

# **Reforming Criminal Justice**

**Volume 1: Introduction and Criminalization**

**Erik Luna**

*Editor and Project Director*



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## Volume 1: Introduction and Criminalization

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*Editor and Project Director*

*a report by*

**The Academy for Justice**

*with the support of*



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**ASU** Sandra Day O'Connor  
College of Law  
Arizona State University

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# Preface

*Erik Luna*<sup>\*</sup>

*Reforming Criminal Justice* is a four-volume report authored and reviewed by leading scholars in criminal law and other disciplines. The contributions to this report describe the need for reform in particular areas of American criminal justice and suggest policy recommendations to achieve such change. The ultimate goal is to fortify reform efforts currently afoot in the United States with the research and analysis of respected academics. In this way, the report hopes to increase the likelihood of success when worthwhile reforms are debated, put to a vote or otherwise considered for action, and implemented in the criminal justice system. The following offers a brief overview of the project.

## SOME BACKGROUND

Criminal justice reform has been a hot political topic for several years now, bringing together otherwise strange bedfellows in a common cause. The proponents of reform come at the issue from diverse political and philosophical positions but still agree that something needs to be done about criminal justice in America. One example of this movement's multifaceted, bipartisan nature is the Coalition for Public Safety, a criminal justice reform partnership composed of the ACLU, Americans for Tax Reform, the Center for American Progress, the Faith & Freedom Coalition, FreedomWorks, the Leadership Conference Education Fund, the NAACP, and Right on Crime. With the support of a diverse group of funders (e.g., Koch Industries and the MacArthur Foundation), the coalition has focused on, among other things: ending overcriminalization and mass incarceration; addressing race- and class-based disparities in criminal justice; ensuring fairness in the criminal process for defendants and victims alike; emphasizing rehabilitation and treatment programs; and facilitating reentry of former inmates into society. Those involved in the budding movement may have different motivations—political, economic, social, religious—yet they all subscribe to basic reforms.

This dynamic was on display at a bipartisan summit on criminal justice reform in November 2015, organized and sponsored by the Charles Koch Institute. The event brought together prominent figures in the reform movement—policymakers, community activists, experts from think tanks and nonprofits, elected officials, religious leaders, business executives, and others—

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to discuss the problems of criminal justice and to propose real, meaningful, lasting solutions. The summit was remarkable not only in its breadth and depth, but also in its inclusiveness, drawing in people from across the ideological spectrum. The sentiment of this event—and, arguably, the entire criminal justice reform movement—might be summed up in the words of the great abolitionist Frederick Douglass: “I would unite with anybody to do right; and with nobody to do wrong.”<sup>1</sup>

As a participant in the summit, I was struck by the underrepresentation of one group: academics. The small number of scholars in attendance illustrated the lack of academic involvement in the reform movement more generally. Although some academics have participated in reform discussions, their engagement has tended to be intermittent, addressing discrete issues as they arise in individual venues. Moreover, much of the academic scholarship that might inform the debate remains inaccessible to policymakers and reform proponents.

There is something odd about this, since criminal justice scholarship is fundamentally all about reform. Academics spend most of their time studying, critically analyzing, and writing at length about crime, punishment, and processes, with an eye toward providing greater understanding of the criminal justice system and proposing changes to the system. Part of the problem is that academic authors write to themselves—that is, to other academics—not to the public or even to policymakers, legal professionals, or policy analysts interested in criminal justice. As a result, academic scholarship is inaccessible in the sense that it is dense, filled with jargon, and, as a general rule, painful to read and unfriendly to normal human beings. But oftentimes scholarly works are physically inaccessible as well—published by academic presses and journals and buried in libraries or hidden behind paywalls.

Immediately following the 2015 summit, a conversation began on whether and how academics could be more involved in criminal justice reform. Eventually, a national academic alliance was proposed to address critical issues of criminal justice in the United States today. The group’s principal work-product would be something akin to a blue-ribbon commission report, containing expert analysis and recommendations of distinguished researchers. The group’s title, Academy for Justice, carries two meanings: [1] the work-product is from the “academy” (i.e., the professoriate) in its attempt to contribute to criminal justice reform; and [2] the endeavor might lead to the creation of an “academy” (i.e., a real or virtual institution) concerned with justice issues.

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1. Frederick Douglass, *The Anti-Slavery Movement*, in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850-1860*, at 352 (Philip S. Foner ed., 1950).

Although the Academy for Justice may well become a platform for future projects, for now at least, it is simply a vehicle for the report. This venture is hardly trivial, however. The cause is a noble one: advancing justice in the United States through the reform of criminal laws and procedures. In particular, the report seeks to make the relevant law and literature accessible to those who might use this information and analysis in discussing and implementing criminal justice reforms. By connecting the world of academics with real-world policy and practice, it is hoped that the report will help bridge the wide gap between scholarship on the books and the reform of criminal justice on the ground.

Thanks to a generous grant from the Charles Koch Foundation, the Academy for Justice project began in earnest in October 2016. Broken down into volumes with individual chapters, this report takes on some of the most pressing issues in criminal justice today—covering topics within the areas of criminalization, policing, pretrial and trial processes, sentencing, incarceration, and release—with every chapter authored by a top scholar in the relevant field. The goal of each chapter is to increase both professional and public understanding of the subject matter, to facilitate an appreciation of the relevant scholarly literature and the need for reform, and to offer potential solutions to the problems raised by the underlying topic.

The report's primary audience includes those groups and individuals who can effect change either directly or indirectly: lawmakers, executive branch officials, other elected and appointed policymakers, judges and other criminal justice actors, think tanks and nonprofit organizations, religious groups, business leaders, community activists, and other professionals interested in criminal justice reform. As a simple example, one might imagine a legislative aide thumbing through the report to find specific sections or recommendations as background for an upcoming hearing or to prepare a draft bill. The report is also intended to be accessible to the general public—accessible in the dual sense that it is readily available to the public and that the prose is not loaded with legalese or its scholarly cousin (academese).

Each chapter runs between 5,000 and 15,000 words in length (with a couple of exceptions<sup>2</sup>) and is intended to be easily understood and used by professional and lay readers alike. The chapters were edited to be thoughtfully organized and free of unnecessary nuance and jargon. In writing their chapters, the authors were encouraged to draw upon their prior works—such as pieces in law reviews, peer-reviewed journals, and academic books—since originality of

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2. The exceptions are the masterful chapters by Stephen J. Morse and Barry C. Feld, who were asked to write on topics that span the entire legal system (mental disorders and juvenile justice, respectively).

ideas and content was not required, nor necessarily even desired. The chapters do not follow the mold of traditional scholarship, however, since this would defeat the report's goal of making the law and literature accessible to those who might use it in discussing and implementing criminal justice reforms.

Although there is a great deal of diversity among the chapters, the authors were asked to do certain things in light of the aim and audience of the report. They were supposed to state up front the areas of concern in the chapter and why it makes sense to regard those as being in need of reform. The authors were expected to lay out the law, policy, and any other information necessary for a reader to have a sufficient, or at least passable, understanding of the background and modern state of affairs of the chapter topic. The authors were also asked to review the scholarly literature and important research, with attention to those works that critically assess the problems raised by the chapter topic and analyze potential solutions to these problems. The authors were encouraged to offer their own evaluation of the best and worst modern practices and proposed reforms for the chapter topic. And finally, the authors were asked to provide reform proposals on the chapter topic for use by policymakers and others involved in criminal justice reform.

To facilitate the writing and review process, the Sandra Day O'Connor College of Law at Arizona State University hosted a two-day event in February 2017 entitled "Bridging the Gap: A Conference on Scholarship and Criminal Justice Reform." With more than 100 participants, including the chapter authors and other leading academics, the conference brought together one of the most remarkable groups of criminal justice scholars ever to be assembled in one place. Indeed, collectively, the participants constituted a veritable "who's who" list of criminal justice scholarship, literally from A to Z—from Professor Alschuler to Professor Zimring, with scores of respected scholars in between.

The heart of the event was a series of simultaneous workshops, during which conference participants reviewed the chapters to provide helpful feedback, to discuss areas of potential consensus for criminal justice reform, and, in general, to ensure the highest quality in terms of content and development. In addition to the workshops, the event featured two keynote speakers who helped demonstrate the intellectual and jurisprudential range of those interested in the challenges of criminal justice reform: Arizona Supreme Court Justice Clint Bolick, who is a research fellow at the Hoover Institute and, prior to his appointment to the bench, was the co-founder of the Institute for Justice and the vice president for litigation of the Goldwater Institute; and Georgetown Law Professor David Cole, a prolific scholar, public intellectual, and advocate

in major constitutional cases who now serves as the national legal director for the American Civil Liberties Union.

Following the conference, chapter authors were given time to incorporate feedback from the workshops into their drafts. On receipt of the final versions, a team of student editors worked on the footnotes and citations in each chapter.<sup>3</sup> The process then shifted to reviewing the chapters for consistency, clarity, and comprehension by the target audience. To expedite the review, basic grammatical conventions were adopted and a style guide was created with simple formatting rules, all with the objective of achieving a degree of uniformity across the chapters. Nonetheless, moderate inconsistencies from chapter to chapter were considered perfectly acceptable. The editing process required a balancing act: trying to maintain a fairly consistent style from chapter to chapter, while also seeking to preserve the voice of individual authors. The goal was to communicate clearly to a non-academic and perhaps non-legal audience. This did not mean reducing things to an elementary level, but instead making sure the audience could appreciate the arguments on the first read. With busy professionals, there probably won't be a second read.

After several rounds of edits, the report's contents were delivered to a printer and published in October 2017. Consistent with the animating principle of accessibility, the report is freely available online at a dedicated website: [academyforjustice.org](http://academyforjustice.org).

## REPORT CONTENTS

This has been an immense and exhausting project, involving 57 separate contributions, totaling well over 500,000 words and nearly 5,000 footnotes, all written, reviewed, edited, and published in a year's time. But the endeavor has been worth it in the hope that this work will help change public policy for the better. The report is unprecedented, at least as far as I can tell, and it certainly is ambitious and wide-ranging. As such, no introduction can neatly summarize the contents while doing justice to the individual contributions, and I won't even try to do so. For the most part, the chapters are as advertised (so to speak): their titles accurately and succinctly convey the topic at hand, so that, for instance, someone flipping through the table of contents and pressed for time can immediately understand the subject of a given chapter. In addition, each contribution begins with a short abstract summarizing the chapter's purpose. Here, I can only hint at the report's breadth through a brief sketch, with parenthetical references to the relevant chapter author(s) to point the reader in the right direction.

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3. The report essentially followed the Bluebook citation system, which is used predominantly in legal scholarship.

Volume 1 introduces the idea of criminal justice reform and the justifications for it, through the keynote addresses of a distinguished right-of-center jurist (Bolick) and a distinguished left-of-center litigator (Cole). The bulk of Volume 1 then analyzes various issues that arise under the general heading of “criminalization,” conceived very broadly. The subjects include the overuse of criminal law, either in general (Husak) or in the federal system (Smith), as well as the abuse of low-level offenses (Natapoff). Likewise, criminalization embraces questions raised by particular substantive crimes and their reform, such as the connection between drug prohibition and violence (Miron), the legalization of marijuana (Kreit), and the modification of sexual offenses (Weisberg). The volume also considers issues related to the instruments and organizations associated with crime and violence, namely, firearms (Zimring) and gangs (Decker). Moreover, criminalization can implicate borders—sometimes quite literally, as when American criminal justice is invoked to serve immigration goals (Chacón) or applied to crimes committed outside of the United States (O’Sullivan). The volume concludes by examining two special categories of offenders—individuals with mental disorders (Morse) and juveniles (Feld)—and the litany of questions raised by their treatment throughout the criminal process.

