wingo, 407 U.S. 514, 529 (1972).

[130] Susskind, *supra* note 32, at 1245 (noting that "[t]he only method to remedy a violation of the Sixth Amendment speedy trial right is to dismiss the case").

[131] *See Barker*, 407 U.S. at 522 (acknowledging that a total dismissal of a defendant's charge was an "unsatisfactorily severe" remedy, but nonetheless held that "it is the only possible remedy"); *see also* Susskind, *supra* note 32, at 1245.

[132] *See* Meagan S. Winings, *What Does Speed Have to Do with It?: An Analysis of the Seventh Circuit's Application of the Speedy Trial Act*, 6 SEVENTH CIRCUIT REV. 114, 129 (2010).

[133] Nancy Ames et al., *The Impact of the Speedy Trial Act on Investigation and Prosecution of Federal Criminal Cases*, U.S. DEP'T OF JUST. (June 1985), https://perma.cc/U22U-NZB6 [hereinafter *The Report*].

[134] *The Report*, *supra* note 133, at 85.

[135] *See* Bloate v. United States, 559 U.S. 196, 201 (2010); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) (stating that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment").

[136] *Bloate*, 559 U.S. at 203 n.7.

exclusions for the sake of buying more time in a case would create a loophole in Congress' intent to have exact timings that would "give effect to the Sixth Amendment."[137] Further, allowing for a split in the interpretation of key provisions of the Speedy Trial Act leaves defendants wondering when they will be charged or indicted or how the Speedy Trial Act will apply to their specific situation.[138]

B. *An Intolerable Reliance on Plea Bargaining*

When, or if, the Supreme Court decides to address the circuit split, it is vital for the Court to address the fundamental unfairness of including plea negotiations as an excludable delay within the Speedy Trial Act.[139] As a result of the extensive use of plea bargaining, the Sixth Amendment right to a public trial has drastically faded.[140] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[141] Nowadays, however, the criminal justice system has morphed into a system that practices contract drafting rather than criminal law.[142] According to the National Center for State Courts, in 1976, two years after the enactment of the Speedy Trial Act, eight percent of all state felony cases utilized either jury or bench trials. By 2003, however, that percentage had dropped to about three percent.[143] Further, according to some experts, since 1977 the ratio of federal criminal defendants who opt for a jury trial has decreased from one in four cases to one in thirty-two, or about three percent.[144]

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[137] *See* United States v. MacDonald, 456 U.S. 1, 7 n.7 (1982).

[138] *See* United States v. Tunnessen, 763 F.2d 74, 76 (2d Cir. 1985) (reiterating that the Speedy Trial Act's exception to allow delay in the furtherance of justice is not to be frequently used); *see also* Karen L. Helgeson, Note, *The Federal Judiciary Emergency Special Sessions Act of 2005: Allowing Ongoing Criminal Prosecutions During Crisis or Hindering Compliance with the Speedy Trial Act?*, 92 IOWA L. REV. 245, 269–70 (2006).

[139] *E.g.*, United States v. Leftenant, 341 F.3d 338, 344 (4th Cir. 2003); United States v. Van Someren, 118 F.3d 1214, 1218 (8th Cir. 1997); United States v. Montoya, 827 F.2d 143, 150 (7th Cir. 1987); United States v. Bowers, 834 F.2d 607, 610 (6th Cir. 1987).

[140] Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-*Booker, 37 WM. MITCHELL L. REV. 469, 529 (2011).

[141] U.S. CONST. amend. VI.

[142] Dr. Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 416 (2015) (making the argument that the Supreme Court has moved the "goal posts" with the theory of plea-bargaining, and, in doing so, "the Court applies a new semiotic category—contract law—where defendants are 'free' to engage in the 'give and take' of plea negotiations to their presumed benefit").

[143] National Center for State Courts, *Felony Caseloads in the NACM Network*, 12 CASELOAD HIGHLIGHTS, no. 1, 2005, at 5, https://perma.cc/GDS4-SXUF .

[144] Matt Clarke, *Dramatic Increase in Percentage of Criminal Cases Being Plea Bargained*, PRISON

Although plea bargaining was certainly not a foreign concept to the United States Congress at the time of the Speedy Trial Act's enactment, the current abuse of plea bargaining was unequivocally not predicted.[145] When the plea negotiation process is excluded from the speedy trial calculus, the number of calendar days between a criminal defendant's arrest and trial significantly increases, potentially leading to prejudice to the defendant.[146] Applying this prejudice to the current expansion of plea bargaining, the number of defendants facing long delays before "enjoy[ing] the right to a speedy and public trial, by an impartial jury of the State" has exponentially increased.[147] When enacting the Speedy Trial Act, Congress intended that criminal trials have a uniform timeline that ensures the speedy trial right of the criminally accused.[148] Where three percent of federal criminal defendants opt for a trial, however, the right to a speedy trial is substantially eroded when allowing plea negotiations to toll the speedy trial clock.[149] It is clear that the approach to criminal justice has changed since the enactment of the Speedy Trial Act, and, therefore, just as Congress demanded the quick resolution of a criminal trial, the new system of plea bargaining must demand the same by allowing plea negotiations to keep the speedy trial clock ticking.[150]

C. *How the Supreme Court Should Rule*

When the Supreme Court grants certiorari on a case that could potentially resolve the circuit split, the Court must not allow plea negotiations to be excluded from the speedy trial calculus.[151] The Supreme Court has before relied on legislative intent when interpreting the Speedy Trial Act and should again follow this direction to resolve this circuit split.[152] The Supreme Court has previously rejected an argument that the Speedy Trial Act implicitly provides for the exclusion of time spent preparing pretrial motions, stating that "had Congress wished courts to exclude

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LEGAL NEWS (Jan. 15, 2013), https://perma.cc/5QJB-5CJB.

145 *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (Jan. 1979) (noting that there were numerous studies on plea bargaining that Congress was aware of at the time of the enactment of the Speedy Trial Act).

146 *See* FED. R. CRIM. P. 45(a) (stating that when computing the time for compliance, the Speedy Trial Act excludes Saturdays, Sundays, and legal holidays from the calculation).

147 *See generally* Clarke, *supra* note 144.

148 18 U.S.C. § 3161 (1996); *see* Bailey, *supra* note 11, at 395.

149 *The Report*, *supra* note 133, at 33.

150 *The Report*, *supra* note 133, at 90 (stating that the Speedy Trial Act serves the societal interest in a speedy disposition of a criminal case "from undue delay in bringing such cases to trial").

151 *See The Report*, *supra* note 133, at 3.

152 *See* Zedner v. United States, 547 U.S. 489, 490 (2006).

pretrial motion preparation time automatically it could have said so."[153] In *Zedner v. United States*, the Supreme Court held that an expansive interpretation of the Speedy Trial Act is inconsistent with Congress's intent when enacting the Speedy Trial Act.[154] The Court explained that excludable reasons for delays, other than those spelled out in the parameters of the Speedy Trial Act, would not adequately protect the defendant's constitutional right to a speedy trial or the public's interest in the prompt disposition of criminal cases.[155] The plea negotiation process is directly analogous to the preparation of the pretrial motion process, as both are completed outside of the court's watchful eyes.[156] Therefore, just as pretrial motion preparation has been held to not be excludable in the speedy trial calculus, the plea negotiation process should be similarly excluded from these calculations.[157]

The Supreme Court should resolve the circuit split following a similar holding in the Ninth Circuit's decision in *United States v. Perez-Reveles*.[158] In this case, the Ninth Circuit held that plea negotiations do not account for an excludable delay under the Speedy Trial Act because plea negotiations are not explicitly mentioned as a reason to exclude time.[159] Further, the Ninth Circuit noted that the Speedy Trial Act only references plea agreements as an exclusion of time, leaving out a reference to plea negotiations.[160] Therefore, the Ninth Circuit did not find a basis in the statute for plea negotiations to count as a reason to exclude time from the speedy trial calculus.[161]

It would be entirely consistent with the intentions of the Speedy Trial Act to interpret the exclusions of delay from "other proceedings" in § 3161(1)(h)(1) to apply only to the proceedings described in that section.[162] The delays described as excludable are caused by the filing of other charges; ordered examinations of the defendant; filing through disposition of

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[153] *See* Bloate v. United States, 559 U.S. 196, 211 n.13 (2010).

[154] *See* 547 U.S. at 490 (holding that there is no reason to think that Congress wanted to treat prospective and retrospective waivers under § 3162(a)(2) of the Speedy Trial Act similarly, and continuing to find that if Congress would have intended this, it would have said so).

[155] *See id.* at 508–09 (noting that Congress had concerns over the dangers of exclusions that, if not enumerated in the Speedy Trial Act, "could get out of hand").

[156] *See generally Bloate*, 559 U.S. at 211 n.13.

[157] Simon, *supra* note 103.

[158] *See generally* 715 F.2d 1348 (9th Cir. 1983).

[159] *Id.* at 1352.

[160] *See* United States v. Lopez-Osuna, 242 F.3d 1191, 1197 (9th Cir. 2000) (noting that courts commonly refer to § 3161(h)(8)(A) of the Speedy Trial Act as the "'ends of justice' exclusion").

[161] *Perez-Reveles*, 715 F. 2d at 1352; *but see* United States v. Fields, 39 F.3d 439, 445 nn. 6–7 (3d Cir. 1994).

[162] *See* Winings, *supra* note 132.

motions; interlocutory appeals; removal or transfer from another district; transportation for examination up to ten days; consideration of a proposed plea agreement; and proceedings actually under advisement by the court up to thirty days.[163] These delays are all related to functional court involvement, requiring the court to either hear or rule on the respective delay and further allowing for court oversight.[164] Distinguishably, the plea negotiation process does not involve the court and is much more informal than the other excludable delays described in the Speedy Trial Act.[165]

Allowing plea negotiations to fall outside of the exclusions for the speedy trial calculus has the potential to benefit both the defendant and prosecution.[166] Defendants will enjoy a public trial in fewer calendar days, and the prosecution will ensure a quicker disposition of the case.[167] Additionally, if either the defendant or the prosecution needs more time to prepare for trial, as is often the case, the enumerated provisions that allow for excludable delays can be utilized.[168] For instance, if the defendant needs additional time to explore a plea offer, the defendant can toll the speedy trial clock by written agreement with the government pursuant to § 3161(h)(2).[169] Further, there are numerous grounds that the prosecution could use to seek various delays, such as delays resulting from trial concerning other charges against the defendant.[170]

The rationale held by the circuits that automatically exclude plea negotiations and the speedy trial calculus is that the exclusions expressly provided under the Speedy Trial Act are not exhaustive and therefore encompass a range of other situations which can toll trial preparation and

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163 *See* 18 U.S.C. § 3161(h)(1)(A)–(H) (1996).