Volume 2 examines some of the most critical issues in policing today, beginning with the overarching challenges of ensuring accountability through democratic mechanisms (Ponomarenko & Friedman) and providing remedies for constitutional violations (Harmon). The volume then turns to specific practices by law enforcement. These include the power to stop and frisk individuals in public spaces (Fradella & White), which is a key component of a new style of policing focused on, among other things, aggressive enforcement of minor crimes (Fagan). Much of this debate revolves around the role that race plays in police decisions to detain, question, and search individuals (Harris), sometimes without even triggering constitutional scrutiny (Carbado). Issues of race have also had a profound impact on recent controversies over police uses of force (Richardson). Other concerns result from the advance of modern technology, such as police access to computer databases (Slobogin). Some problems, however, have long existed in law enforcement: extracting confessions through police interrogation (Leo), identifying suspects by eyewitness testimony (Wells), and obtaining evidence from informants or cooperating witnesses (Richman).

Volume 3 considers some key aspects of criminal adjudication, including the historic but still mysterious institution of the grand jury (Fairfax) and the underappreciated decision to detain a defendant prior to trial (Stevenson & Mayson). The most powerful actor in the process, the prosecutor, has a

complex role but often lacks full information and external input (Wright). For instance, the prosecutor controls plea bargaining—a practice that dominates the criminal justice system (J. Turner)—in the absence of binding guidelines for prosecutorial decision-making (Pfaff). In turn, defense counsel is frequently charged with representing a staggering number of indigent defendants but without adequate funding (Primus). The ideal of an adversarial process may be undermined further by restrictions on pretrial discovery (Brown) and the use of forensic evidence found to be scientifically unsound (E. Murphy). These and other issues have contributed to the phenomenon of wrongful convictions of innocent individuals (Garrett). Further problems may implicate important values besides accuracy, such as racial equality in criminal adjudication (Butler) and due respect for the interests of crime victims (Cassell). A thorough discussion must also consider what occurs after trial, especially the correction of errors on appeal (King), or what might happen instead of the conventional trial process, like the use of specialty courts (Boldt).

Volume 4 begins with three traditional rationales for punishment—retribution (J. Murphy), deterrence (Nagin), and incapacitation (Bushman)—and the failures of modern sentencing under these theories. The resulting mass incarceration of millions of people calls for new strategies (Clear & Austin), such as well-informed risk assessments in sentencing to gauge the probability of recidivism (Monahan). The volume then considers two sentencing schemes typically associated with incarceration: sentencing guidelines (Berman) and mandatory minimums (Luna). Some jurisdictions also retain the ultimate sanction—capital punishment (Steiker & Steiker). These schemes have raised serious issues like racial disparities in sentencing (Spohn). Other approaches—for instance, community punishments (Tonry) and economic sanctions (Colgan)—may avoid incarceration but not without their own challenges. Turning to confinement and release, a lingering question is whether prison rehabilitation programs can reduce recidivism (Cullen). Other critical issues concern the deplorable state of prison conditions (Dolovich), the difficulties faced by prisoners with disabilities (Schlanger), and the prospect of releasing older prisoners (Milleman, Bowman-Rivas & Smith). All of these topics eventually lead to the reentry of former inmates into society (S. Turner). For many convicted individuals, the biggest impediments to a law-abiding life are the collateral consequences of conviction (Chen), including certain registration and notification requirements (Logan). For other offenders, however, the only hope lies in an act of clemency (Osler).



Given the quality and scope of the volumes, as well as the stature of the authors and reviewers, there is reason to be optimistic that the report can assist in the evolving debate about criminal justice reform. A few limitations should be noted, however. The report does not, and could not, cover the entire universe of potential topics for criminal justice reform. Nor is every subject canvassed in the report likely to be a high priority for policymakers. Rather, the topics were selected with the input of leading academics based on the current state of the literature, with an emphasis on those issues on which scholarship could provide meaningful insights for reform.

The chapters and their discussions sometimes overlap, and a very careful reader of the entire report may occasionally detect a bit of tension among arguments in different chapters. The former is unavoidable, and perhaps even beneficial, in light of the connections among the topics discussed. After all, the report concerns the criminal justice *system*, that is, a set of interrelated, interacting, and interdependent parts—in the form of particular actors and institutions—that work (or are perceived as working) as a single entity. It would be surprising, in fact, if the contributions didn’t overlap. As for points of contention, the disagreements among chapters are remarkably few but still to be expected in a multi-volume report involving complicated issues on which there can be a diversity of opinion among scholars.

All of this is to say that the work is not seamless like some finely scripted novel, which raises a final caveat about the report. As mentioned earlier, the project is influenced by the idea of a blue-ribbon commission report, and, to some extent, that model is apt. The Academy for Justice is composed of experts who were brought together to investigate a matter of great significance: the reform of American criminal justice. The authors are independent scholars who, for the most part, have no direct ties to government and exercise no direct authority over the system. The report’s value comes from the authors bringing their expertise to bear in analyzing the problems of criminal justice and making recommendations to the institutions and actors who can address these problems.

Unlike a commission report, however, this work has not been written as a group and it does not carry the collective endorsement of everyone involved in the project. Rather, each chapter bears the weight only of its author(s). The other participants in this project have not approved the arguments made in each chapter. Moreover, an author’s cross-references to other chapters in the report are provided for the convenience of the reader and do not indicate that the author necessarily approves of the arguments presented in the cited chapters. Nonetheless, the authors were chosen to contribute to the report



precisely because they are leaders in their respective fields and are known to be thoughtful and reasonable. Their chapters were reviewed in a process involving some of the best and brightest in the academic world. Besides, this work is not intended as the end-all of debate about criminal justice reform. To the contrary, the report hopes to rekindle the discussion with the input of those whose lifework is the study of criminal justice.

### ACKNOWLEDGEMENTS—AND A FINAL THOUGHT

As mentioned above, this project was made possible by a generous grant from the Charles Koch Foundation. Special thanks to Allison Kasic, associate director of research at the Charles Koch Foundation, who recognized the need for academic participation in criminal justice reform, helped develop the concept of this project and its work-product, shepherded the application through the grant process, and provided ever thoughtful and effective support for the report. To their great credit, the Charles Koch Foundation and its staff have sponsored the project without any expectation of editorial input or control over the report and its contents or any involvement in the selection of authors and project participants.

A large debt of gratitude is owed to Dean Douglas J. Sylvester and his staff at the Sandra Day O'Connor College of Law. The exceptional team of professionals at ASU Law were engaged in every aspect of this project, and their diligent efforts are the reason for its success.<sup>4</sup> My great thanks also goes to a group of outstanding law students who helped orchestrate the criminal justice reform conference, took notes during the workshops for later use by the chapter authors, and put in countless hours editing the footnotes and citations in each chapter.<sup>5</sup> Most of all, I am extremely grateful to Chad Snow for his unflagging efforts to help bring this report to fruition. Drawing upon his experience as a senior newspaper editor, Chad served as my chief advisor throughout the review process and provided extraordinary editorial guidance, operational management, and wise counsel.

Finally, I would like to thank the US-UK Fulbright Commission and Birmingham Law School for their support during my recent term as the

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4. Among others, the following ASU Law staff members helped facilitate this project (listed in alphabetical order): Christopher Baier; Keith Chandler; Lynn French; Edward Garcia; Hal Haanes; Melissa Harris Thirsk; Katherine Howland O'Brien; Rebecca Hutchison; Melanie Knerr; Xavier Sifuentes; Michelle St. Amour; Judy Stinson; Karen Sung; Matthew Villa; Leanna Walker; Qi Wang; Jessica Wells; Thomas Williams; and William Wilson.

5. They are (in alphabetical order): Ashley Fitzwilliams; Kia Grass; Ryan Hogan; D. Eric Lystrup; Nic Martino; Madeline Mayer; Daniel Peabody; Jennifer Piatt; Andrea Prigmore; Ashley Repka; Aaron Taylor; John Thorpe; Elizabeth Turnbull; and Chase Turrentine.

Fulbright Distinguished Chair at the University of Birmingham. In addition to enabling research unrelated to the present project, my stay in the United Kingdom provided the opportunity to review the report and its contents with a fresh eye, and to view American criminal justice from the mirror of another constitutional democracy with a shared legal heritage. Indeed, the birthplace of the common law offers historical examples of criminal justice reform resonating not only with political liberals and progressives, but also political conservatives and libertarians. Consider, for instance, the following words from a British prison reformer:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the state and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry of all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes and an unfaltering faith that there is a treasure, if only you can find it in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored up strength of a nation, and are the sign and proof of the living virtue in it.<sup>6</sup>

The speaker was the then-Home Secretary, Winston Churchill, proposing major improvements to the British penal system. The greatest conservative politician of the 20th century, Churchill reminds us that improving criminal justice is not merely for the political left. Today, the United States is unique among Western nations in terms of the scale and punitiveness of its criminal justice system. And on this, Churchill's later words may also ring true: "The Americans can always be trusted to do the right thing, once all other possibilities have been exhausted."<sup>7</sup> I hope that this report can in some small way assist those interested in making sure the United States does the right thing when it comes to criminal justice reform.

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6. Speech, House of Commons, July 20, 1910.

7. CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 124 (Richard Langworth ed., 2008). Admittedly, not all of Churchill's positions would be considered enlightened by modern (or even historical) standards. For present purposes, however, it is enough to reiterate an adage often attributed to Churchill (but apparently dating back several centuries): "Great and good are seldom the same man."

# **Reforming Criminal Justice**

## **Volume 1: Introduction and Criminalization**



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# Criminal Justice Reform: An Introduction

*Clint Bolick\**

Thank you, Professor Luna, for the kind words and for organizing this remarkable conference. It was a great day for Arizona and ASU when you joined the law faculty, and I am personally grateful for the insights on criminal law you have generously shared with me.

Thanks also to ASU for hosting this conference in this magnificent new building. What a gem not only for the students lucky enough to study here, but for the entire community, for which this law school is a pillar.

And a hearty thanks and welcome to everyone participating in this conference. Your work here, and back at home, will be extremely consequential as we weigh changes in our criminal justice system. I am as gratified as I am humbled by the charge you have undertaken, and I look forward to the fruits of your wisdom and labors.

It is ironic that I am kicking off this conference. I still consider myself a rookie justice, although as you may know we recently expanded the Arizona Supreme Court from five to seven, with the odd consequence that I am now further from the bottom yet no closer to the top. Prior to joining the Court slightly more than a year ago, I had no direct involvement in criminal law or—with the exception of peripheral involvement with civil asset forfeiture—with criminal justice reform. I probably know less about the topic than anyone in the room, and certainly I have much more to learn from you than I can possibly impart.

But since joining the Court, despite a very steep learning curve, I have taken on criminal cases and related policy issues with great enthusiasm. Because nearly all of the criminal cases that reach my Court raise issues of constitutional or statutory interpretation, they fit comfortably within my analytical wheelhouse, even if the specific questions are new to me. Likewise, my experiences with systemic policy reform in areas such as education and immigration lend themselves to confronting criminal justice reform, even though like those other issues it is essential to learn them deeply before attempting to solve them.

And solve them we must. As you all know, how our criminal justice system works or doesn't work touches intimately the lives of every American. Certainly those accused of crimes: Will they receive fair, expeditious justice? Will their experience with the criminal justice system leave them rehabilitated or ruined?

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\* Justice, Supreme Court of Arizona, and Research Fellow at the Hoover Institution. The following was given as the keynote address on February 10, 2017, at the Academy for Justice conference on criminal justice reform.

But it impacts everyone else as well. Will our criminal justice system keep us safe or will it foster criminality? Will it deliver justice and restitution to victims? Will it provide a commensurate return on taxpayer investment? And perhaps most important, will it instill the public confidence and support necessary to sustain the rule of law?