164 *See id.* (providing that, for example, the excludable delays include the time while the court is taking pretrial motions under actual advisement).

165 *See* Paul Bergman, *How Plea Bargains Get Made*, NOLO, https://perma.cc/G7CQ-C4QB (last visited May 24, 2021) ("Much of the time, plea bargaining negotiations take place privately between the defense lawyer and prosecutor, outside of court.").

166 *See* Simon, *supra* note 103.

167 *See* Simon, *supra* note 103.

168 *See* FED. R. CRIM. P. 45(a) (stating that when computing the time for compliance, the Speedy Trial Act excludes Saturdays, Sundays, and legal holidays from the calculation, so with less excludable delays, there will be a quicker resolution of the case).

169 *See* 18 U.S.C. § 3161(h)(2) (1996).

170 *See, e.g.*, United States v. Papaleo, 853 F.2d 16, 20 (1st Cir. 1988) (allowing a criminal defendant time to retain counsel was excludable under the Speedy Trial Act); United States v. DiTommaso, 817 F.2d 201, 210 (2d Cir. 1987) (delaying trial because of a prosecutor's illness and to allow a new assistant prosecutor to prepare for trial was proper ends of justice finding); United States v. Nance, 666 F.2d 353, 358 (9th Cir. 1982) (allowing the exclusion of three continuances because the defendant's lawyer was unavailable because of a death in the family, a co-defendant's lawyer was unavailable because of his involvement in another trial, and an unrelated trial scheduled on judge's docket took longer than originally expected).

which, on the basis of fairness and efficiency, should not be held against the government.[171] These circuits further reason that the delays caused explicitly by plea negotiations are indistinguishable from the plea agreement process itself.[172] This rationale demands the recognition that plea negotiations are a basis for tolling the speedy trial clock and that this rationale keeps with the Speedy Trial Act.[173] This is plainly wrong.[174] The automatic exclusion of plea negotiations mistakenly recognizes situations which, through no fault of the defendant, delay trial preparation and therefore *should* be ascribed to the government.[175] The plea bargaining power itself is held in the hands of the prosecution, leaving delays that are caused by the plea bargaining process in the control of the government.[176] Additionally, allowing for exclusions of plea negotiations does not keep with the principle of the Speedy Trial Act as it slows the efficiency of charging cases.[177] As has been noted, when plea negotiations are excluded from the speedy trial clock, the number of calendar days between the arrest and trial can significantly increase.[178]

Lastly, these circuits mistakenly hold that plea negotiations and plea agreements are indistinguishable from the plea process itself.[179] Similar to the other excludable delays, the plea agreement exclusion provided under § 3161(h)(1) involves court proceedings and oversight.[180] Distinguishably, however, the plea negotiation process does not in and of itself require court proceedings or supervision.[181] This characteristic is one of the factors that the minority of circuits have focused on to bring plea negotiations outside of the

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171 *See* 18 U.S.C. § 3161(1); United States v. Lucky, 569 F.3d 101, 107 (2d Cir. 2009).

172 *See, e.g.*, United States v. Leftenant, 341 F.3d 338, 345 (4th Cir. 2003); United States v. Van Someren, 118 F.3d 1214, 1218 (8th Cir. 1997); United States v. Fields, 39 F.3d 439, 445 (3d Cir. 1994); United States v. Bowers, 834 F.2d 607, 610 (6th Cir. 1987); United States v. Montoya, 827 F.2d 143, 150 (7th Cir. 1987) (holding in each instance that the delay caused by plea negotiations is excluded from the time limitations of the Speedy Trial Act).

173 *See* United States v. Rector, 598 F.3d 468, 472 (8th Cir. 2010); United States v. Santiago-Becerril, 130 F.3d 11, 20 (1st Cir. 1997); United States v. Davis, 679 F.2d 845, 849–50 (11th Cir. 1982).

174 *See, e.g.*, *Leftenant*, 341 F.3d at 344–45.

175 Frase, *supra* note 42, at 680.

176 Will Bain, *Plea Bargaining, Legislative Limits, and the Separation of Powers*, 32 COLO. LAW., Mar. 2003, at 63, 66.

177 *See, e.g.*, United States v. Arellano-Rivera, 244 F.3d 1119, 1123–24 (9th Cir. 2001).

178 *See* FED. R. CRIM. P. 45(a).

179 Partridge, *supra* note 40, at 50.

180 *See* 18 U.S.C. § 3161(1) (1996).

181 Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1159 (2005) (stating that plea bargaining is quite informal and "necessarily based mostly on hearsay, at which the prosecutor decides what . . . plea to accept").

enumerated exclusions unless otherwise found by the court.[182]

VI. Alternative Action: Congress Must Amend the Speedy Trial Act to Better Effectuate Legislative Intent

A. *Congress Must Effectuate the Original Intent of the Speedy Trial Act*

The United States Constitution guarantees the Sixth Amendment right to a speedy trial; however, Congress enacted the Speedy Trial Act of 1974 to expand the rights of the defendant and incorporate protections for societal interests in having a criminal defendant's trial begin on time.[183] It seems abundantly clear that the Supreme Court has a limited interest in resolving the circuit split, so perhaps Congress is the better outlet for a resolution.[184] Congress enacted the Speedy Trial Act to create uniformity in the application of speedy trial timings, and it necessarily follows that Congress should amend the Speedy Trial Act to solidify this uniformity.[185]

As has been noted above, Congress was well aware of the use of plea bargaining when the Speedy Trial Act was enacted.[186] In fact, national attention was given to the problem of plea bargaining in the 1960s when the President's Crime Commission of then-President Lyndon Johnson issued a report conditionally approving plea bargaining.[187] Subsequently in 1968, the ABA recognized the difficulties with plea bargaining and recommended standards bringing plea bargaining under judicial oversight.[188] In 1974, the same year the Speedy Trial Act was enacted, Chief Justice Burger of the Supreme Court conveyed to Congress proposed amendments to the Federal Rules of Criminal Procedure, including Rule 11, which governs plea bargaining.[189] The notes to the proposed amendment stated that there is increasing acknowledgment of both the inevitability and the propriety of plea agreements.[190] These notes also cited recent Supreme Court cases referring to plea bargaining as "an essential component of the administration of justice," and proper administration of plea agreements

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[182] *See, e.g.*, United States v. McFadden, 689 F. App'x 76, 78 (2d Cir. 2017); United States v. Young, 674 F. App'x 855, 859 (11th Cir. 2016); United States v. Hernandez-Meza, 720 F.3d 760, 763 (9th Cir. 2013); United States v. Duckworth, 51 F.3d 1045, 1045 n.6 (5th Cir. 1995).

[183] *See The Report*, *supra* note 133, at 90.

[184] *Supreme Court Avoids Resolving Circuit Split on Speedy Trial Act by Issuing GVR Following Government Confession of Error*, *supra* note 120.

[185] *See* Winings, *supra* note 132, at 130.

[186] *See* Partridge, *supra* note 40, at 11.

[187] *See* Partridge, *supra* note 40, at 59.

[188] *See generally* Partridge, *supra* note 40.

[189] Partridge, *supra* note 40.

[190] Partridge, *supra* note 40.

should be encouraged, making frequent reference to the ABA Standards.[191]

If the Supreme Court remains reluctant to resolve the circuit split on the excludability of plea negotiations within the speedy trial calculus, Congress must then step in and uphold the legislative intent of the Speedy Trial Act.[192] The legislative history makes clear that the Speedy Trial Act is intended to prevent a lengthy criminal process.[193] Even the 1974 Senate Judiciary Committee reasoned that the enumerated provisions under the Speedy Trial Act were to assure "that the time limits do not fall too harshly upon either the defendant or the government."[194] It is clear that Congress' intention was to set a distinct balance between various trial processes that would toll the *clock* for the defendant and the government.[195] Thus, because the plea negotiation process is not explicitly mentioned in the enumerated provisions, it necessarily follows that including plea negotiations as an excludable delay would counter the balance created by the various requirements.[196] By excluding the plea negotiation process itself within the enumerated-excludable provisions, it is unmistakable that Congress intended this process to not disturb the speedy trial calculus.[197]

B. *Societal Interests are Best Preserved by Excluding Plea Negotiations from the Speedy Trial Calculus*

Courts have consistently noted that there are societal interests in the right to a speedy trial that exist separate and distinct from those of the accused.[198] Specifically, society benefits from the judicial economy preserved by a speedy trial, freeing up the courts for continued prosecution of cases.[199] This interest can be furthered by allowing the exclusion of plea negotiations from the speedy trial calculus.[200] When plea negotiations are excluded from

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[191] Partridge, *supra* note 40.

[192] *See* White's Cert. Petition, *supra* note 95, at 7.

[193] *See* White's Cert. Petition, *supra* note 95, at 7.

[194] Partridge, *supra* note 40, at 104 (noting that the work of the committee was to provide assistance to federal judges in fulfilling their responsibilities under the Speedy Trial Act of 1974).

[195] Partridge, *supra* note 40, at 59.

[196] *See* White's Cert. Petition, *supra* note 95, at 7.

[197] *See* White's Cert. Petition, *supra* note 95, at 8.

[198] People v. Blakley, 313 N.E.2d 763, 765 (N.Y. 1974) (noting that the societal interest in the right to a speedy trial is separate, and "at times in opposition," to the rights of the criminally accused).

[199] *See* Suzanne Isaacson, *Speedy Trial Act of 1974—Dismissal Sanction for Noncompliance with the Act: Defining the Range of District Courts' Discretion to Dismiss Cases with Prejudice*, 79 J. CRIM. L. & CRIMINOLOGY 997, 1011 (1988) (noting the competing interests of protecting the defendant's right to a speedy trial and society's interest in controlling crime).