It may be a useful starting point, and is always a worthwhile exercise, as I have in my own past endeavors in education and immigration policy, to begin the conversation with the most fundamental question: If we were designing a criminal justice system today, from scratch, with no preconceptions, to obtain its most essential goals, would it resemble the system that we have today? In the areas of K-12 education and immigration, my own answer to those questions was absolutely not. I suspect the answer is quite different for our criminal justice system, fortunately. Indeed, my own brief experience as a justice has greatly increased my confidence in our criminal justice system, in the sense that it produces just results in the vast majority of cases.

Which leaves us to concentrate on specific but very important practices that should be questioned and improved. Which in turn requires us, in my view, to resist the passions of the day—whether to lock 'em up and throw away the key, or to view the system as fundamentally flawed and criminals as its victims—and instead focus on improving the system to ensure just results in individual cases that produce a sound criminal justice system in the aggregate.

Foremost among those salient issues are our nation's incarceration practices. It will be no revelation to you that our nation's incarceration rates, and the expenses associated with those numbers, are staggering—more than 2.2 million people behind bars, an increase of 500 percent over the past 40 years.<sup>1</sup> The cost to taxpayers is immense; indeed, a recent study showed that pretrial incarceration alone, about which I will talk in more detail later, costs \$14 billion nationally every year.<sup>2</sup>

Arizona is no exception to increased incarceration and its attendant costs. When Governor Doug Ducey entered office in 2015, our state faced a huge fiscal crisis with a \$1.5 billion budget shortfall.<sup>3</sup> Indeed, we previously sold off a number of state buildings, including the House and Senate offices, and were

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1. *Criminal Justice Facts*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/criminal-justice-facts/> (last visited May 11, 2017).

2. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017).

3. Bob Christie, *Arizona Governor Enters 2nd Year with Good Budget News*, WASH. TIMES (Jan. 10, 2016), <http://www.washingtontimes.com/news/2016/jan/10/arizona-governor-enters-2nd-year-with-good-budget-/>.



renting them back to save money.<sup>4</sup> As a result, Governor Ducey's inaugural budget was austere, eliminating the structural deficit by cutting hundreds of millions in state spending.<sup>5</sup> But with one notable exception: a proposed increase of more than \$50 million to expand prison capacity, with more to follow.<sup>6</sup> And yet even with that, we still have fewer cells than we need. We simply can't afford to keep building prisons, much less removing potentially productive people from their communities, their workplaces, or their families, if there are better alternatives.

At this early stage of my own education on the subject, I won't wade into the surrounding debate over whether too many people are being incarcerated for crimes that don't justify incarceration or the terms associated with them; or conversely, whether those high incarceration rates may be in whole or part responsible for reduced crime rates. I hope that you will develop sound data on those questions that will help drive the national debate.

But as a jurist who is oath-bound to do justice in individual cases, and as a fiscal conservative, I believe we must demand accountability and proportionality in all of our sentencing practices. If we are jailing people for whom less costly and equally effective alternatives are available, we should pursue those options.

At the same time, we should insist that the reforms protect public safety and the rights of crime victims. If we can find that sweet spot—policies that reduce crime, reduce costs, and make victims whole—we will have the ultimate win-win situation.

As we attempt to do so, I am gratified that people of good faith are reaching across traditional divides to find solutions—prosecutors and defense attorneys, liberals and conservatives. Not always agreeing, of course, but attempting to find common ground and often succeeding. I can't think of a single issue from my own policy experience in which progress was made absent a nontraditional alliance, and I think that is emphatically the case with criminal justice reform. As a conservative, I'm gratified to see groups like the American Legislative Exchange Council, the Charles Koch Foundation, and the Texas Public Policy Foundation in the forefront of reform efforts.

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4. See Ronald J. Hansen & Yvonne Wingett Sanchez, *Ducey Signs Historically Lean \$9.1B Arizona Budget*, ARIZ. REPUBLIC (Mar. 12, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/03/12/arizona-governor-ducey-signs-state-budget/70244574/>.

5. *Id.*

6. Craig Harris, *Corrections Wants to Add 2,500 More Prison Beds*, ARIZ. REPUBLIC (Sept. 3, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/09/03/arizona-corrections-wants-more-prison-beds/71622852/>.

One wonderful feature of our federalist system with dual sovereignty is our ability to pursue different directions of public policy at the state level and to compare results across the nation. That is particularly true in criminal justice policy, where the federal constitution sets the baseline and parameters but states have wide latitude to apply distinctive approaches.

When it comes to policy innovation in a wide variety of areas, Arizona is, shall we say, not a shrinking violet. That is true of criminal justice reform. To cite just one example, in 2008, Arizona enacted the Safe Communities Act,<sup>7</sup> which sought to reduce over-incarceration by focusing probation supervision on high-risk offenders and creating financial incentives to reduce crime and violations by probationers rather than to revoke offenders into state custody. The reform involved a system of earned time credits for most probationers, providing 20 days off of their probation term for every month they meet their probation obligations, including victim restitution. They lose their credits if they are rearrested. At the same time, the state re-engineered adult probation to implement evidence-based supervision techniques.

A 2011 report by the Pew Foundation found significant gains from these modest, common-sense reforms.<sup>8</sup> Within two years, despite an increase in probationers, the number of new felony convictions by probationers decreased by 31.1 percent. Likewise, there were sharp declines in probation revocations, saving the state \$36 million in incarceration costs.

Arizona is embarking on additional reforms that I would like to briefly share with you. They result from a task force initiated by my colleague, Chief Justice Scott Bales, called “Fair Justice for All.”<sup>9</sup> The reforms cohere around a number of principles, one of them paramount: that people should not be in jail solely because they lack the financial resources not to be. This principle derives from our state Constitution’s Declaration of Rights, which prohibits imprisonment for debt,<sup>10</sup> and forbids not only excessive bail but excessive fines as well.<sup>11</sup>

In the real world, it is absolutely essential that we vindicate this principle. My wife and I have been watching *Narcos*<sup>12</sup> recently—have any of you watched it? I was struck by the fact that when Pablo Escobar finally decides to give up,

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7. S.B. 1476, 48th Leg., 2nd Reg. Sess. (Ariz. 2008).

8. PEW CTR. ON STATES, THE IMPACT OF ARIZONA’S PROBATION REFORMS (2011).

9. ARIZ. SUPREME CT., JUSTICE FOR ALL: REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL (2016), <https://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf> [hereinafter JUSTICE FOR ALL].

10. ARIZ. CONST. art. II, § 18.

11. *Id.* § 15.

12. *Narcos* (Netflix).

he builds his own jail for himself—that’s a whole new take on private prisons, right?—and from there he continues to direct his drug empire. Now, there are not very many people who can do this—not even the part about building the jail, but being able to conduct business and even get richer while in jail.

For ordinary people, by contrast, even a brief stay in jail is devastating. It disrupts work and family. Each passing day fuels recidivism and greater criminality. I have absolutely no hesitation about harsh penalties for people who have committed serious crimes. But we should all be concerned about people being incarcerated solely because they cannot pay fines or meet bail.

There is great debate, which many of you may be involved in, over how many people are in jail or prison for minor drug offenses. But there can be no debate over the fact that a large number of people are in jail solely because their financial circumstances dictate that they cannot get out. If we can cure that problem, we will make a significant dent in our jail population. Even more, that solution may well have a trickle-up effect, in that it will reduce recidivism and greater criminality that increases our prison population.

From our task force’s core principle that people should not be incarcerated solely because they cannot afford to get out flow 11 others, which I will recite because each is an important premise for the overall reform effort:

1. Judges need discretion to set reasonable penalties.
2. Convenient payment options and reasonable time payment plans should be based on a defendant’s ability to pay.
3. There should be alternatives to paying a fine.
4. Courts should employ practices that promote a defendant’s voluntary appearance in court.
5. Suspension of a driver’s license should be a last resort.
6. Non-jail enforcement alternatives should be available.
7. Special-needs offenders should be addressed appropriately.
8. Detaining low- to moderate-risk defendants causes harm and higher rates of new criminal activity.
9. Only defendants who present a high risk to the community or individuals who repeatedly fail to be held in court should be held in custody.

10. Money bond is not required to secure appearance of defendants.
11. Release decisions must be individualized and based on a defendant's level of risk.<sup>13</sup>

These premises in turn lead to two primary reform thrusts, reducing fines and fees, and largely eliminating cash bail.

Fines and fees may represent the lowest-hanging fruit on the criminal justice reform tree. They sound relatively innocuous but often lead to a debilitating cycle. Fines for relatively minor driving and related infractions typically start off in the hundreds of dollars. To that are added court fees. Driving without insurance in Arizona, for instance, carries a mandatory minimum assessment of at least \$500 including court fees and surcharges.<sup>14</sup> Judges have little to no discretion regarding such assessments. Failure to pay the assessments leads to automatic driver's license revocation.<sup>15</sup> Each year in our state, 100,000 driver's licenses are suspended for failure to pay fines and fees.<sup>16</sup>

Just think about what that means. A person who can't afford insurance probably also can't afford to pay an assessment of \$500 or more. For that reason, many offenders will avoid their court hearings. Which means their driver's license will be suspended. Over half of those will then be cited for driving without a valid license.<sup>17</sup> Before long, the offender may wind up in jail, if employed he'll lose his job, and the fines are still unpaid.

Already, our courts have developed procedures to partly ameliorate these problems, through payment plans and telephonic reminders of court appearances.<sup>18</sup> Those efforts have reduced failures to appear. But judges need far more flexibility, to reduce or eliminate fines and fees on a case-specific basis, substitute community service where appropriate, and restrict rather than suspend driver's licenses. Our Legislature is considering such reforms.

But not without a fight. Fines and fees are enormously popular revenue sources. All sorts of government programs, including the courts themselves, depend on them. Given that there is rarely if ever organized opposition to new fines and fees—indeed, people assessed with civil or criminal penalties are surely the world's least-powerful special-interest group—such penalties are simply too

13. JUSTICE FOR ALL, *supra* note 9, at 14–37 (discussing all 11 principles of the Justice for All Task Force).

14. ARIZ. REV. STAT. § 28-4135(E)(1).

15. *Id.* § 28-1601(A).

16. JUSTICE FOR ALL, *supra* note 9, at 20.

17. *Id.*

18. *See id.* at 16, 18, 20–21.

tempting as a revenue source. Indeed, here in Arizona, we even subsidize political campaigns through a 10% surcharge on civil and criminal penalties.<sup>19</sup>

But we simply must give judges greater flexibility over such fines and fees. Surely we end up paying far more in terms of incarceration, lost productivity, and secondary crime than the amount of the initial fines. We want people to come to their court hearings, to receive consequences commensurate with their circumstances, to clear their records, and to remain productive members of society. Our current system imposes perverse disincentives to all of those goals and should be reformed.

A more controversial reform is the elimination of most cash bail, which accounts for most of those who are incarcerated for financial inability to pay. Whether you would end it or mend it, cash bail clearly leads to perverse consequences. Many people arrested for relatively minor offenses cannot secure even minimal amounts of cash bail. The longer they languish in jail for inability to pay, the more likely they are to lose their jobs, have their family lives disrupted, and recidivate. A May 2016 report by the Maricopa County Justice System found that low-risk defendants detained for only two to three days were 39% more likely to recidivate before trial than those detained only one day.<sup>20</sup> The numbers go up from there, with defendants detained four to seven days 50% more likely to recidivate, and 74% more likely if detained more than a month. Similar trends were found in post-disposition recidivism based on the amount of pretrial detention. For low-risk defendants, pretrial detention seems more likely to breed crime than prevent it.

By contrast, many seriously dangerous criminals can bail their way out of jail. Returning to Pablo Escobar, would there be *any* amount of cash bail he couldn't meet? Having bail be the norm—and one's liberty depend primarily not on the severity of the crime, the risk of harm to others, or the risk of flight, but rather ability to pay—is fundamentally unfair and is not calibrated to the goals of the criminal justice system.

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19. ARIZ. REV. STAT. § 16-954 (“[Pursuant to the Citizen Clean Elections Act,] an additional surcharge of ten per cent shall be imposed on all civil and criminal fines and penalties collected pursuant to § 12-116.01 and shall be deposited into the fund.”).

20. See DAWN NOGGLE ET AL., TRANSITION FROM JAIL TO COMMUNITY AND THE INTERSECTION BETWEEN HOMELESSNESS, SMI, AND INVOLVEMENT IN THE CRIMINAL-JUSTICE SYSTEM 24 (2016), <http://www.azceh.org/resources/Pictures/23rd%20Annual%20Conference/2016%20Session%20Documents/Session%205%20-%20Transition%20for%20Jail%20to%20Community%20PPT.pdf> (presenting statistics).

Last winter, our Court approved major changes to our bail rules that will take effect on April 3. The heart of the changes is as follows: “Any person charged with an offense bailable as a matter of right must be released pending or during trial on the person’s own recognizance with only the conditions of release” specified elsewhere in the rules, “unless the court determines, in its discretion, that such a release will not reasonably assure the person’s appearance ... or protect other persons or the community from risk posed by the person. If such a determination is made, the court may impose the least onerous condition or conditions ... that are reasonable and necessary to protect other persons or the community from risk posed by the person or to secure the appearance of the person in court.”<sup>21</sup>

The new rules authorize monetary conditions only on an individualized determination of the defendant’s risk of non-appearance, risk of harm, and financial circumstances, rather than a bond schedule. The rules specify that the court “must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond.”<sup>22</sup> And the court must impose the least-onerous type of bond in the lowest amount necessary to protect the public and secure appearance, with preferences for unsecured appearance bonds or deposit bonds over cash bonds.

Although we are far from pioneers in this area, I believe these rules are a bold move. There are two aspects of the changes that I particularly like. Previously, the bail and release assessment focused exclusively on securing the defendant’s appearance. For the first time, public safety is placed on an equal footing with risk of flight. Hence, while the imposition of cash bail will unquestionably be reduced, I hope that going forward, release conditions will be carefully tailored to public safety. And indeed, we may have to be prepared for the possibility that by taking by these factors into account, we will see fewer defendants released at all because they are deemed to present danger to others, a phenomenon that has happened in the federal system and the District of Columbia.<sup>23</sup>

A second aspect I am pleased to see is release conditions based on individualized risk assessments rather than bond schedules that treat all defendants the same. The risk-assessment tools currently available are far from flawless, but they are an improvement upon a one-size-fits-all approach.

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21. ARIZ. R. CRIM. P. 7.2(a).

22. ARIZ. R. CRIM. P. 7.3(b)(2).

23. See, e.g., *Performance Measures*, PRETRIAL SERVS. AGENCY FOR D.C., [https://www.psa.gov/?q=data/performance\\_measures](https://www.psa.gov/?q=data/performance_measures) (last visited May 11, 2017).

I cannot, however, yet fully subscribe to the task force's 10th principle—"Money bond is not required to secure appearance of defendants,"<sup>24</sup> or for that matter public safety—as more than an aspiration rather than as a proven fact. Of course, that issue is hotly contested across the nation. Just this Tuesday, the *New York Times* profiled New Jersey's system that by constitutional amendment has largely eliminated cash bail.<sup>25</sup> The article was fairly positive. Before the changes, 39% of the state's inmates were bail-eligible but could not post bond, leaving many accused of low-level crimes incarcerated for long periods. Now, only a handful of defendants are held before trial—but those few include defendants charged with serious crimes who previously would have been bail-eligible.

But some studies show that defendants released on their own recognizance are substantially less likely to appear at court hearings than those who post cash bail,<sup>26</sup> although others show that low- to medium-risk defendants released without bonds or on non-secured bonds return at higher rates.<sup>27</sup> Because the direct and indirect costs of failure to appear are high, additional data would be useful. By definition, with fewer defendants in jail, the risk of additional crimes increases. Perhaps most significantly, the disappearance of bail bondsmen removes from the law-enforcement arsenal a privately funded mechanism with a strong financial incentive to assure that defendants appear in court. That absence may be most acutely felt in smaller and rural communities that lack adequate resources to monitor defendants. Indeed, the appreciable savings from reduced pretrial incarceration may largely be offset by increased resources needed to monitor defendants and secure their appearance.

Certainly we should not be shaken by episodic instances where the new systems fail. They are inevitable, just as are examples of people on bail committing crimes and defendants who can't bail themselves out becoming hardened criminals in prison. But we must also carefully measure the progress of new systems and not allow ourselves to be wedded to our own inventions any more than we are to the status quo. While I believe our new rules here in Arizona are an improvement over the status quo, ultimately we may find

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24. JUSTICE FOR ALL, *supra* note 9, at i.

25. Lisa W. Foderaro, *New Jersey Alters its Bail System and Upends Legal Landscape*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html>.

26. See, e.g., THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007) ("Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances.").

27. See, e.g., PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (2013) ("For defendants who were lower, moderate, or higher risk: Unsecured bonds are as effective at achieving public safety as are secured bonds.").

that we have to give our courts greater discretion to order cash bail, in truly appropriate circumstances, not only as a last resort but as one discretionary tool among many. But I would love to discover that this proves unnecessary.

We really have to get this right. We are in what I would describe as the Goldilocks phase of criminal justice reform—testing out what is too hot, too cold, and just about right. I am glad to see a great amount of experimentation, cooperation, study, and debate.

Your role in this is central. Like many others, I am only a student of your work, but am poised to do what I can to put it to good use. There is an incredible amount of intellectual wattage in this room. Please, illuminate us.

Thank you so much.



# The Changing Politics of Crime and the Future of Mass Incarceration

*David Cole\**

For too many years, it seemed that the only possible stance a politician could take on crime was to be tougher than his opponent. For almost two generations beginning in the mid-1970s, state and federal legislators enacted increasingly harsh criminal penalties—mandatory minimums, “three-strikes-and-you’re-out” life sentences, parole elimination, and the like. Police pursued “broken windows” or “zero tolerance” strategies, leading to greatly increased arrests. Prosecutors charged defendants as aggressively as possible. And legislators deprived judges of the discretion to sentence based on individualized considerations, mandating specific sentences with no room for leniency. The result was an unprecedented boom in the nation’s population behind bars. Our per capita incarceration rate not only soon parted ways with those of our European allies, but outstripped every nation in the world, as the United States became the world leader in incarceration.<sup>1</sup>

Today, however, “smart on crime” has replaced “tough on crime.” Rather than simply being tougher than the next guy, politicians and government officials increasingly seek solutions that are based on evidence and reason rather than heated rhetoric and demagoguery. To that end, this project brings together a who’s who of experts in criminal law, and asks each contributor to offer both a concise diagnosis of the problems in their particular area of expertise and, more importantly, a prescription for practical reforms. For those who seek to bring reason and common sense to the criminal justice system, this report offers proposals and suggestions in every area of the criminal justice system, from policing to sentencing to interrogation to the treatment of people with mental and physical disabilities. Anyone interested in improving criminal justice will find invaluable guidance here.

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\* Hon. George J. Mitchell Professor in Law and Public Policy, Georgetown University, and National Legal Director for the American Civil Liberties Union. The following was given as the keynote address on February 11, 2017, at the Academy for Justice conference on criminal justice reform.

1. *Highest to Lowest–Prison Population Rate*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (last visited May 28, 2017). The United States has the largest incarcerated population in the world, with approximately 2.1 million people in jail or prison on any given day. It is second only to the island nation of the Seychelles in per capita incarceration. *See id.*

Skeptics may ask whether these reforms stand a chance in the wake of the election of Donald Trump, who ran at least in part as a throwback to the “tough-on-crime” approaches of the 20th century. As a candidate, Trump defended the aggressive “stop-and-frisk” policing that generated racial profiling in New York City and other cities.<sup>2</sup> As president, he appointed as attorney general Jeff Sessions, who, while a senator from Alabama, consistently opposed bipartisan efforts at criminal justice reform.<sup>3</sup> Sessions has already reversed criminal justice reforms introduced by the Obama administration, and has directed federal prosecutors in drug cases to charge the most harsh penalty possible in all cases, regardless of the circumstances.<sup>4</sup> The shift from the prior administration is dramatic on all fronts, but nowhere more so than on criminal justice. So does it make sense to think about criminal justice reform in this political environment?

The answer is yes, for three fundamental reasons. First, it’s the right thing to do. The status quo—in which more than 2 million people are behind bars, many needlessly, and nearly all for much longer than warranted by concerns about recidivism, retribution, or deterrence—is morally problematic and fiscally irresponsible. That the incarcerated population is disproportionately poor and people of color compounds the injustice.<sup>5</sup> Bringing a measure of justice to our criminal law enforcement system is the most urgent civil-rights issue of our time.

Second, criminal justice reform enjoys substantial bipartisan support, despite our highly polarized world, making it possible to forge progress here that is not possible on many other subjects. This project has been financially supported by the Charles Koch Foundation. Meanwhile, also with Koch’s

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2. Max Ehrenfreund, *Donald Trump Claims New York’s Stop-and-Frisk Policy Reduced Crime; The Data Disagree*, WASH. POST (Sept. 22, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/09/22/donald-trump-claims-new-yorks-stop-and-frisk-policy-reduced-crime-the-data-disagree/?utm\\_term=.cb9aea7f5322](https://www.washingtonpost.com/news/wonk/wp/2016/09/22/donald-trump-claims-new-yorks-stop-and-frisk-policy-reduced-crime-the-data-disagree/?utm_term=.cb9aea7f5322).

3. See AMES C. GRAWERT, BRENNAN CTR. FOR JUST., ANALYSIS: SEN. JEFF SESSIONS’S RECORD ON CRIMINAL JUSTICE (2017).

4. See Rebecca Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html>.

5. See, e.g., E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015, at 13 (2016); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (June 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

support, the ACLU, the Center for American Progress, Right on Crime, Prison Fellowship, and the Tea Party's Freedom Agenda have all joined forces to press for criminal justice reform.<sup>6</sup> The time for reform is now.

Third, while the president and attorney general are unlikely to be allies on criminal justice reform, the federal government has less to say on this subject than on many others. About 99% of criminal law cases are brought by state and local officials, in state courts.<sup>7</sup> And about 90% of the nation's incarcerated population is housed in state prisons and jails.<sup>8</sup> It certainly helps to have a president and attorney general committed to reform, as President Barack Obama and Attorney General Eric Holder were. But reform can and must continue without federal assistance. The locus of the debate on criminal justice must be at the state level. And red, blue, and purple states have all shown an interest in getting smarter, more efficient, and more humane in their criminal law policies.

Election Day—November 8, 2016—provided evidence that support for Trump can coexist with criminal justice reform. On that day in Oklahoma, voters preferred Donald Trump to Hillary Clinton by a 65% to 29% margin.<sup>9</sup> This makes Oklahoma a very red state. Yet almost 60% of Oklahoma voters approved ballot measures to reduce many drug and property crimes from felonies to misdemeanors, and to reinvest the savings in rehabilitation for prisoners.<sup>10</sup>

The same day, 64% of California voters supported parole and juvenile justice reform, which requires that judges and not prosecutors decide whether to charge juveniles as adults, and expands parole and early-release opportunities.<sup>11</sup> In New Mexico, a referendum passed that prohibits the detention of individuals who cannot afford to pay bail and are not dangerous or a flight risk.<sup>12</sup> Voters in California, Massachusetts, and Nevada endorsed legalizing marijuana for

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6. See Jake Miller, *An Unlikely Alliance Forms between Koch Brothers and Liberal Groups*, CBS NEWS (Feb. 19, 2015), <https://www.cbsnews.com/news/koch-brothers-conservative-liberal-groups-unite-on-criminal-justice-reform/>.

7. See JEROLD ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 2 (2016).

8. See Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

9. *Oklahoma Results*, N.Y. TIMES (last updated Feb. 10, 2017), <https://www.nytimes.com/elections/results/oklahoma>.