[200] *See id.*

the speedy trial calculus, a defendant's trial clock figuratively keeps ticking for the quick resolution of the case.[201] Senator Ervin, commenting on the Speedy Trial Act, noted that the unfortunate result of the incredible caseloads of the courts is the reliance on plea bargaining.[202] It is clear that supporters of the Speedy Trial Act anticipated benefits for both criminal defendants, by reducing the reliance on plea bargaining, as well as society, by preventing significant delays in the criminal process.[203] By allowing plea negotiations to continue the speedy trial clock, there are fewer calendar delays between a defendant's arrest and the ultimate resolution of the case.[204] This directly supports the societal interest that Congress intended to secure and therefore supports a logical resolution of the circuit split.[205]

CONCLUSION

The right to a speedy trial protects criminal defendants and society alike. Criminal defendants enjoy the important safeguards of preventing undue and oppressive incarceration before trial, minimizing anxiety and concern accompanying public accusation, and limiting the possible delays that could impair the ability of the accused to defend themselves. Society enjoys the avoidance of a number of social troubles that can be traced to court congestion and delay.

Congress enacted the Speedy Trial Act to ensure all criminal defendants receive a speedy trial as protected by the Sixth Amendment. Where there is a split in the interpretation of key provisions of the Speedy Trial Act, however, defendants are left wondering as to when they will be charged or indicted or how the Speedy Trial Act will apply to their specific situation. The legislative intent to treat everyone under the Speedy Trial Act with uniformity and consistency is essentially ineffective where the various circuits have created a disparate treatment for defendants in their respective jurisdictions.

The circuit split on the excludability of plea negotiations in the speedy trial calculus should be resolved by disallowing exclusions for plea negotiations, thereby forcing prosecutors to offer fair and just plea deals without tolling the defendant's speedy trial right. The right to a speedy trial should not be delayed by the injustices of plea bargaining, and there should be greater efficiency in the presentation of potential bargaining.

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[201] *See* Partridge, *supra* note 40.

[202] Partridge, *supra* note 40, at 16; *see S. Rep. on Public Law 96-43*, *supra* note 34; Simon, *supra* note 103.

[203] *See* Partridge, *supra* note 40.

[204] *See* FED. R. CRIM. P. 45(a).

[205] *See The Report*, *supra* note 133, at 89.

Additionally, where the prosecutor holds the arrangement of plea agreements, effectively exempting them from the clock could result in the strategic use of plea bargaining to reserve the time prescribed within the Speedy Trial Act. This circumventing of a constitutional right needs to be closed.

Ultimately, the Supreme Court is the correct outlet for a uniform resolve of this circuit split. The Court, however, missed a perfect opportunity to resolve the split when hearing *United States v. White*. If the Court does not settle this often-debated issue, Congress must step in and redefine the parameters of the Speedy Trial Act, therefore establishing the correct interpretation of the enumerated exclusions within the Speedy Trial Act.

Looking back at John's hypothetical case, noted above, the majority of circuit courts would likely exclude the timeframe of plea negotiations from his speedy trial calculus, causing him to spend a lengthy amount of time in jail as he watches his possible defenses fade away. However, with a resolution consistent with effectuating the original intent of the Speedy Trial Act, John's right to a speedy trial will be preserved. The plea negotiations in his case will not toll his speedy trial calculus, causing the prosecution to avoid such delays with honest and fair plea offers. Further, society's interest will be advanced with a quick disposition of John's trial in fewer calendar days. Of course, if more time is needed, other exceptions can be applied through the enumerated list provided in the Speedy Trial Act. With this resolution, John will not be left wondering whether the *clock stops here*. Until then, however, many in John's position will be left waiting in a cold jailhouse cell. As their speedy trial continues to be delayed, so does their access to justice, livelihood, and a possible defense.

Time's Up[1]: Eliminating the Statute of Limitations for Rape in Massachusetts

Kileigh Stranahan[*]

INTRODUCTION[2]

On August 29, 2005, Jenny Wendt, a nursing student at Indiana University, went on a date with her teaching assistant, Bart Bareither.[3]At the conclusion of their date, she agreed to go to his apartment to watch a movie.[4] There, Bareither brutally raped Wendt.[5] After the attack, Wendt spent several days in bed suffering from "physical, mental and emotional pain," but told no one what had occurred.[6] After a period of time, Wendt gathered the courage to tell two of her closest friends and her doctor, but she never reported the crime to the police.[7] In 2014, Bareither, on his own accord, walked into the County Sheriff's Department and confessed to raping Jenny Wendt.[8] Although seemingly a victory for Wendt, the state of Indiana could not do anything because the statute of limitations for rape had passed.[9]

Cindy Hillebrand was raped in Topeka, Kansas, in 1985.[10] A decade

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[1] *About*, TIME'S UP, https://perma.cc/KJ6N-2GXW (last visited Aug. 13, 2021).

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[2] For ease of reference, this Note will primarily use she/her pronouns to refer to sexual assault victims. In doing so, it by no means attempts to suggest that men and gender-neutral persons are not also victims of sex crimes.

[3] Bill McCleery & Tim Evans, *Rape Victim Recounts Her Pain, Fear*, INDYSTAR (Feb. 15, 2014, 9:57 PM ET), https://perma.cc/N98R-UUUQ.

[4] *Id.*

[5] *Id.* (describing in detail the violent attack on the victim).

[6] *Id.*

[7] *Id.*

[8] Tim Evans, *When Rape Is Not a Crime: Indiana Case Spotlights Statute of Limitations*, INDYSTAR (Feb. 15, 2014, 9:47 PM ET), https://perma.cc/38Q4-52B9.

[9] *Id.*

[10] Diana Reese, *New Kansas Law Ends Statute of Limitations for Rape Cases*, WASH. POST (Apr. 2, 2013), https://perma.cc/KDQ8-2APY.

later, Hillebrand's rapist, Joel Russel, was identified by DNA evidence, collected in connection with another sex crime.[11] At the time of his identification, Russel was serving a separate sentence, but would never (and could never) be punished for the attack of Hillebrand because the statute of limitations for rape in Kansas had expired.[12]

Lisa Flotlin was seventeen years old when she became close with her high school Spanish teacher.13 After inviting Flotlin to his home, her Spanish teacher "pushed" sexual acts on her.14 At the time of the occurrence, Flotlin did not recognize that she was a victim of sexual abuse.15 Eight years later, when Flotlin was twenty-five years old and able to understand what happened to her, she decided to press charges against her former Spanish teacher.16 She quickly learned, however, that she could not.17 Because Flotlin was over the age of fifteen years old when she was sexually assaulted, the statute of limitations had elapsed and prevented the prosecution of her attacker.[18]

As time and society changes, so too must the law.[19] As the law currently stands in Massachusetts, a victim of rape must put her own mental, emotional, and physical trauma aside to "beat the clock" if she wants to see her attacker brought to justice.[20] This Note will address the need to eliminate the statute of limitations for rape in the state of Massachusetts. Part I will discuss the origin of statutes of limitations and their designated purpose. It will introduce the history of rape law, its evolution throughout time, and the conversation surrounding rape and sexual assault today. Further, Part I will discuss the statutes of limitations for rape across the United States, the recent changes that have been made, and the current statute of limitations for rape in Massachusetts. Part II will introduce the pervasive issue of underreported rapes in the United States. Part III will argue that Massachusetts is unique because of its coveted higher education system. As such, the state's legislature should step in and protect the thousands of individuals who travel to Massachusetts seeking higher education. American colleges have a

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[11] *See* Evans, *supra* note 8.

[12] *See* Evans, *supra* note 8.

[13] Lynsi Burton, *'We Need to Catch Up to the Times': Series of Sexual Assault Reforms Introduced in Wash. Legislature,* SEATTLEPI (Jan. 24, 2019), https://perma.cc/258S-8UJC.

[14] *Id.*

[15] *See id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See generally* Roscoe Pound, *Critique: W. Friedmann's "Law in a Changing Society,"* 46 MINN. L. REV. 117 (1961) (arguing that law must be stable but cannot stand still).

[20] *See* MASS. GEN. LAWS ch. 277, § 63 (West 2012); *see also* Emily Shugerman, *Here's How Many Years You Have to Report a Rape in All 50 States*, REVELIST (Feb. 4, 2019, 4:18 PM), https://perma.cc/Q4EZ-PJ7E.

significant and systemic rape problem, and the legislature can aid these victims by eliminating the statute of limitations for rape. Part IV will argue that the rationale for the original imposition of statutes of limitation no longer holds weight in our growing and technologically advanced society.

I. Background

A. *Origin and Purpose of Statutes of Limitations*

Statutes of limitations are laws that restrict the time in which legal proceedings may be brought.[21] Typically, statutes of limitations are fixed to a period of time after the occurrence of the events that gave rise to the specific cause of action.[22] As such, the cause of action dictates the statute of limitations.[23] Limitations on actions were established first in early Roman law, which restricted the time in which a person could recover property.[24] In England, limitations on actions to recover property were not instituted until the sixteenth century, and those on personal actions, until the seventeenth.[25] Other Continental codes have modeled their own civil statutes of limitations after these laws.[26] The civil actions are often limited in periods by general statutes, which classify various actions into broad groups.[27] The periods prescribed are generally arbitrary and are formed by an estimate of time for which reliable evidence of the respective transactions may be expected to survive.[28]

For criminal prosecutions, however, countries vary in time limits.[29] Presently, in England, for example, there are no general statutes of limitations for crimes.[30] Although crimes that are created by statute often have a limit of time for prosecution, "the common law felon must depend on the forbearance of the authorities for freedom from prosecution for a crime long past."[31] In contrast, many Continental countries impose a

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[21] Editors of Encyclopedia Britannica, *Statute of Limitations*, ENCYCLOPEDIA BRITANNICA, https://perma.cc/9TZQ-HNFT (last visited Aug. 13, 2021).

[22] *Id.*; *Statute of Limitations*, THE LAW DICTIONARY, https://perma.cc/535Y-H2NL (last visited Aug. 13, 2021).

[23] *See* Editors of Encyclopedia Britannica, *supra* note 21.

[24] *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950) [hereinafter *Developments in the Law*]; Editors of Encyclopedia Britannica, *supra* note 21.

[25] Editors of Encyclopedia Britannica, *supra* note 21.