10. See *id.*

11. John Myers, *Proposition 57, Gov. Jerry Brown's push to loosen prison parole rules, is approved by voters*, L.A. TIMES (Nov. 8, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-election-day-2016-proposition-57-gov-jerry-brown-prison-1478452055-htmlstory.html>.

12. See *New Mexico Results*, N.Y. TIMES (last updated Feb. 10, 2017), <https://www.nytimes.com/elections/results/new-mexico>.

adults.<sup>13</sup> District attorney candidates who advocated reducing incarceration and racial disparities in criminal justice enforcement won in Houston, Birmingham, and Tampa.<sup>14</sup> Florida elected its first African-American state attorney.<sup>15</sup> And in Maricopa County, Arizona, Sheriff Joe Arpaio, infamous for his anti-immigrant and unconstitutional police practices, lost his bid for a seventh term.<sup>16</sup>

In an election that Trump won, these are important reminders that the politics of crime has moved on from the “tough-on-crime” mantra that dominated in the latter part of the 20th century. I graduated law school in 1984. For most of my legal career, all the news on criminal justice was bad. Incarceration increased at record rates from the mid-1970s to the early 2000s.<sup>17</sup> Racial disparities grew as well. Richard Nixon introduced the “war on crime.” Ronald Reagan and George H.W. Bush launched and pursued the “war on drugs.” Bill Clinton took time off from his first presidential campaign to sign the death warrant for Ricky Ray Rector, a man who as a result of a brain injury barely comprehended what was happening to him.<sup>18</sup> Clinton went on to sign the Anti-Terrorism and Effective Death Penalty Act,<sup>19</sup> which restricted federal court review of state criminal convictions. States, meanwhile, were enacting longer and longer sentences, building more prisons, putting more police on the street, and watching as their prisons filled with young men, mostly of color. For decades, the ACLU opposed virtually all criminal law bills—because they all made a bad situation worse.

Today, by contrast, there is good news. Incarceration rates have flattened out and have started to fall. The nation’s total prison population has declined every

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13. Katy Steinmetz, *These States Just Legalized Marijuana*, TIME (last updated Nov. 10, 2016), <http://time.com/4559278/marijuana-election-results-2016/>.

14. Maurice Chammah, *These prosecutors campaigned for less jail time — and won*, BUSINESS INSIDER (Nov. 9, 2016), <http://www.businessinsider.com/election-jail-sentences-district-attorneys-2016-11>.

15. Scott Powers, *Aramis Ayala Becomes First Black State Attorney in Florida’s History*, FLA. POLITICS (Nov. 8, 2016), <http://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history>.

16. Bill Chappell, *Maricopa Sheriff Joe Arpaio Loses Re-election Fight*, NPR (Nov. 9, 2016), <http://www.npr.org/sections/thetwo-way/2016/11/09/501388042/maricopa-sheriff-joe-apraio-loses-reelection-fight>.

17. See THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (2017).

18. Peter Applebome, *Arkansas Execution Raises Questions on Governor’s Politics*, N.Y. TIMES (Jan. 25, 1992), <http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html>.

19. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of U.S. Code).

year since 2010. The per capita imprisonment rate peaked at 506 per 100,000 in 2008, and was 458 in 2015.<sup>20</sup> Six states—Alaska, California, Connecticut, New York, New Jersey, and Vermont—have reduced their prison populations by at least 20%, without an increase in crime, in the last decade or so.<sup>21</sup> Ten more states have reduced their prison populations by between 10% and 20%.<sup>22</sup> Thirty-six states and the federal Bureau of Prisons have seen declines in their prison populations from their peak years, generally in the early 2000s.<sup>23</sup> In a single year, from 2013 to 2014, Mississippi experienced a decrease of 15% in its prison population.<sup>24</sup>

During 2015, lawmakers in at least 30 states adopted changes in policy and practice that are likely to contribute to further declines in incarcerated populations. Six states expanded access to parole, reducing returns to prison for parole violations. Fourteen reduced the collateral consequences of convictions, including bans on voting and welfare. Four reclassified certain felonies as misdemeanors. And similar reforms have been adopted in many other states over the past five years.<sup>25</sup>

Racial disparities, still shockingly large, have decreased in the first decade of the 21st century. For example, between 1988 and 1993, African-Americans were arrested for drug offenses at rates about 5 times that of whites.<sup>26</sup> In 2007, however, the black arrest rate was between 3.5 and 3.9 times higher than the white arrest rate.<sup>27</sup> For all crimes, African-Americans were arrested at four times the rate of whites in 1989, but 2.5 times the rate of whites in 2006.<sup>28</sup> Racial disparities in traffic stops—“driving while black”—have fallen in recent

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20. See CARSON & ANDERSON, *supra* note 8, at 5. This number reflects those in federal or state prisons, serving sentences for felonies. It does not include people incarcerated in jails, awaiting trial, or serving short sentences for misdemeanors.

21. THE SENTENCING PROJECT, U.S. PRISON POPULATION TRENDS 1999–2015: MODEST REDUCTIONS WITH SIGNIFICANT VARIATION (2017).

22. *Id.*

23. *Id.*

24. Colleen Curry, *How Mississippi Slashed Its Prison Population and Embraced Criminal Justice Reform*, VICE NEWS (Sept. 23, 2015), <https://news.vice.com/article/how-mississippi-slashed-its-prison-population-and-embraced-criminal-justice-reform>.

25. NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2015: DEVELOPMENTS IN POLICY AND PRACTICE (2016), <http://www.sentencingproject.org/publications/the-state-of-sentencing-2015-developments-in-policy-and-practice/>.

26. See HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 7 (2009), [http://www.hrw.org/sites/default/files/reports/us0309web\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf).

27. See *id.*

28. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 8 (2007).

years, with roughly proportional stops reported in many places.<sup>29</sup> Substantial disparities linger in particular jurisdictions, and blacks and Hispanics are still more likely to be searched in a traffic stop than whites in general.<sup>30</sup>

In New York City, as a result of a lawsuit, an advocacy campaign, and the election of Mayor Bill de Blasio in 2013, “stop-and-frisk” encounters, which were disparately targeted at black and Hispanic men, dropped from a high of 686,000 in 2011 to 22,000 in 2015, on pace for 15,000 in 2016.<sup>31</sup> Racial disparities remain, but as a result, black and Hispanic men are the disproportionate beneficiary of the reduction in stop.

These developments reflect a significant change in the prevailing politics of crime. Where in prior decades new criminal justice laws were a one-way ratchet making criminal law more harsh, today they are now more likely to reduce the severity of the criminal laws than to enhance it. The Fair Sentencing Act of 2010,<sup>32</sup> for example, reduced the disparity between sentences for crack and powder cocaine from 100-to-1 to 18-to-1. President Obama was the first president to visit a federal prison. He directed the Justice Department to review solitary confinement, leading to a 2016 guidance that reduced its use in the federal prison system, especially for juveniles and the mentally ill, and urged states to follow suit.<sup>33</sup> Under a clemency initiative, President Obama commuted the sentences of nearly 2,000 people, a marked increase over most of his predecessors.<sup>34</sup> The Justice Department’s Civil Rights Division conducted high-profile investigations of several police departments across the country for systematic civil-rights abuses, including Chicago, Baltimore, New Orleans, Cleveland, Newark, and Ferguson, Missouri. Many of these reports led to consent decrees that require meaningful reform and provide for ongoing monitoring.

29. See, e.g., Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>.

30. See Kia Makarechi, *What the Data Really Shows About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <http://www.vanityfair.com/news/2016/07/data-police-racial-bias>.

31. See *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited May 28, 2017).

32. Pub L. No. 111–220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.).

33. Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 26, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html?utm\\_term=.5f86a2c3874c](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.5f86a2c3874c).

34. See Justin Sink et al., *Obama Commutes More Sentences than any Other U.S. President*, BLOOMBERG (Jan. 19, 2017), <https://www.bloomberg.com/graphics/2017-obama-clemency/>.

In speeches that would have been unimaginable from any other attorney general in the past 40 years, then-Attorney General Eric Holder publicly questioned the effectiveness and fairness of the war on drugs and spoke forcefully against mass incarceration.<sup>35</sup> He reversed a policy instituted by George W. Bush's attorney general, John Ashcroft, which required prosecutors to charge defendants with the most serious crimes possible. Instead, Holder instructed federal prosecutors to use their charging discretion wisely to prioritize the most serious crimes; to not charge low-level drug offenders with crimes that trigger draconian mandatory-minimum sentences; and to pursue alternatives to incarceration where appropriate. In the wake of these reforms, federal drug-trafficking cases dropped, prosecutors sought mandatory minimums in drug cases much less often, and the federal prison population fell for the first time in decades.<sup>36</sup>

Perhaps most significantly, these initiatives are not supported only by Democrats. Republicans have been equal partners in the calls for criminal justice reform. At the federal level, Paul Ryan, Charles Grassley, Rand Paul, and Mike Lee have all said they want to see federal criminal justice reform. The American Legislative Exchange Council (ALEC), a conservative nonprofit committed to gun rights, cutting taxes, and reducing business regulation, has prioritized the reduction of prison overcrowding, and works with the ACLU to further sentencing reform at the state level.

There are many possible reasons for this transformation in the politics of crime. Crime rates have fallen for about the last quarter-century,<sup>37</sup> reducing the fear that often impedes rational discussion. Meanwhile, states are increasingly seeing a reduction in their prison populations as a way to save money in financially strapped circumstances. Imprisonment is expensive, and especially for those who pose little risk of recidivism, a considerable waste of resources. It's also possible that the country reached a tipping point on incarceration; being the world leader in incarceration hardly induces pride. Revelations, aided by DNA testing and the work of the Innocence Project, that many of those serving substantial prison sentences are innocent has undermined trust in our

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35. See, e.g., Charlie Savage, *Justice Dept. to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), [http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?\\_r=0](http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?_r=0).

36. See Christopher Ingraham, *The Justice Department is Getting Smart About Drug Sentencing; Here's the Data to Prove it*, WASH. POST (Feb. 17, 2015), [https://www.washingtonpost.com/news/work/wp/2015/02/17/the-justice-department-is-getting-smart-about-drug-sentencing-heres-the-data-to-prove-it/?utm\\_term=.20805c9f406f](https://www.washingtonpost.com/news/work/wp/2015/02/17/the-justice-department-is-getting-smart-about-drug-sentencing-heres-the-data-to-prove-it/?utm_term=.20805c9f406f).

37. John Gramlich, *5 Facts About Crime in the U.S.*, PEW RESEARCH CTR. (Feb. 21, 2017), <http://www.pewresearch.org/fact-tank/2017/02/21/5-facts-about-crime-in-the-u-s/>.



criminal justice system. And the war on terror may have given politicians an alternative focus for fear-mongering and “get tough” stances.<sup>38</sup>

Whatever the causes of the new politics of crime, the urgent questions now are what should be done. This report offers an extraordinary range of detailed and pragmatic answers. Those seeking to improve the system will find here multiple ways to fix multiple problems. I leave the details to the experts, but want to emphasize a few general points here.

First, it is important to make the cause of reducing incarceration appealing to a wider swath of voters. To this end, it is important to understand and emphasize the ways in which incarceration harms us all. Fiscal concerns, for example, affect all of us. If we are needlessly spending tax dollars incarcerating people who don’t pose a threat, that’s money that cannot be spent on schools, infrastructure, or job creation. Recidivism, too, affects all of us, as we are all potentially victims of crime. If incarceration itself breeds recidivism, we should be motivated to identify alternatives to incarceration that produce better results.