[26] *See Developments in the Law*, *supra* note 24, at 1178 (discussing the impact of Roman law on modern Continental codes).

[27] Editors of Encyclopedia Britannica, *supra* note 21.

[28] Editors of Encyclopedia Britannica, *supra* note 21.

[29] *See Developments in the Law*, *supra* note 24, at 1179.

[30] *Developments in the Law*, *supra* note 24, at 1179.

[31] *Developments in the Law*, *supra* note 24, at 1179.

limitation on the prosecution of all crimes.[32] However, in comparison to the United States, the Continental time limits are often much longer and provide more flexibility.[33]

The United States enacted general statutes limiting the prosecution for most crimes fairly early on in its existence.[34] The primary consideration for such legislation is undoubtedly fairness to the defendant.[35] These statutes have long been justified as "indispensable protection" of the innocent and the wrongly accused.[36] Arguably, one ought not to be forced to defend oneself when "evidence has been lost, memories have faded, and witnesses have disappeared."[37] Thus, statutes of limitations help ensure that trials are based on relatively "'fresh' rather than old . . . evidence and information, thereby facilitating the jury's fact-finding responsibilities in their search for 'the truth.'"[38] When juries are forced to rely on dated evidence, this typically prejudices the defendant, rather than the prosecution.[39] Given that juries often do not fully understand the prosecution's burden and may decide a case based on emotion or gut-feeling,[40] it is possible that jurors will convict innocent defendants because of their inability to exonerate themselves.[41] For example, if defendants have no idea where they were, what they were doing, or who they were with on specific nights in question, this may raise unwarranted suspicion, when in reality it is merely a result of innocent memory diminishment.[42]

Another argued purpose for statutes of limitation is that "[t]here comes a time when [a suspect] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations."[43] Reinforcing the notion that these statutes are for the benefit of the defendant, many argue that, at some point, suspects should no longer have to answer for old

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[32] *Developments in the Law*, *supra* note 24, at 1179.

[33] *Developments in the Law*, *supra* note 24, at 1179; *see* Editors of Encyclopedia Britannica, *supra* note 21.

[34] *Developments in the Law*, *supra* note 24, at 1179.

[35] *Developments in the Law*, *supra* note 24, at 1185.

[36] *See* Gerald D. Robin & Richard H. Anson, *Is Time Running Out on Criminal Statutes of Limitations?*, 47 CRIM. L. BULL., no. 1, Winter 2011; *Developments in the Law*, *supra* note 24, at 1185.

[37] *Developments in the Law*, *supra* note 24, at 1185 (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944)).

[38] Robin & Anson, *supra* note 36, at 1.

[39] *See* Robin & Anson, *supra* note 36, at 1.

[40] *See* Bobby Greene, Comment, *Reasonable Doubt: Is It Defined by Whatever Is at the Top of the Google Search Page?*, 50 J. MARSHALL L. REV. 933, 933–34 (2017); Timothy P. O'Neill, *Instructing Illinois Juries on the Definition of "Reasonable Doubt": The Need for Reform*, 27 LOY. U. CHI. L.J. 921, 922 (1996).

[41] *See* Robin & Anson, *supra* note 36, at 1.

[42] *See* Robin & Anson, *supra* note 36, at 1.

[43] *Developments in the Law*, *supra* note 24, at 1185.

crimes.[44] Instead, they "should be able to rest easy ('repose') and get on with their lives, without worrying about criminal charges indefinitely hanging over their heads."[45] The Supreme Court of the United States has endorsed this justification when it stated that "criminal limitations statutes are to be liberally interpreted in favor of repose."[46] The Court further explained that repose is favored even though it will almost always permit a "rogue" to escape.[47]

Several other justifications for the creation of limiting statutes are not quite as defendant centric.[48] One argument is that these statutes "free up the courts."[49] If "inconsequential and tenuous claims" cannot be brought, then courts will be more effective because they will not be required to bear the burden of adjudicating such claims.[50] Further, it has been said that the existence of statutes of limitations forces police officers to do their jobs more expediently.[51] Arguably, there is a greater incentive to pursue criminal complaints with some urgency when law enforcement officials know that if they do not, the offenders will escape justice.[52] This position assumes, however, that police officers and law enforcement consider the statute of limitations when investigating reported crimes.[53]Although the weakest of the arguments in favor of statutes of limitations, it theoretically reminds police that "justice delayed is justice denied."[54] If the police do not do their jobs quickly, they will lose the opportunity to do their jobs at all.[55]

B. *Sexual Assault and Rape in the United States*

1. Anglo-American History of Rape

In seventeenth and eighteenth century England, rape was defined as some variation of "carnal knowledge of a woman forcibly and against her will."[56] Rape not only required sexual conduct that was non-consensual, but

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[44] *See Developments in the Law*, *supra* note 24, at 1185; *see also* Robin & Anson, *supra* note 36, at 1.

[45] Robin & Anson, *supra* note 36, at 1.

[46] Toussie v. United States, 397 U.S. 112, 115 (1970); Robin & Anson, *supra* note 36, at 2.

[47] *Toussie*, 397 U.S. at 123.

[48] *See* Robin & Anson, *supra* note 36, at 3; *Developments in the Law*, *supra* note 24, at 1185–86.

[49] *See Developments in the Law*, *supra* note 24, at 1185.

[50] *Developments in the Law*, *supra* note 24, at 1185.

[51] Robin & Anson, *supra* note 36, at 3.

[52] Robin & Anson, *supra* note 36, at 3.

[53] *See* Robin & Anson, *supra* note 36, at 3.

[54] Robin & Anson, *supra* note 36, at 3.

[55] *See* Robin & Anson, *supra* note 36, at 3.

[56] Thomas Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (or Learning from Our Mistakes: Abandoning a Fundamentally Prejudiced System & Moving Toward a Rational Jurisprudence of Rape)*, 18 BUFF. J.

there also needed to be a presence of actual physical force.[57] During this time period, the requirements to bring suit were also rather stringent.[58] Rape victims, most commonly women, had to make a "fresh discovery and pursuit of the offense and offender."[59] If not, a victim's suit was presumptively malicious, and would be faced with criticism and skepticism.[60] Additionally, if an alleged victim did not possess any visible injuries as proof of a struggle, her testimony was likely not to be credible.[61] An illustrative example is a Massachusetts case from the seventeenth century.[62] A woman named Elizabeth Emerson accused a man of raping her.[63] However, when the public discovered that she had not scratched or kicked him, and further, she became pregnant, her suit was discredited and dismissed.[64] Society believed that conception could not occur as a result of rape, and that rape victims should struggle vigorously and call out for help.[65]

These notions stemmed from the belief that rape was not a crime against a woman, but against her chastity.[66] A woman's chastity was believed to be her worth.[67] According to society, a woman must vigorously struggle with her rapist because she must protect her chastity with all of her power, at any cost.[68] Because of this, many acts that society deems rape today were not then considered rape because the acts had no negative implications for a woman's purity.[69] For example, a woman could not be raped by her husband because "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[70] The same rationale applied to an unmarried woman who lived in the same quarters as her alleged rapist.[71] Further, if a woman consented after-the-fact, this was likely to be deemed sufficient consent.[72]

GENDER L. & SOC. POL'Y 73, 85–88 (2010) (discussing prominent jurists which all define rape similarly).

[57] *Id.* at 85 (stating that threat of force was insufficient).

[58] *See id.* at 87–89.

[59] *Id.* at 87.

[60] *See* SIR MATTHEW HALE, HISTORIA PLACITORUM CORONÆ 632 (1847 ed.) (1736).

[61] *See id.* at 633.

[62] Mitchell, *supra* note 56, at 90.

[63] Mitchell, *supra* note 56, at 90.

[64] Mitchell, *supra* note 56, at 90.

[65] Mitchell, *supra* note 56, at 90.

[66] *See* Mitchell, *supra* note 56, at 77.

[67] *See* Mitchell, *supra* note 56, at 85.

[68] *See* Mitchell, *supra* note 56, at 85.

[69] *See* Mitchell, *supra* note 56, at 85.

[70] *See generally* HALE, *supra* note 60, at 628 (comparing treason to marriage).

[71] Mitchell, *supra* note 56, at 86.

[72] Mitchell, *supra* note 56, at 86–87.

2. Second-Wave Feminism and Its Impact on Legal and Societal Perceptions of Rape

It was not until the 1970s, as a result of second-wave feminism, that there was a drastic shift in thinking about rape and the injury that it caused.[73] Instead of being thought of as solely an injury to chastity, society instead began to understand the crime as an affront to autonomy.[74] Society began to understand the concept that a woman has the power to choose when, where, and with whom she will be intimate, and stripping a woman of this power is a grievous injury.[75] Because of this new found understanding of gender and power, rape shield laws were implemented in the United States.[76] In the late 1970s, these laws were enacted to protect victims from being re-victimized by their alleged rapists at trial.[77] Prior to the creation of these laws, defendants were allowed to present evidence of victims' sexual activity to the jury.[78] The accused rapists often mounted character attacks and painted their victims as immoral and unchaste.[79] "If she was impure—how could she be trusted?"[80] When chastity no longer became the focus of the crime of rape, it logically followed that it should no longer be the focus of a rape trial.[81]

However, rape was still considered a crime that was committed by a stranger in a dark alley, not by someone you knew and trusted.[82] Often when rape *was* committed by a spouse, friend, acquaintance, or relative it was kept silent, uncharged, and often not even thought of as rape.[83] This likely

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[73] *See* Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 686–89 (2001).

[74] *See id.* at 686; *see also* Mitchell, *supra* note 56, at 86.

[75] *See* Rodes, *supra* note 73, at 686.

[76] Denise Roman, *Under the Rape Shield: Constitutional and Feminist Critiques of Rape Shield Laws*, UCLA CTR. FOR THE STUDY OF WOMEN 38, 38 (Apr. 1, 2011), https://perma.cc/27LU-L5VM.

[77] *See Rape Shield Laws: Protecting Sex-Crime Victims*, NOLO (Nov. 8, 2013), https://perma.cc/AG28-MHT2 [hereinafter *Rape Shield Laws*]; *see also* Mitchell, *supra* note 56, at 100.

[78] *Rape Shield Laws*, *supra* note 77.

[79] *Rape Shield Laws*, *supra* note 77.