Second, reform efforts must be bipartisan. Most state legislatures are in Republican control, so if Republicans are not on board, reform will be a nonstarter. And even where Democrats are in the majority, bipartisan support is critical to ensure that the issue not become an opportunity for demagoguery. As the latter part of the 20th century demonstrated, it is all too easy for politicians of both parties to encourage fear of crime and fan the flames of retribution. If reform efforts are bipartisan, there will be less temptation to engage in partisan finger-pointing by both sides. If we are going to be truly smart on crime, we need to rise above partisan politics. But the good news, as noted above, is that this has already begun to happen.

Third, reformers need to focus on the states. This is not just because the federal government is unlikely to be a sympathetic forum in the short term, but because that’s where the problem—and the solution—lies. As noted above, states are overwhelmingly the principal enforcers of criminal law, and as a result, house about 90% of the nation’s prison population.<sup>39</sup> We routinely talk about the per capita incarceration rate of the United States, but in fact each state has its own independent political and legal processes, and incarceration rates vary widely among the states. The only way to achieve systemic reform is to work at the state level.

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38. For a more detailed exploration of these causes, see David Cole, *Turning the Corner on Mass Incarceration?* 9 OHIO ST. J. CRIM. L. 27 (2011).

39. See E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015 (2016).



Fourth, reformers should seek to engage faith-based communities in the effort. At the heart of any major reform effort must be the idea, common to virtually all religions, that human beings are capable of redemption, or as noted criminal defense attorney Bryan Stevenson often puts it, no one is as bad as the worst thing they've ever done.<sup>40</sup> Many religious organizations are already involved in prison work. Religious groups can provide an opportunity to bridge partisan divides. Prison Fellowship, for example, is a conservative Christian organization devoted to helping inmates rehabilitate through religious involvement and support.<sup>41</sup>

Fifth, we must press for investment in disadvantaged communities, and in forms other than more police and prisons. As two recent award-winning books, *Evicted* and *Ghettoside*, demonstrate, those born into inner-city poverty face enormous obstacles, most of which are beyond the capacity of the criminal justice system to fix.<sup>42</sup> The "Justice Reinvestment" program tries to address that fact, by seeking to reduce incarceration and direct the savings to programs in disadvantaged communities that promise to reduce crime without resorting to incarceration (such as better schools, after-care, and job training).<sup>43</sup>

Sixth, reform should focus on prosecutors' incentives. John Pfaff has shown that prosecutors' increased proclivity to charge arrestees with felonies is one of the principal drivers of the rise in imprisonment rates.<sup>44</sup> Prosecutors should be encouraged to adopt a more nuanced approach, reserving the most serious charges for the most dangerous offenders, and generally favoring the least severe penalty absent specific reasons to seek a longer sentence. As attorney general, Eric Holder issued a memo to federal prosecutors to that effect with respect to drug crimes. But the vast majority of prosecutors are county officials, enforcing state law, so the U.S. attorney general's memos do not apply to them.

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40. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17-18 (2014).

41. See PRISON FELLOWSHIP, <https://www.prisonfellowship.org> (last visited May 28, 2017).

42. Matthew Desmond's *Evicted: Poverty and Profit in the American City* chronicles the struggles of several individuals and families over the course of a single year in Milwaukee, as they bounce from apartment to apartment in a failed search for a steady home. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016). *Ghettoside*, by Jill Leovy, addresses the problem of black-on-black homicide in South Los Angeles in the early 2000s, and also underscores the massive challenges faced by those who live in communities that have lost trust in the police and in which gangs have filled the void in law enforcement with deadly vengeance. JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015).

43. JUSTICE REINVESTMENT INITIATIVE, <https://www.bja.gov/programs/justicereinvestment/> (last visited May 28, 2017).

44. See John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (July 12, 2011) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990508](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508).

New Jersey has imposed charging guidelines on prosecutors.<sup>45</sup> California used financial incentives, requiring counties to hold more convicted criminals in county jails rather than state prisons. The ACLU, where I am the national legal director, has conducted public education about prosecutors' responsibility for mass incarceration in connection with electoral campaigns for district attorney. And many advocates have sought to reduce the severity of statutory penalties, which has the effect of reducing the lopsided advantage prosecutors exercise over defendants that may coerce many to plead guilty.

Finally, and perhaps most importantly, reform efforts must not be limited to nonviolent drug and property crimes. To be sure, those are the easiest problems to tackle, and it may make sense to start there. But we cannot stop there, because the majority of those serving time are doing so for violent crimes. The solution is not to stop punishing violent crime, of course. But we might pursue social investments in high-crime communities to reduce the prevalence of violent crime in the first place. We might reduce the sentences handed out for violent crime; deterrence is more a function of the certainty of punishment than of its severity,<sup>46</sup> so sentences can be reduced without undermining deterrence. Moreover, individuals tend to "age out" of criminal behavior as they get older,<sup>47</sup> so we should consider reviewing and commuting the sentences of those serving long sentences, much as President Obama did with respect to prisoners serving long sentences for drug crimes.

At one extreme, sentences of life in prison without the possibility of parole grew by 22% from 2008 to 2012.<sup>48</sup> One in nine prisoners, totaling about 160,000 prisoners, are serving a life sentence.<sup>49</sup> Some 10,000 of those are for nonviolent offenses, and another 10,000 are serving life sentences for crimes committed as juveniles.<sup>50</sup> In part because of the "aging out" phenomenon, those who do eventually obtain release from life sentences are less prone to recidivism.<sup>51</sup>

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45. See *Attorney General Issues Directive to Guide Prosecutors and Police*, N.J. ASS'N OF COUNTIES (Oct. 13, 2016), <http://njac.org/attorney-general-issues-directive-to-guide-prosecutors-and-police/>.

46. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCE* 132-40 (Jeremy Travis et al. eds., 2014).

47. See *id.* at 141-43; see also Dana Goldstein, *Too Old to Commit Crime?*, THE MARSHALL PROJECT (Mar. 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime#.B6zrQEv2K>.

48. ASHLEY NELLIS, *THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA I* (2013), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

49. *Id.*

50. *Id.*

51. *Id.* at 17.

The essays collected in this report offer many more concrete steps that state and local governments can take to reduce our collective reliance on mass incarceration. Collectively, they demonstrate that the problem is not that we don't know how to address this problem, but that until now, we have lacked the will to do so. That the United States is the world leader in incarceration is a national tragedy. It's also unnecessary. All of the nations that we associate ourselves with have much lower per capita incarceration rates. They manage to keep crime rates low without locking up large swaths of their young and most disadvantaged people. We could do the same. This report provides a road map, offering multiple options to achieve a more sensible criminal justice system. All that is needed is the will to change. And in recent years, Americans of all political stripes, from red, blue, and purple states, from cities and rural areas, have begun to develop that will. My hope is that this report helps us realize this truly worthy bipartisan goal.



# Overcriminalization

*Douglas Husak\**

*Legal philosophers (like me) have thought long and hard about the limits of the substantive criminal law and the principles that should be employed to constrain it. The attempt to formulate and apply these principles is a small but important part of an effort to retard the phenomenon of overcriminalization. Regardless of their political ideology, most commentators agree that the tendency to criminalize too much and to punish too many are problems from which the United States currently suffers. Despite this near consensus, concrete proposals to implement a theory of criminalization tend to be embraced or resisted depending upon the socioeconomic class of defendant they would be expected to benefit. Conservatives have accepted but liberals have rejected principled suggestions to expand the defense of ignorance of law. This result is unfortunate. In my view, the case for or against the expansion of this defense should derive solely from an assessment of the normative arguments in its favor.*

## I. ASPIRATIONS OF NEUTRALITY

Alarm about the size and scope of the criminal justice system led me to write *Overcriminalization* in 2008.<sup>1</sup> There I identified, defended, and applied a number of constraints that particular offenses should be required to satisfy before they should be regarded as justifiable. Some of these constraints are derived from moral philosophy. I contended that a proposed statute must prohibit conduct that is wrongful, prevent harm, and impose liability only on those who are deserving. Other constraints are derived from political theory. I contended that a proposed statute must be designed to further a substantial state interest, must actually succeed in advancing that interest, and be no broader than necessary to achieve its objective.<sup>2</sup>

In trying to combat the phenomenon of overcriminalization, I formulated a theory that is almost wholly non-ideological or politically partisan. That is, I did not suppose that my list of constraints that need to be satisfied for a

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1. See DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

2. For a discussion of overcriminalization in the federal system, see Stephen F. Smith, “Overfederalization,” in the present Volume.

proposed statute to be a legitimate imposition of the penal sanction would prove more congenial to political conservatives, liberals, or to anyone else with a mainstream ideology. Although my confidence has been shaken, I continue to believe my original assumption is basically correct. It is unfortunate if those who aspire to retard overcriminalization invoke their political ideology to argue for or against a particular theory.

Of course, my claim about the absence of a non-ideological tilt was bound to strike cynics as naïve at the outset. Their conviction to the contrary may as well have been *a priori* (i.e., based on theoretical deduction rather than experience or observation). That is, many thinkers are certain that all theories simply must contain a political bias, even without the need to examine a given theory to determine whether their certainty is warranted. On a high enough level of abstraction, I am certain they are correct. Any theory that seeks to contrast justified from unjustified impositions of the criminal sanction will be rejected by commentators who are persuaded that no law, or at least no criminal law, is ever justified. Thus my endeavor is rejected as misguided by anarchists and the small but growing number of criminal law abolitionists. The same is true of those on the opposite end of the political spectrum. Someone who thinks that any law is justified, or that any law enacted in accordance with specified procedures in a constitutional democracy is justified, will not appreciate the need for an independent set of normative principles that purport to contrast the justified from the unjustified. All of the work is done by procedure; there is no need for a substantive theory to evaluate criminal laws. Obviously, I reject each of these extreme positions. Some actual and possible penal statutes are justified and others are not, and it is an important project for legal philosophers to defend a set of principles to draw the line between them. The question is whether those who join me in rejecting these extreme positions should employ whatever political ideology they hold as a basis for accepting or (more likely) for rejecting my (or any) theory of criminalization.

To be sure, the particular theory I produced in 2008 has certainly attracted its share of critics.<sup>3</sup> Any philosopher should anticipate this response. In fact, he should *hope* for this response; the alternative is neglect, which is far worse. In any event, some legal philosophers have contended that a viable theory of criminalization should not consist in a set of constraints.<sup>4</sup> Others have contested the acceptability of some of my constraints. In particular, they have pointed out that the harm constraint is not so easy to formulate, let alone to defend.<sup>5</sup> For present purposes, however, the important point is not whether I was correct or incorrect to employ constraints to construct a theory of criminalization or to include a harm requirement among those constraints that penal statutes must satisfy. Instead, the important point is that there is no obvious connection between those who accept or reject my theory and those who adopt a particular political ideology. That is, one should make no inferences about whether someone is a conservative or a liberal (or a pragmatist or whatever) because she accepts or rejects any of my constraints. Admittedly, we may well differ about what harm is,<sup>6</sup> for example, and we are even more likely to differ about whether a given statute proscribes it.<sup>7</sup> But the constraint itself, in the absence of further embellishment, comes pretty close to qualifying as politically neutral.

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3. See John Gardner, *Book Review*, NOTRE DAME PHIL. REVS. (Aug. 3, 2008), <http://ndpr.nd.edu/news/overcriminalization-the-limits-of-the-criminal-law/>; Danny Scoccia, *Book Review*, 119 ETHICS 189 (2008); Peter Ramsay, *Overcriminalization as Vulnerable Citizenship*, 13 MOD. L. REV. 262 (2010); Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27 (2009); Heidi M. Hurd, *Paternalism on Pain of Punishment*, 28 CRIM. JUST. ETHICS 49 (2009); Victor Tadros, *The Architecture of Criminalization*, 28 CRIM. JUST. ETHICS 74 (2009); A.P. Simester & Andrew von Hirsch, *Remote Harms and Non-constitutive Crimes*, 28 CRIM. JUST. ETHICS 89 (2009); Robert Young, *Douglas Husak on Dispensing with the Malum Prohibitum Offense of Money Laundering*, 28 CRIM. JUST. ETHICS 108 (2009); Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971 (2010); Stuart P. Green, *Is There Too Much Criminal Law?*, 6 OHIO ST. J. CRIM. L. 737 (2009); Vanessa E. Munro, *Book Review*, 12 NEW CRIM. L. REV. 323 (2009); Alfonso Donoso, *Critical Review: Douglas Husak—Overcriminalization: The Limits of the Criminal Law*, 4 CRIM. L. & PHIL. 99 (2010); Jeremy Horder, *Book Review*, 35 SOC. THEORY & PRAC. 483 (2009); Re'em Segev, *Is the Criminal Law (so) Special? Comments on Douglas Husak's Theory of Criminalization*, 1 JERUSALEM REV. LEGAL STUD. 3 (2010); Miriam Gur-Ayre, *Comments on Douglas Husak's Overcriminalization*, 1 JERUSALEM REV. LEGAL STUD. 21 (2010); Gideon Yaffe, *Harmfulness, Wrongfulness, Lesser Evils and Risk-Creation: A Comment on Douglas Husak's Overcriminalization*, 1 JERUSALEM REV. LEGAL STUD. 35 (2010).

4. See VICTOR TADROS, *WRONGS AND CRIMES* (2016).

5. See James Edwards, *Harm Principles*, 20 LEGAL THEORY 253 (2014).

6. See Matthew Hanser, *The Metaphysics of Harm*, 77 PHIL. & PHENOMENOLOGICAL RES. 421, 432 (2008).

7. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

And I believe the same is true of the additional constraints that I included in my theory of criminalization. As I indicated, I argued that no one should be subjected to penal liability in the absence of her desert.<sup>8</sup> Again, what constitutes desert is extraordinarily contentious. To my knowledge, however, virtually no one (except perhaps those who reject the existence of desert altogether) openly argues that criminal liability is justifiably imposed on persons in the absence of their desert, that is, on persons who do not deserve it. This latter position, it seems to me, would be extraordinary. Only in the most catastrophic circumstances should we entertain the possibility that criminal liability should be imposed on those who do not deserve it.

Desert is a significant constraint independent of the others because penal liability requires not only that a person commits an offense, but also that she does so while lacking a defense. If a theory of criminalization allowed penal liability to be imposed on those who do not deserve it because they ought to have a substantive defense that justifies or excuses their conduct, the theory would be deficient in failing to serve its most important (but not its only) function. What is this “most important” function? Why should those of us who care about the real world (in addition to philosophical argumentation) be anxious to identify the correct theory of criminalization? The single best answer, I continue to believe, is that an incorrect theory will inevitably produce overcriminalization and undercriminalization. That is, some conduct that should not incur penal liability will be subject to it, and some conduct that should incur penal liability will not be subject to it. Undercriminalization may well be a larger problem than I appreciated at the time I wrote my book.<sup>9</sup> But even if the problem of undercriminalization is real, surely the problem of overcriminalization is far more worrisome. Imposing criminal liability on those who do not satisfy the constraints in our best theory of criminalization is a worse evil than not imposing criminal liability on those who do. Again, I do not take myself to be saying anything here that is unorthodox. Those who accept the presumption of innocence have always contended that false positives are more worrisome than false negatives in criminal justice.<sup>10</sup>

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8. For a discussion of the concept of desert, see Jeffrie G. Murphy, “Retribution,” in Volume 4 of the present Report.

9. See Andrew Ashworth & Lucia Zedner, *Preventive Orders: A Problem of Undercriminalization?*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 59 (R.A. Duff et al. eds., 2010).

10. For a discussion of the complexities in the presumption of innocence, see the special issue of 8 *CRIM. L. & PHIL.* 283-525 (2014).



And why should we worry about overcriminalization? Once again, there are several different reasons. One of these stands out. We should worry about overcriminalization mostly because it is bound to produce overpunishment. Here is why. When a new criminal statute is enacted, legal officials gain powers they previously lacked. Police have the power to arrest, prosecutors have the power to press charges, and judges have the power to sentence. Of course, there is no logical necessity that these powers will ever be exercised. But it is nearly inevitable that these newly created powers will be exercised on some occasions. After all, outlawing conduct does not prevent it. Some persons will persist in the banned behavior, whatever the law may say. It is almost certain that at least some of the people who break a specific law will be arrested, prosecuted, and sentenced. If the statute for which they are punished is an illegitimate use of the penal sanction because it violates the constraints that are included in our best theory of criminalization, these punishments will be unjust. Thus overcriminalization inevitably produces injustice: punishments that cannot be justified. If the state cannot justifiably punish any of the persons who breach a given penal statute, that statute should not have been enacted in the first place.

Overcriminalization produces overpunishment, and that is its principal vice. More and more commentators from all political ideologies have come to appreciate what knowledgeable students of criminal justice have realized for some time: We in the United States punish too many people with too much severity.<sup>11</sup> Today, this phenomenon is increasingly characterized as an epidemic of mass incarceration.<sup>12</sup> One of many possible ways to retard mass incarceration is to reduce overpunishment, and one way to reduce overpunishment is to reduce overcriminalization. Of course, there are many other ways to combat this epidemic; some may be more fruitful than developing a theory of criminalization and each should be evaluated on its own merits. But identifying and implementing the correct theory of criminalization would represent major progress toward reaching this objective—an objective that many contemporary commentators agree to be of crucial significance.

Given the foregoing, I admit to having been surprised and disappointed about the extent to which commentators accept or reject given constraints because of their political leanings. Several examples of this phenomenon could be cited. In combination, they have helped to erode my confidence about the depth of the social consensus to reduce mass incarceration. In many respects, the movement to do so is reminiscent of pleas to reduce the federal

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11. See, e.g., Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report.

12. See, e.g., Todd R. Clear & James Austin, "Mass Incarceration," in Volume 4 of the present Report.

deficit. In the abstract, citizens increasingly believe that sentences throughout the United States are excessive or that government spending is too high. But opinions change quickly when respondents are asked about punishments for specific kinds of crime or about what exact government programs they would cut. With hindsight, I gather I was naïve to suppose that I had reached a level of philosophical abstraction on which criminal law and its reform is not thoroughly politicized.

In particular, quite a few respondents believe that punishments are often too lenient for sexual offenders.<sup>13</sup> For example, a 2016 sexual-assault case at Stanford University ignited public outrage after the defendant was sentenced to a “mere” six months in jail. A petition calling for the recall of the sentencing judge quickly attracted over 240,000 supporters,<sup>14</sup> and editorials called the sentence a “slap on the wrist” and a “setback for the movement to take campus rape seriously.”<sup>15</sup> Given the supposed prevalence of sexual offenses, increases in the severity of punishments would almost certainly cause levels of incarceration to rise rather than to fall. Those who believe sexual misconduct is a paradigm instance of undercriminalization are unlikely to succeed in retarding the phenomenon of mass incarceration.<sup>16</sup>

I admit that no one has a good theory of what might be called cardinal proportionality: how severely given kinds of conduct should be punished. Even when theorists agree that, all other things being equal, the severity of the sentence should be a function of the seriousness of the crime, and the seriousness of the crime is a function of its wrongfulness, harmfulness, and the culpability of the perpetrator, such abstract considerations provide almost no guidance for particular questions about the sentences to impose. How these factors should be balanced in specific cases, or what considerations must be held constant to satisfy the *ceteris paribus* clause, are hotly contested. No one ever said that just sentences would be easy to identify.

13. See generally Robert Weisberg, “Sexual Offenses,” in the present Volume; Wayne A. Logan, “Sex Offender Registration and Notification,” in Volume 4 of the present Report.

14. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), <http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html>.

15. Editorial, *Stanford sexual assault sentence was too light*, MERCURY NEWS (June 2, 2016), <http://www.mercurynews.com/2016/06/02/mercury-news-editorial-stanford-sexual-assault-sentence-was-too-light/>.

16. For other possible examples of undercriminalization, especially in foreign jurisdictions, see Dmitriy Kamensky, *American Peanuts v. Ukranian Cigarettes: Dangers of White-Collar Overcriminalization and Undercriminalization*, 35 MISS. C. L. REV. 148 (2016).

What kind of topic is ripe for scrutiny from the perspective of a theory of criminalization? Although my own work mostly examines the justifiability of drug crimes, statutes prohibiting the electronic possession of child pornography are also good candidates.<sup>17</sup> Perhaps these laws can survive this scrutiny and perhaps they cannot. But I hope we will not fudge the results of this analysis because we hold political views that give us a stake in the outcome. If we have confidence in our principles, we should be willing to allow the arguments to take us where they may.

In what follows, however, I will move away from the substantive content of penal statutes and focus instead on an example of politicization that involves resistance to a principled proposal to expand the scope of a defense we currently recognize under very limited circumstances. My shift from offenses to defenses should not be resisted. After all, a reduction in the scale of punishment can be accomplished just as effectively by enlarging defenses as by contracting offenses. The particular defense on which I will focus is that of ignorance (or mistake) of law. In my judgment, the unwillingness to enlarge this defense produces overcriminalization because it imposes penal liability on those who do not deserve it. I select this particular example from a number of possibilities for a simple reason. Except perhaps for a radical reform of our punitive drug policies, an expansion in the availability of the defense of ignorance of law has the potential to make a non-trivial dent in overpunishment—the phenomenon that makes us concerned about overcriminalization in the first place. In this case, as elsewhere, I think we should accept the constraints in my theory and be willing to accept whatever political implications they turn out to have.

## II. IGNORANCE OF LAW

I have long believed that the reluctance to recognize a greatly expanded (complete or partial) defense of ignorance of law throughout the Anglo-American world is normatively indefensible.<sup>18</sup> I will not describe existing doctrine in much detail; I assume most everyone is familiar with the general adage that ignorance of law is no defense as well as with the handful of important exceptions to this adage that most jurisdictions recognize.

Let me simply state my general position in theoretical terms I believe are roughly accurate, neglecting nuance and qualification. Most commentators are critical of strict liability in the criminal law, insisting that some level of culpability or mens rea should attach to every material element in penal statutes. I regard

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17. See Asaf Harduf, *Criminalization Downloads Evil: Re-examining the Approach to Electronic Possession when Child Pornography Goes International*, 34 B.U. INT'L L. J. 279 (2016)..

18. See DOUGLAS HUSAK, *IGNORANCE OF LAW* (2016).

culpability or mens rea as a requirement designed to ensure that defendants are blameworthy for their criminal acts; punishment in the absence of blame is almost always unjust. The culpability or mens rea provisions in penal codes guard against imposing criminal liability on persons who are mistaken about what they have done. As a default, a defendant is not guilty unless he is at least reckless, consciously disregarding a substantial and unjustifiable risk his conduct is criminal. But existing mens rea provisions almost solely protect persons who make mistakes of fact. As a result, a defendant who makes a mistake of law can have all of the culpability needed for conviction. A defendant can be reckless, for example, even though he is not aware of the substantial and unjustifiable risk that his conduct violates a law. Thus our existing doctrines that deny a defense of ignorance of law impose a kind of strict liability.<sup>19</sup>

The outstanding question, I believe, is why the mens rea, blameworthiness, or desert generally needed in order to impose criminal liability and punishment, does not extend to defendants who make mistakes of law as much as to defendants who make mistakes of fact. I believe that it should. Unfortunately, I cannot mount much of an argument for this belief. Let me simply offer one piece of evidence that most of us—especially those of us whose so-called intuitions have not been corrupted by a lifetime of immersion in legal practice—regard ignorance of law as a more robust excuse than current black-letter doctrine allows. At some time or another in our lives, each of us has violated a legal rule of which we were unaware. How did we react on these occasions, and how did we anticipate that others should react to us?