[80] *Rape Shield Laws*, *supra* note 77.

[81] *See Rape Shield Laws*, *supra* note 77.

[82] *See* Noreen Malone & Amanda Demme, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen*, THE CUT (July 26, 2015, 9:00 PM), https://perma.cc/H97P-UWS8 [hereinafter Malone & Demme, *Stories*] ("In 1975, it wasn't an issue that was even discussed. Rape was being beaten up in a park. I understood at the time that it was wrong, but I just internalized it and dealt with it and pushed it down, and it resided in a very private place.").

[83] *See* Noreen Malone & Amanda Demme, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen: Patricia Leary Steuer*, THE CUT (July 26, 2015, 9:00 PM), https://perma.cc/8WNC-QJ9K ("[I]n the late '70s, women didn't challenge powerful men.").

stemmed from the notion that if a woman knew someone, it was "more likely" that she consented at the time but simply regretted it after.[84] Change was effected when the marital exemption to rape was finally foreclosed in the 1980s.[85] This gave women the ability to put a name on sexual invasions at the hands of their husbands and gave them an avenue to seek assistance and retribution.[86] But, just because wives were given this ability does not mean that they frequently used it.[87] In fact, many women had difficulty with calling sexual abuse by their husbands the word "rape."[88] Further, many were afraid to report any incident due to their financial dependence on their husbands.[89] Speaking up about rape and sexual violence has long been stigmatized and suppressed.[90]

3. The Modern Era

Due to the rise of various movements and several famously offensive rape cases, the conversation surrounding rape and sexual assault has become more fluid and open.[91] In 2006, Tarana Burke founded the "me too" movement to help survivors of sexual violence find "pathways to healing."[92] A little over ten years later, however, the phrase took off on social media when actress Alyssa Milano posted a tweet stating "[i]f you've been sexually harassed or assaulted write 'me too' as a reply to this tweet," in response to the sexual assault accusations against Harvey Weinstein.[93] Milano received

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[84] *See* Mitchell, *supra* note 56, at 77; *see also* Clifford Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 715 (1995).

[85] Roman, *supra* note 76, at 39. *See generally* State v. Smith, 85 N.J. 193 (1981) (discussing at length the legal history of the marital exemption).

[86] *See* Roman, *supra* note 76, at 39. *See generally* Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R.4TH 105, § 2(a) (1983).

[87] *Marital Rape: The Sexual Assault No One Talks About*, SAFE HAVEN (Oct. 20, 2017), https://perma.cc/VC45-TYWH [hereinafter *Marital Rape*]. *See generally* Walsh, *supra* note 86, § 2(a).

[88] *See Marital Rape*, *supra* note 87.

[89] *See, e.g.*, *Marital Rape*, *supra* note 87.

[90] *See* Christine Ro, *Why Most Rape Victims Never Acknowledge What Happened*, BBC NEWS (Nov. 5, 2018), https://perma.cc/XP8D-9FM2.

[91] *See, e.g.*, Tarana Burke, *History & Inception*, ME TOO, https://perma.cc/DER9-NYCR (last visited Aug. 13, 2021); TIME'S UP, *supra* note 1; *see also* People v. Turner, No. B1577162, 2016 WL 3440260, at *1 (Cal. Super. Ct. Mar. 9, 2016); Graham Bowley, *Bill Cosby Assault Case: A Timeline*, N.Y. TIMES (Apr. 25, 2018), https://perma.cc/W89M-5BNG; Christine Hauser & Maggie Astor, *The Larry Nassar Case: What Happened and How the Fallout Is Spreading*, N.Y. TIMES (Jan. 25, 2018), https://perma.cc/7WWN-B3MZ.

[92] *See* Burke, *supra* note 91.

[93] Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW (July 31, 2018), https://perma.cc/5DSD-ELUJ; Nadja Sayej, *Alyssa Milano on the #MeToo Movement:*

55,000 replies and #MeToo became the number one trending hashtag on Twitter.[94] Since the 2017 tweet, #MeToo has made its way across the globe and has provided women with a voice to speak out about their stories and history with rape and sexual violence.[95] Additionally, the #MeToo movement has impacted laws in the United States.[96] For example, some states placed restrictions on non-disclosure agreements in sexual assault and harassment cases.[97] The #MeToo movement has also generated other movements.[98] For example, the "Time's Up" movement stemmed from #MeToo, but has a separate and more specific goal—to ensure women in the workplace are free from discrimination, sexual harassment, and abuse.[99]

In addition to these movements, some recent and particularly shocking rape cases have sparked conversation and increased the reporting of rape and sexual assault.[100] In 2016, Brock Turner's case gained national attention, specifically because of his light sentence.[101] Turner was accused of raping an unconscious twenty-two year old woman behind a dumpster.[102] He was convicted of three charges of felony sexual assault, but not rape.[103] Despite this, the news headlines often described him as "Stanford Swimmer," and although he could have been sentenced to up to fourteen years in prison, he was only sentenced to six months.[104] This fueled outrage and discussion.[105] Because of the Turner case, California lawmakers decided to expand the definition of rape in the state, so that acts like Brock Turner's would be

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'We're Not Going to Stand for it Any More,' THE GUARDIAN (Dec. 1, 2017, 7:00 EST), https://perma.cc/2W5K-492C; *see* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://perma.cc/U66D-99CP.

[94] *See* Garcia, *supra* note 93; Sayej, *supra* note 93.

[95] *See* Beitsch, *supra* note 93.

[96] *See* Beitsch, *supra* note 93.

[97] Beitsch, *supra* note 93.

[98] Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME (Mar. 8, 2018, 6:00 AM EST), https://perma.cc/8ZKG-C3V3.

[99] *Safe, Fair, and Dignified Work for Women of All Kinds.*, TIME'S UP, https://perma.cc/NPW4-TTZM (last visited Aug. 14, 2021).

[100] *See, e.g.*, Bowley, *supra* note 91; Hauser & Astor, *supra* note 91; *see also* People v. Turner, H043709, 2018 WL 3751731 (Cal. App. 6th Dist. Aug. 8, 2018).

[101] Kayla Lombardo, *How a Rape Case Involving a Stanford Swimmer Became National News*, SPORTS ILLUSTRATED (June 9, 2016), https://perma.cc/2VAN-6VJH.

[102] *Id.*

[103] *Id.*

[104] Naomi LaChance, *Media Continues to Refer to Brock Turner as a "Stanford Swimmer" Rather Than a Rapist*, THE INTERCEPT (Sept. 2, 2016, 1:45 PM), https://perma.cc/69JA-UDL3; *see, e.g.*, Veronica Mocha & Brittny Mejia, *Stanford Swimmer Convicted of Sex Assault Lied About Never Partying, Documents Show*, L.A. TIMES (June 10, 2016, 6:50 PM PT), https://perma.cc/J453-WFX8.

[105] *See* Callie Marie Rennison, *I'm the Professor Who Made Brock Turner the "Textbook Definition" of a Rapist*, VOX (Nov. 17, 2017, 8:30 AM EST), https://perma.cc/HH2P-LTTA.

included in the definition.[106]

Another famous case is Larry Nassar's.[107] He was sentenced to 175 years in prison for the sexual abuse of over 156 women.[108] Nassar, an Olympic doctor, used his position to take advantage of the young gymnasts he was assigned to care for.[109] Many of his victims came forward with allegations against Nassar long before any investigation was undertaken, but were simply told to "be quiet" or were not believed.[110] In response to Nassar's case, Michigan enacted two laws, with over twenty more in the works.[111] The first extended the civil statute of limitations and "gave childhood sex abuse victims more time to sue, including by creating a 90-day window for Nassar victims to do so retroactively."[112] The second extended the criminal statute of limitations and "gave prosecutors 15 years or until a victim's 28th birthday to file charges in second- and third-degree sexual conduct cases if the victim was younger than 18."[113]

Lastly, the case that really shocked the country and enabled over fifty women to speak out about what had happened to them was the case against Bill Cosby.[114] In 2018, Cosby, who was coined as "America's Dad," was sentenced to three to ten years in state prison for drugging and sexually assaulting a woman fourteen years earlier.[115] Although he was only prosecuted for this one crime, dozens of other victims were able to sigh in relief knowing he was finally brought to justice.[116] Most of these women, who only came forward to support those who already had, legally could not bring charges against Cosby.[117] This was because the statute of limitations

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[106] *Id.*

[107] Roland Hughes & Rajini Vaidyanathan, *Larry Nassar Case: The 156 Women Who Confronted a Predator*, BBC NEWS (Jan. 25, 2018), https://perma.cc/8QXY-NL7C.

[108] *Id.*

[109] *Id.*

[110] *See* Caitlin Flynn, *Larry Nassar's Time Is Up—But Why Did It Take Over 150 Victims to Finally Bring Him to Justice?*, HELLO GIGGLES, https://perma.cc/EG3Z-6LK3 (last updated Jan. 25, 2018, 12:53 PM); Will Hobson, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced to 40-175 Years for Sex Crimes*, WASH. POST (Jan. 24, 2018), https://perma.cc/BKF6-CNLC.

[111] David Eggert, *More Larry Nassar-Inspired Bills Headed to Michigan Governor*, LANSING ST. J. (Dec. 4, 2018, 4:02 PM ET), https://perma.cc/54D5-BJ4B.

[112] *Id.*

[113] *Id.*

[114] Bowley, *supra* note 91.

[115] Bowley, *supra* note 91.

[116] *See* Bowley, *supra* note 91 ("During the trial, Ms. Constand became something of a proxy for other women, more than 50, who have accused Mr. Cosby of similar sexual misconduct.").

[117] *See* Malone & Demme, *Stories*, *supra* note 82 ("I came forward to offer my support as a witness. I knew my statute of limitations had run out. When only one or two women came out, a couple of years ago, they were ridiculed more.").

had passed.[118] As such, Cosby was only able to be sentenced to three to ten years, as opposed to the rest of his life, like Nassar.[119]

C. *Changes in Statute of Limitations for Rape and Other Sex Crimes Across the United States*

As a direct result of Bill Cosby's case, California changed its statute of limitations.[120] Before the Cosby accusations, the statute of limitations for rape and other sex crimes in California was just ten years.[121] However, as of January 1, 2019, California no longer has a statute of limitations for felony sex crimes, including rape.[122] In recent years, many other states either have altered, or are in the process of altering, their statute of limitations for felony sex crimes as well.[123] As stated above, Michigan changed its statute of limitations in response to the Larry Nassar case.[124] Although Michigan has not had a statute of limitations for criminal sexual conduct in the first degree for over a decade,[125] the new law altered the statute of limitations for second- and third-degree sexual assault cases.[126]

Pennsylvania lawmakers are also currently attempting to eliminate the statute of limitations for child sex abuse cases.[127] After the release of a grand jury report into "[d]iocesan child sexual abuse that claimed more than 1,000 child victims by more than 300 church officials," the Pennsylvania legislature vowed to react.[128] They did so by creating Senate Bill 261, which would "eliminate the statute of limitations [for the] criminal prosecution of child sex crimes and would allow victims until the age of 50 to sue in civil court."[129]

D. *Massachusetts' Statute of Limitations for Rape*

The statute of limitations for rape in Massachusetts is currently fifteen years, and it begins running at the commission of the offense.[130] However, if

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[118] *See* Bowley, *supra* note 91.

[119] *See* Bowley, *supra* note 91.

[120] Eric Levenson, *California Ended Its Statute of Limitations on Rape After Bill Cosby. It May Not Apply to the Golden State Killer*, CNN (Apr. 26, 2018, 4:51 PM EDT), https://perma.cc/S4YT-R8J3.

[121] *Id.*

[122] CAL. PENAL CODE § 799 (West 2020).

[123] *See, e.g.*, Eggert, *supra* note 111.

[124] Eggert, *supra* note 111.

[125] *See* MICH. COMP. LAWS § 767.24 (2018).

[126] Eggert, *supra* note 111.

[127] Brent Addleman, *Local Lawmakers Support Bill That Would Extend Statute of Limitations for Child Sexual Abuse Victims*, NEW CASTLE NEWS (Aug. 15, 2018), https://perma.cc/94WQ-2DC3.

[128] *Id.*

[129] *Id.*

[130] MASS. GEN. LAWS ch. 277, § 63 (West 2012).

the victim of the offense is under the age of sixteen at the time of its occurrence, the statute of limitations does not begin to run until the victim reaches the age of sixteen.[131] To be clear, this means that if a victim is raped at the age of fifteen, the prosecution must indict the defendant before the victim is thirty-one in order to remain within the confines of the statute of limitations.[132] Further, an indictment or a complaint for the sexual abuse or rape of a child, or conspiracy to commit thereto, may be discovered and filed at any time.[133] However, if filed more than twenty-seven years after the commission of the offense, it must be supported by "independent evidence that corroborates the victim's allegations."[134]

II. Rape Is Pervasive and the Most Underreported Crime in the United States

In the United States, one in five women and one in seventy-one men will be raped at some point in their lifetime.[135] And yet, over 63% of sexual assaults go unreported.[136] These statistics, taken from the National Sexual Violence Resource Center, while seemingly high, are likely not giving the full picture.[137] Because these numbers are often obtained by the U.S. Census Bureau when it conducts in-house interviews, it is highly unlikely that every individual is entirely forthcoming.[138] If an individual has not reported the event to the police, the likelihood that the person will discuss it with the Census Bureau is very low.[139]

The lack of reporting in this country may be attributed to many different factors.[140] The reasons for not reporting can depend upon the victim, the victim's personality, how the victim copes with trauma, and the nature of the event.[141] However, simply because these crimes are not reported does not mean that the problem is declining.[142] Rather, there is no completely accurate way to discover what the rate of sexual assault and rape is in the United States because of the high number of unreported events.[143]

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[131] *Id.*

[132] *See id.*

[133] *Id.*

[134] *Id.*

[135] *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR., https://perma.cc/P5XF-GK3Y (last visited Aug. 14, 2021).

[136] *Id.*

[137] *See* Emily Thomas, *Rape Is Grossly Underreported in the U.S., Study Finds*, HUFF. POST (Nov. 21, 2013, 11:07 AM EST), https://perma.cc/QM6X-N82X.

[138] *Id.*

[139] *See id.*

[140] *See infra* Part III(B).

[141] *See* Ro, *supra* note 90.

[142] Thomas, *supra* note 137.

[143] *See* Thomas, *supra* note 137.

What is quantifiably minimal, however, is the number of false accusations of rape and sexual assault.[144] Contrary to popular belief, only between 2% and 10% of reported sexual assaults and rapes are the result of false accusations.[145] For example, "a study of 136 sexual assault cases in Boston found a 5.9% rate of false reports."[146] Rape is an epidemic in America.[147] It is not something individuals invent in their heads or a "figment of some collective feminist man-hating agenda."[148] Rape is a problem in this country; it affects more Americans than not, whether directly or indirectly, and something needs to be done.[149]

ANALYSIS

III. The Massachusetts Legislature Should Step in and Protect Students Seeking Higher Education in the State

A. *Massachusetts' Higher Education System*

Several colleges in Massachusetts are renowned and well-respected all over the world.[150] The state "boasts the oldest and arguably most prestigious college[s] in the country."[151] In 2019, Forbes magazine ranked the colleges throughout the United States, and Harvard University—a Massachusetts school—topped the list at number one.[152] Further, seven more Massachusetts colleges ranked within the list's top fifty in the country.[153] Because of this, students from all over the world travel to the state to receive an education from one of the 121 Massachusetts colleges and universities.[154]

Specifically, over 340,000 students attend college in Massachusetts.[155] Approximately 55,000 of those students are individuals who travelled from

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[144] Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), https://perma.cc/66GK-PG2A.

[145] *Id.*

[146] *Statistics About Sexual Violence*, *supra* note 135.

[147] Victoria A. Brownworth, *America Has a Rape Problem*, HUFF. POST (June 18, 2014, 4:30 PM ET), https://perma.cc/6GSG-DGT2.

[148] *Id.*

[149] *Id.*

[150] *See America's Top Colleges 2019*, FORBES (Aug. 15, 2019, 7:00 AM), https://perma.cc/99MM-RT5Z.

[151] *Study in Massachusetts*, INT'L STUDENT, https://perma.cc/845Y-GTB6 (last visited Aug. 14, 2021).

[152] *America's Top Colleges 2019*, *supra* note 150.

[153] *America's Top Colleges 2019*, *supra* note 150.

[154] *See Best Colleges in Massachusetts*, COLL. CHOICE, https://perma.cc/BM9L-PUW6 (last updated June 9, 2021).

[155] *Best Massachusetts Colleges*, COLL. SIMPLY, https://perma.cc/Z6HE-THSH (last visited Aug. 14, 2021).

another country to attend school in Massachusetts.[156] In fact, many international students who "may have first considered living in the fast-paced, densely populated New York City, then decided the dynamic city of Boston offered all the cultural richness, diversity, and stimuli of the big city, but on a more welcoming, slightly smaller, and more moderately-paced scale."[157]

B. *Rape and Underreporting on College Campuses*

1. Prevalence of Rape in College

Rape is a systemic and growing problem in American colleges.[158] In fact, rape is the most common violent crime that occurs on college campuses today.[159] Between 20% and 25% of women will experience rape, or attempted rape, during their time in college.[160] Although women are the most common victims of rape, women are not the only individuals affected by this crime.[161] Notably, 15% of men will also experience some form of sexual violence while in college.[162] Nevertheless, it is college women who are more at risk of rape and other forms of sexual assault than women who are the same age but do not attend college.[163] Further, women are more at risk of rape while in college than they are at any other point in their adult lives.[164]

The majority of women who are raped in college are victims of acquaintance rape—rape that is committed by someone known to the victim.[165] This could be a classmate, a friend, a boyfriend, an ex-boyfriend,

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[156] Laura Krantz, *Number of Foreign College Students in Boston Surges*, BOS. GLOBE (Nov. 16, 2015, 7:20 PM), https://perma.cc/4TWS-UQ8R.

[157] *Study in Massachusetts*, *supra* note 151 ("Boston is a great place for international students because so many people in this city are students themselves, and a lot of us aren't native to the city either.").

[158] *See* Crime on College Campuses: Institutional Liability for Acquaintance Rape, 1 ANN. ATLA-CLE 499, 499 (2004) [hereinafter Crime on College Campuses]; Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 42 (1991); Abby Jackson, *American Colleges Have a Massive Rape Problem, and There's No Clear Solution in Sight*, BUS. INSIDER (Apr. 2, 2018, 1:22 PM), https://perma.cc/C65P-DDEC.

[159] Crime on College Campuses, *supra* note 158, at 499.

[160] *Statistics About Sexual Violence*, *supra* note 135.

[161] Emily Kassie, *Male Victims of Campus Sexual Assault Speak Out 'We're Up Against a System That's Not Designed to Help Us,'* HUFF. POST (Jan. 27, 2015, 7:33 AM ET), https://perma.cc/954F-FCJ5 ("While women have 'really moved the ball forward,' resulting in a heightened awareness about sexual assault against women and children, it's an awareness that doesn't include men as victims.").

[162] *Statistics About Sexual Violence*, *supra* note 135.

[163] Crime on College Campuses, *supra* note 158, at 499.

[164] Crime on College Campuses, *supra* note 158, at 499.

[165] *See* Steinberg, *supra* note 158, at 41; *see also Acquaintance Rape*, MERRIAM-WEBSTER, https://perma.cc/MAL9-2F6T (last visited Aug. 14, 2021).

or someone that they have seen around campus.[166] Some characteristics specific to the college environment increase the probability of acquaintance rape.[167] A college campus is one of the few places where individuals between the ages of eighteen and twenty-four are able to live in close quarters and spend a majority of their time with each other for a number of years.[168] College students live together, eat together, do homework together, and socialize together.[169] When first arriving at college, a new sense of "freedom away from home begins, and peer pressure on students—mostly male—to become sexually active may develop."[170] The close proximity of male and female students not only increases the opportunity to form relationships, but also increases the opportunity for breaches of trust within those relationships.[171]

Additionally, alcohol is almost always a factor in acquaintance rape on college campuses.[172] It naturally follows that colleges with higher rates of binge drinking have higher rates of on-campus rape.[173] Although alcohol does not *cause* rape, its presence makes it more likely that a rape will occur.[174] Alcohol has the effect of impairing judgment, creating misperceptions, and weakening a victim's ability to physically resist.[175] When students drink alcohol, it is often in the presence of friends at a dorm room or a fraternity party, with a false sense of invincibility.[176]

2. Culture Against Reporting

When women are raped in college, most do not report the incident to the police or the school administration.[177] Specifically, the American Civil Liberties Union estimates that at least 95% of campus rapes in the United

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[166] Crime on College Campuses, *supra* note 158, at 499.

[167] *See* Steinberg, *supra* note 158, at 43.

[168] Steinberg, *supra* note 158, at 43.

[169] Steinberg, *supra* note 158, at 43.

[170] Steinberg, *supra* note 158, at 43.

[171] Steinberg, *supra* note 158, at 39, 43 ("During my last semester of law school, a friend tried to rape me in my apartment in Cambridge, Massachusetts.").

[172] Crime on College Campuses, *supra* note 158, at 499 ("Seventy-five to 90 percent of the acquaintance rapes that occur on campus involve either drugs or alcohol.").

[173] Crime on College Campuses, *supra* note 158, at 499.

[174] *The Realities of Sexual Assault on Campus*, BEST COLLEGES, https://www.bestcolleges.com/resources/preventing-sexual-assault/ (last visited Jan. 30, 2020) (stating that the responsibility for the attack lies solely with the perpetrator).

[175] *See* Crime on College Campuses, *supra* note 158, at 499; *see also Alcohol-Related Brain Damage*, THE RECOVERY VILLAGE, https://perma.cc/TGZ6-SFTG (last updated June 29, 2021).

[176] Steinberg, *supra* note 158, at 43 n.24 ("A fraternity member is more than twice as likely to commit rape as is his non-affiliated classmates.").

[177] Rana Sampson, *Acquaintance Rape of College Students*, ARIZ. ST. UNIV. (Aug. 2011), https://popcenter.asu.edu/content/acquaintance-rape-college-students-0.

States go unreported.[178] There are a number of reasons why women do not report rape.[179] For college women, one of the most significant reasons is the fear of being ostracized or disbelieved.[180]

As noted, most campus rapes occur in the presence of alcohol, surrounded by friends, by someone the victim is friendly with.[181]A victim's decision to report can be heavily influenced by the relationship that the victim has with the offender.[182] When a victim is raped by someone the victim knows or is friends with, the culture of college often persuades the victim not to report.[183] A real and rational fear that the victim's peers will side with the rapist and disengage friendship comes into play.[184]

Another major reason why college victims, specifically women, do not report is that they themselves feel like they contributed to what happened to them—they feel guilty and or ashamed.[185] This self-blame can derive from the fact that a victim was drinking, she allowed herself to be alone with the offender, or she may feel that she led the person on in some fashion.[186] When these factors are present, college victims may not realize that what happened to them in fact constitutes rape.[187] Although antiquated, the myth that rape can only be committed by a stranger in a dark alley is still very much prevalent.[188] When the attacker does not fit the expectation of what a rapist "should" be, it can be difficult to classify what happened as rape.[189] Further, and in the same vein, if a victim does not feel like she acted in a way that a victim "should" act, the victim may not understand that she was in fact raped.[190]

Even when a victim recognizes that she was raped by an acquaintance, regardless of the fact that she was drinking or that she was alone with the offender, she may not report because she fears that others will not

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[178] *The Realities of Sexual Assault on Campus*, *supra* note 174.

[179] *See supra* Part II.

[180] Steinberg, *supra* note 158, at 40-41 ("I did not report my attempted rape to the police because I was afraid that too many people would believe common misconceptions, and not me.").

[181] *See supra* Part III(B)(1).

[182] Marjorie Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157, 158 (2006).

[183] *See The Realities of Sexual Assault on Campus*, *supra* note 174.

[184] *See* Steinberg, *supra* note 158, at 39.

[185] *See* Sampson, *supra* note 177.

[186] *See* Sampson, *supra* note 177.

[187] Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014, 6:41 PM EDT), https://perma.cc/T5EC-U8FT.

[188] *See* Ro, *supra* note 90.

[189] *See* Ro, *supra* note 90.

[190] *See* Ro, *supra* note 90.

understand.[191] Victims who do report are often questioned about what they were wearing, what drugs or alcohol they consumed, what their prior relationship with the offender was, and why they were with the offender at the time of the rape.[192] This type of questioning, in essence, re-victimizes rape victims and frequently dissuades them from coming forward with any allegations against both acquaintance rapists and stranger rapists.[193]

3. Undeveloped Trauma Processing

When in college, victims of rape, regardless of whether it is acquaintance rape or stranger rape, suffer a magnitude of trauma.[194] Many women can experience "shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction."[195] In addition, it is very common for rape victims to suffer from rape trauma disorder, which is a medically verifiable disorder that is a form of post-traumatic stress disorder.[196]

> Women who have been raped normally experience one or more of the following symptoms for the first three to four months following the rape: re-experiencing the rape, nightmares about the rape, fear of men who look or act like the rapist, frequent or unexplained crying, intense fright and surprise when touched, avoiding the location of the rape, withdrawal, fear of future harm, depression, anger, fear of dying, shame, and avoiding sex.[197]

College acquaintance rape victims face additional consequences.[198] Many either drop out of school or transfer because, if they stay, they may have to face their rapists in their classes, in their dorm rooms, in the dining hall, and around campus.[199] Further, because most victims do not report, there is no way to prevent them from reencountering their attackers.[200] When a victim does not report, the traumatic effects of the rape have the potential to have a long-lasting impact on the victim.[201]

If a college victim does not report a rape, it is unlikely the victim will

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[191] *See* Sampson, *supra* note 177.
[192] *See* Sampson, *supra* note 177.
[193] *See* Sampson, *supra* note 177.
[194] *See* Crime on College Campuses, *supra* note 158, at 499.
[195] Crime on College Campuses, *supra* note 158, at 499.
[196] Steinberg, *supra* note 158, at 45–46.
[197] Steinberg, *supra* note 158, at 45–46.
[198] Sampson, *supra* note 177.
[199] Sampson, *supra* note 177.
[200] *See* Steinberg, *supra* note 158, at 46.
[201] *See* Steinberg, *supra* note 158, at 46.

receive the help that the individual may need.[202] College students are particularly vulnerable to trauma.[203] "Advancements in neuroscience have confirmed that the adolescent brain does not fully mature until people reach their mid-twenties."[204] As such, it takes victims longer to process, understand, and cope with what has happened to them.[205]

C. *The College Adjudication Process Is Insufficient to Assist Victims*

College rape victims have two potential avenues to seek justice against their attackers: the institution's adjudication process or the formal legal system outside of their colleges.[206] Far too frequently, however, students do not pursue either option.[207] Many college victims recognize the difficulty in proving that they were raped.[208] A common misbelief is that if someone who is raped in college cannot meet the lower standard of proof to a school administration board, it is unlikely that a formal criminal proceeding would be successful.[209] However, the manner in which colleges handle sexual assault and rape proceedings is entirely inadequate.[210]

Although there are legitimate reasons why colleges should treat sexual assault investigations and hearings differently than criminal courts do, that does not "give colleges a pass to deny students their constitutional rights."[211] Colleges have a duty to ensure their campuses are safe places for all to pursue their academic endeavors.[212] This duty was upheld by the Supreme Judicial Court of Massachusetts in *Mullins v. Pine Manor College*.[213] In *Mullins*, the court held that the college had a duty to protect its students from criminal acts against third parties, and as such, had a duty to provide

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[202] Sampson, *supra* note 177 (stating low reporting rates ensures that few victims receive adequate help).

[203] *See* Steinberg, *supra* note 158, at 46.

[204] Christopher Ramos, *Adolescent Brain Development, Mental Illness, and the University-Student Relationship: Why Institutions of Higher Education Have a Special Duty-Creating Relationship with Their Students*, 24 S. CAL. REV. L. & SOC. JUST. 343, 348 (2015).

[205] *See, e.g.*, Malone & Demme, *Stories*, *supra* note 82 ("Eighteen is very young. It took me a long, long time to come to terms with the fact that it was him, it wasn't me. Life has not been easy for me. I had addiction problems as I got older.").

[206] *See* LAUREN J. GERMAIN, CAMPUS SEXUAL ASSAULT 33 (2016).

[207] *See supra* Part III(B)(2).

[208] GERMAIN, *supra* note 206, at 33 (quoting an interview with a university student, "because it's a he said/she said type of case. There was no witnesses; there was no physical evidence. He is probably going to deny it if ever asked . . . it's, I feel like, the University would have a lot of problems accepting my story.").

[209] GERMAIN, *supra* note 206, at 34.

[210] *See* Jackson, *supra* note 158.

[211] Jackson, *supra* note 158.

[212] *See* Jackson, *supra* note 158.

[213] Mullins v. Pine Manor College, 389 Mass. 47, 53–56 (1983).

security for its students.[214] Because colleges have this unique duty, they should be incentivized to conduct thorough and detailed hearings.[215] Instead, however, trials at colleges are relatively quick, the process is confidential, and the results are often "middling rulings" or findings of not responsible.[216]

When a school does decide that a victim produced enough evidence to prove that a rape occurred, the outcome of this decision remains limited to the college's authority.[217] Schools do not have the power to send a rapist to jail; a college only has the authority to expel a studen.[218] Yet, colleges often do not take such measures.[219] Instead, many who are deemed to have committed wrongdoing against fellow students are eventually allowed to return to campus, graduate, and join the workforce.[220] Schools' failure to properly investigate and find wrongdoing by their students has been attributed to the mandated reporting requirements under the Clery Act.[221] Motivated by a desire to have a campus with a low crime rate, college administration boards cannot be completely neutral when faced with a complaint of sexual assault.[222]

Many colleges' shortcomings are recognized and dealt with by women on their campuses.[223] Instead of relying on the colleges' adjudication process, a number of students have taken matters into their own hands.[224] In 1990, a bathroom wall in the basement of Brown University's library read, "Beware of [student name], he doesn't take no for an answer."[225] In the following weeks, other students added the names of men who assaulted them to

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[214] *Id.*

[215] *See* Jackson, *supra* note 158.

[216] *See* Jackson, *supra* note 158 (addressing middling rulings and the impression they give: "[w]e kind of believe the victim but don't want to get sued, so let's split the difference."); *see also* GERMAIN, *supra* note 206, at 38.

[217] Jackson, *supra* note 158.

[218] Jackson, *supra* note 158.

[219] *See* Jackson, *supra* note 158.

[220] *See* GERMAIN, *supra* note 206, at 80 ("I think it's dumb . . . cheat on an exam? And then you're kicked out . . . And you can rape someone and then it's like 'See you on Monday'"); *see also* Jackson, *supra* note 158 (discussing Yale's inadequate repercussions for students who were deemed to have raped others).

[221] *Summary of the Jeanne Clery Act*, CLERY CTR., https://perma.cc/483U-BJ78 (last visited Aug. 14, 2021); *see* GERMAIN, *supra* note 206, at 77–78.

[222] *See* Jackson, *supra* note 158.

[223] GERMAIN, *supra* note 206, at 77–78.

[224] GERMAIN, *supra* note 206, at 82.

[225] Sophia Seawell & Patricia Ekpo, '*Rape List' Returns: 25 Years of Sexual Assault Activism at Brown*, BLUESTOCKINGS MAG. (May 15, 2014), https://perma.cc/Q3XP-US22; GERMAIN, *supra* note 206, at 71.

caution other students.[226] "Rape lists" have reappeared in the twenty-first century at colleges like Brown and Columbia University.[227] The administrations at these colleges have failed the students who have been subject to sexual violence.[228] As such, college women have banded together to help each other by writing the names of their attackers on bathroom walls as a warning.[229] Some self-defined justice, however, is not quite as peaceful.[230] A few women have made up for their colleges' deficiencies by engaging in physical violence towards their attackers.[231] This further demonstrates that the current process undertaken by colleges is inadequate and leaves victims to seek out their own form of justice.[232]

IV. In Light of Societal and Technological Advances, the Interests of the Victim Outweigh the Rationale for Imposing a Statute of Limitations for Rape

A. *Combating the Rationale*

1. Protection of the Innocent Defendant

As previously mentioned, the key rationale for imposing a statute of limitations is protecting the innocent from having to defend themselves after time has passed, evidence has gone stale, and memories have faded.[233] The idea is that, if a defendant is falsely accused, the defendant will be unable to provide a sufficient alibi due to the passage of time and will be wrongly convicted.[234] Although this rationale had merit when statutes of limitations were originally implemented, it can no longer justify placing a time limit on the prosecution of rape.[235]

First, false accusations of rape are extremely rare.[236] Further, not all "false accusations" are necessarily "made-up accusations."[237] There are many factors that might result in an allegation being deemed false.[238] One is

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[226] GERMAIN, *supra* note 206, at 71; Seawell & Ekpo, *supra* note 225.

[227] GERMAIN, *supra* note 206, at 71; Seawell & Ekpo, *supra* note 225.

[228] *See* Steinberg, *supra* note 158, at 47.

[229] Steinberg, *supra* note 158, at 47.

[230] GERMAIN, *supra* note 206, at 83.

[231] GERMAIN, *supra* note 206, at 83.

[232] *See* GERMAIN, *supra* note 206, at 83.

[233] *See generally supra* Part I(A).

[234] Robin & Anson, *supra* note 36, at 1.

[235] *See* Robin & Anson, *supra* note 36, at 1.

[236] *See* Katty Kay, *The Truth About False Assault Accusations by Women*, BBC NEWS (Sept. 18, 2018), https://perma.cc/F39D-EGMM.

[237] Katie Heaney, *Almost No One Is Falsely Accused of Rape*, THE CUT (Oct. 5, 2018), https://perma.cc/K3VW-2F4Z.

[238] *See id.*

that a woman who initially made an accusation chooses to recant it.[239] This, however, does not necessarily mean that she was lying.[240] "If you don't want to go through a police investigation, for any reason—and there are many many reasons why you might not want to, it's really traumatizing—then the easiest and quickest way to get out of it is to recant and say you were lying[.]"[241]

Additionally, the police also may deem an allegation false merely because they find incriminating evidence on the part of the accuser.[242]

Although infrequent, false allegations do occur.[243] When false allegations occur, they hardly ever lead to wrongful convictions or jail time.[244] In the age of technology and DNA evidence, the prosecution of a criminal case rarely relies solely on eye-witness testimony.[245] With the advent of DNA evidence, there is less concern about an innocent defendant being wrongly convicted.[246] In fact, many states have already carved out an exception to the statute of limitations for rape when a perpetrator is later identified through DNA evidence.[247] Furthermore, "social media and technology is changing the nature of evidence in [rape] cases."[248] Recent cases of rape and sexual assault have been supported by evidence of videos, screenshots, and recordings from social media applications.[249] Texting, emailing, and communicating through applications on our cell-phone has become so ubiquitous in society, that there is a record of almost everything that Americans do.[250] With this new form of evidence, innocent defendants will be able to defend themselves in a way that was impossible to do when statutes of limitations were originally imposed.[251]

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[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *See* Stacy M. Brown, *Could False Accusations Threaten the #MeToo Movement?*, THE PHILA. TRIBUNE (Jan. 1, 2019), https://perma.cc/RJ2P-DSDL (discussing the history of false allegations of sexual assault against Black men).

[244] Kay, *supra* note 236.

[245] *See* Robin & Anson, *supra* note 36, at 1.

[246] *See* Brittany Ericksen & Ilse Knecht, *Statutes of Limitations for Sexual Assault: A State-by-State Comparison*, THE NAT'L CTR. FOR VICTIMS OF CRIME (Aug. 21, 2013), https://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf.

[247] *Id.*

[248] Kari Paul, *Texts and Emails Could Ultimately Help Kill the Statute of Limitations for Sex Crimes*, MARKETWATCH (Sept. 28, 2018, 9:06 AM ET), https://perma.cc/EP9V-ESJE.

[249] *Id.*

[250] *Id.*

[251] *See id.*

2. Suspect's Right to Repose

Another justification used to defend statutes of limitations is the suspect's right to repose.[252] The belief is that, at some point after a person commits a crime, the person should be able to move on with life without having to fear prosecution for old wrongdoings.[253] However, the notion that criminals should live freely without their past crimes haunting them for the rest of their lives seems backwards when considering the effects that their past crimes have on victims, especially in the context of rape.[254] Rape has a lasting and traumatic effect on victims.[255] Some of these effects can stay with victims for their entire lives.[256] There are various social and psychological factors that may inhibit a victim of sexual abuse from coming forward promptly with allegations.[257] As such, the law should no longer favor a criminal's right to repose over a victim's right to seek justice.[258]

B. *Victim's Interest in Prosecuting Rape Without a Time Limit*

The legislature should treat the statute of limitations for the crime of rape as it does the crime of murder.[259] Because rape is a particularly severe, intrusive, and sometimes violent crime, rape victims have the same interest that the families of murder victims do in ensuring that offenders are brought to justice without a time limit.[260] The Massachusetts legislature established that the crime of murder is exceptionally severe such that it warrants an unlimited amount of time for prosecution.[261] There is no statute of limitations for murder in the state, even though "evidence may be lost, memories may fade, and witnesses may disappear."[262] This is arguably

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[252] *See* Robin & Anson, *supra* note 36, at 1.

[253] Robin & Anson, *supra* note 36, at 2.

[254] *See* Robin & Anson, *supra* note 36, at 18 (discussing the absurdity of giving criminals the right to repose while victims remain long-injured).

[255] *See supra* Part III(B)(3).

[256] *See supra* Part III(B)(3).

[257] *See* Steph Machado, *Sexual Abuse Victims Testify for Elimination of Statute of Limitations*, WRPI (MAY 4, 2018, 6:59 AM EDT), https://perma.cc/BF9K-MMEM; *see also* Shaila Dewan, *Why Women Can Take Years to Come Forward With Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), https://perma.cc/F8G7-DC5Y (explaining the many reasons why a victim of sexual violence may not come forward with allegations).

[258] *See* Robin & Anson, *supra* note 36, at 18.

[259] *See* Zoe Lake et al., *'Got a Pass'? Dennis Hastert Case Renews Debate Over Sex Crime Statute of Limitations*, ABC NEWS (Oct. 29, 2015, 12:37 PM), https://perma.cc/V8AT-P7HF; *see also* MASS. GEN. LAWS ch. 277, § 63 (2012).

[260] *See generally* Natalie Worlow, *Why is There No Statute of Limitations on Murder but There is Regarding Rape and Molestation?*, QUORA (June 1, 2015), https://perma.cc/3255-XRNK (describing lawmaker's rationale for imposing a statute of limitations for rape but not murder).

[261] MASS. GEN. LAWS CH. 277, § 63 (2012).

[262] *Supra* Part I(A).

"because no one thinks the passage of time should shield a killer from answering for his crime."[263] However, some individuals believe that rape is a more heinous crime than murder.[264] This begs the question of why the passage of time should provide a rapist with such a "legal escape hatch."[265] The required and necessary answer is that it should not.[266]

CONCLUSION

The Massachusetts legislature should eliminate the statute of limitations for rape. The states that have already eliminated, or are in the process of eliminating, their statutes of limitations for rape have only done so after horrendous events occurred within their borders. Massachusetts should not wait until its citizens suffer the same fate, especially considering the state's coveted higher education system. The state of Massachusetts has one of the best higher education systems in the country, and thousands of people, all over the world, travel to the state to go to school. Campus rape is a significant and systemic problem in the United States. Because colleges seemingly cannot redress this issue on their own, the legislature must step in and eliminate the statute of limitations for rape. The statute of limitations can no longer be supported by the argument that an innocent defendant will be wrongly convicted or that a guilty defendant deserves to repose. With the advent of DNA evidence, as well as social media, there is ample opportunity for innocent defendants to relieve themselves of culpability. It is time for the legislature to recognize the interests of the victims, who should have the right and the ability to report their rape when they are emotionally, mentally, and physically ready.

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[263] Lake et al., *supra* note 259.

[264] *Which is Worse Rape (Yes) or Murder (No)?*, DEBATE.ORG, https://perma.cc/P4WJ-M77T (last visited Aug. 14, 2021) ("I believe rape is worse because as a survivor myself, I wish the man that did it would've killed me, the pain would be gone.").

[265] Lake et al., *supra* note 259.

[266] *See* Lake et al., *supra* note 259.