Consider the following example. After returning from abroad, I recently observed a stranger talking on a mobile phone in an area in which such conversations are expressly prohibited by Homeland Security—and where four prominently displayed signs warn travelers of the regulation. It is easy to predict how the offender reacted when an authority confronted him. He did not reply, “I have nothing to say on my own behalf; ignorance of law is no defense.” Instead, he responded apologetically, “I am sorry; I did not know I was not allowed to use my phone here.” I make two observations if I am correct to assume that this latter reply is nearly universal and the former is unusual or non-existent. First, the offender must have believed he was entitled to leniency if his plea were accepted as true. He would not have responded, for example, “my father has a lot of money” or “rules are made to be broken.” These latter retorts, I am sure he would realize, would get him nowhere. Second and just as importantly, the plea of ignorance is often accepted as a wholly or partially

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19. See the discussion in GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

valid defense by the authority who confronts him. One would be astonished to learn that this person did not actually receive some degree of leniency relative to an offender who knew mobile phones were prohibited and hoped he would not be detected. If the intuition that ignorance of law is no excuse were as entrenched as many commentators allege, we would be puzzled by the fact that ordinary persons plead it so frequently and authorities accept it so readily. But these familiar facts are not puzzling. A perspective on the culpability or blameworthiness of legally ignorant defendants must explain rather than neglect these truisms.

My claim that ignorance of a rule reduces or eliminates blameworthiness is indifferent to whether the rule in question is legal or moral. I hold there to be a strong presumption that our theory of penal liability should mirror our theory of moral responsibility. In morality, I believe most of us allow ignorance that one is acting wrongfully to at least mitigate our blame. This claim is comparative; the relevant kind of case in which to test this judgment compares two people who breach the same moral or legal rule and differ only in that the former but not the latter is aware her conduct is wrongful. The question to be answered, then, is whether each is equally deserving of blame for her immoral or illegal act. In my judgment, the answer is almost always that their blameworthiness differs substantially. If the extent of punishment should generally reflect blameworthiness, as I also believe to be the case, then those who are ignorant that their conduct breaches the rule in question should be punished less severely than those who understand perfectly that their act is immoral and/or criminal.

One kind of case that has attracted considerable attention from moral and legal philosophers is that of ancient slave owners. For example, Hittites who lived 30 centuries ago apparently had no moral qualms about enslaving captives caught in battle.<sup>20</sup> Let me stipulate what I also believe to be obvious: Slavery is an unjust institution and owning slaves is wrongful. How should we assess the moral blameworthiness of persons who own slaves today, knowing the institution to be unjust, relative to that of ancient Hittites, whose conduct is otherwise relevantly similar?<sup>21</sup> Reasonable minds can and do disagree, but I hold the blameworthiness of slave owners who know better to be greater than that of ancient slave owners who were morally ignorant. To support this judgment, we would need to move beyond simple intuitions, which may well conflict or be unclear, and invoke a general theory of the conditions that render persons blameworthy for their

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20. For recent commentary, see Alexander A. Guerrero, *Deliberation, Responsibility, and Excusing Mistakes of Law*, 6 JURIS. 81 (2015).

21. See *id.*

wrongful conduct. Although I happen to have such a general theory, further defense of my thesis that ignorance of a moral or legal rule should partly or wholly excuse would take us too far afield. I hope only to have suggested that the case for excuse is powerful and hardly outside the philosophical mainstream. The plausibility of this thesis is far greater than that of the extreme polar positions about justified criminalization with which I began.

My thesis about the excusing significance of ignorance of law should be assessed on its own merits. It should not be rejected because the critic invokes a political ideology to find its real-world implications to be distasteful. But this is exactly the reception to which pleas to expand the excusing significance of ignorance of law have tended to receive in our climate of polarization and paralysis. My own thoughts on this matter are not much evidence for or against such a reception. For better or worse, legal philosophers rarely influence the real world; we mostly engage one another. But concrete ideas to enlarge the excusing significance of ignorance of law have stalled in bills pending before Congress. For example, the Criminal Code Improvement Act of 2015 provides, among other things, that “if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.”<sup>22</sup> To oversimplify a bit, this statute would disallow criminal liability to be imposed on persons who make mistakes of law unless a reasonable person in their circumstances would not have made that mistake.

This Act seems destined to languish before a polarized Congress. Somewhat surprisingly, opposing commentary has come from politicians with whom liberal legal philosophers typically agree. Sen. Elizabeth Warren, for example, called the bill “shameful” because it would make it harder to convict persons who commit corporate crimes.<sup>23</sup> “All of a sudden, some Republicans are threatening to block a reform unless Congress includes a so-called mens rea amendment to make it much harder for the government to prosecute hundreds of corporate crimes,” she declared from the Senate floor.<sup>24</sup> “That is shameful because we’re already way too easy on corporate law breakers.”<sup>25</sup>

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22. H.R. 4002, 114th Cong. § 11(2) (2015).

23. Jordain Carney, *Warren: GOP push to block criminal justice reform ‘shameful’*, THE HILL (Feb. 3, 2016), <http://thehill.com/blogs/floor-action/senate/268056-warren-gop-push-to-block-criminal-justice-reform-shameful>.

24. *Id.*

25. *Id.*

Perhaps Warren is correct that we tend to be too lenient with corporate offenders. Each year, however, corporations pay billions of dollars to plaintiffs in civil penalties as well as to governments pursuant to deferred prosecution agreements.<sup>26</sup> We cannot expect to make a dent in retarding the problem of mass incarceration if we continue to believe that nothing less than prison represents a real punishment for wrongdoers that stigmatizes them sufficiently.<sup>27</sup> Even more importantly, however, is that Warren's retort does not begin to address the Bill on its merits. I trust Warren would not purport to solve the problem of under-punitiveness by endorsing a proposal to imprison corporate criminals who do not deserve it. She owes us a principled argument as to why anyone whose mistake of law is not even negligent deserves criminal liability and punishment.

Conversely, commentary in support of the Act has come from politicians with whom legal philosophers rarely agree. Some even agree that the defense should be conceptualized as a denial of *mens rea*. According to Orrin Hatch, member and former chairman of the Senate Judiciary Committee, "without adequate *mens rea* protections—that is, without the requirement that a person know his conduct was wrong, or unlawful—everyday citizens can be held criminally liable for conduct that no reasonable person would know was wrong. This is not only unfair; it is immoral."<sup>28</sup> Hatch's suggestion is potentially radical. It departs from textbook orthodoxy in construing the scope of *mens rea* to encompass not only knowledge of the relevant facts but also knowledge of the applicable law. To be sure, Hatch may be right or he may be wrong. But at least he offers a sketch of an argument of principle that should be confronted on its own merits. If Hatch is mistaken and it is fair to convict a person when no reasonable person would know her conduct to be wrong, we must be able to say why. I, for one, am unable to do so. In fact, I would go further and regard ignorance of law to be wholly or partly excusing even when the mistake is negligent. Penal liability for negligence is and ought to be unusual, if it is justifiable at all. In any event, it seems to me that whoever turns out to benefit from the foregoing Act should be excused for the simple reason that they do not deserve criminal liability and punishment.

Public commentary about this proposal tended not to address the argument of principle Hatch sketched. A subsequent editorial in *The New York Times*

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26. See BRANDON L. GARRETT, *TOO BIG TO JAIL* (2014).

27. Dan Kahan calls this the problem of "punishment incommensurability." See Dan Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691 (1998).

28. Press Release, Orrin Hatch, Hatch: It's Time for Criminal Justice, Mens Rea Reform (Sept. 15, 2015), <http://www.hatch.senate.gov/public/index.cfm/2015/9/hatch-it-s-time-for-criminal-justice-mens-rea-reform>.



criticized pending legislation it said “would require prosecutors to prove that a defendant ‘knew, or had reason to believe, the conduct was unlawful.’”<sup>29</sup> This proposal was alleged to be objectionable on the ground that it would “indiscriminately” require the “government to prove ‘mens rea’ or intent on the part of the defendant.”<sup>30</sup> It concluded: “Ignorance of the law is generally not an excuse for breaking it, and it certainly should not be turned into an excuse when the action inflicts serious harm to large numbers of people or to the environment.”<sup>31</sup> The editorial did not address the issue of whether or why it would be fair to excuse defendants who are ignorant of law when they do *not* inflict serious harm to large numbers of people or to the environment. As far as I can see, an argument about whether and to what extent legally ignorant defendants are blameworthy is not sensitive to the severity or the type of harm a defendant causes.<sup>32</sup>

My point is that we should not favor or oppose proposals to allow ignorance of law as an excuse by speculating about what class of penal wrongdoers would be most likely to benefit from the reform. In my judgment, white-collar environmental polluters who know they are violating the law are more blameworthy than white-collar environmental polluters who do not know they are violating the law. Similarly, disadvantaged minority drug offenders who do not know they are violating the law are less culpable than disadvantaged minority drug dealers who do know they are violating the law. The latter, of course, are far more likely to be the kind of defendants who attract sympathy. Nonetheless, I hold ignorance to be partly or wholly excusing, regardless of the content of the law about which the mistake is made—and regardless of the socioeconomic class of the person who makes it.

Would a relaxation of the general rule that ignorance of law is no excuse make a significant dent in the problem of over-punishment? It is hard to say in the absence of better empirical data about the extent to which the law is known by persons who commit criminal acts. But my own suspicion is that the change would be neither momentous nor trivial. As I have indicated, however, apart from a radical alteration in our punitive drug policy—which I happen to have publicly championed for decades—it is hard to think of a single principled reform of the substantive criminal law that is likely to have a greater impact.<sup>33</sup>

29. Editorial, *Don't Change the Legal Rule on Intent*, N.Y. TIMES (Dec. 6, 2015), <https://www.nytimes.com/2015/12/06/opinion/sunday/dont-change-the-legal-rule-on-intent.html>.

30. *Id.*

31. *Id.*

32. Some philosophers disagree. See my discussion of so-called *quality of will* theories of blameworthiness in HUSAK, *IGNORANCE OF LAW*, *supra* note 18.

33. See DOUGLAS HUSAK: *DRUGS AND RIGHTS* (1992).



Still, we sometimes must be willing to settle for changes that turn out to be incremental. If we really hope to make a dent in mass incarceration by reserving criminal liability for those who deserve it, the foregoing proposal is a sensible part of a solution.

Moreover, consider the long-term effects my proposal would be expected to cause. How would we predict legislators would respond to an expansion of a defense of ignorance of law? To answer this question, we must ask why sane adult defendants make mistakes of law. Under what material conditions is ignorance of illegality likely to be prevalent? I agree with Hatch that a main source of the problem is overcriminalization. He writes, “for too long, Congress has criminalized too much conduct and enacted overbroad statutes that sweep far beyond the evils they’re designed to avoid.”<sup>34</sup> Prohibiting conduct that not even reasonable people would know to be criminal is a terrible idea. These crimes should probably be repealed, and new statutes with the same flaw should not be enacted—regardless of whether they are likely to be used against white-collar or blue-collar offenders. I am now resigned to the reality that proposed reforms of the criminal law will continue to be politicized in the foreseeable future. Nonetheless, I encourage policymakers to resist politicization and to evaluate reforms on grounds of principle. If we truly aspire to resist overcriminalization and overpunishment, we should care more about what defendants deserve and less about what class of offenders is most likely to benefit from the changes proposed.

### RECOMMENDATIONS

1. **Specifically, I recommend that the defense of ignorance of law should be expanded along the lines proposed in either the House or Senate bills on mens rea reform.**<sup>35</sup> The penal sanction should be reserved for persons who deserve to be punished, and those who violate criminal laws of which they are unaware deserve complete exculpation or at least mitigation in the severity of their sentence.
2. **More generally, the extreme partisanship that divides our country ideologically should not be brought to bear when assessing principled proposals to further the urgent goal of reducing the size and scale of the substantive criminal law.** Obviously, legal philosophers might well be mistaken in their efforts to identify the principles that should be

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34. Press Release, *supra* note 28.

35. See Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. § 11(2) (2015); Mens Rea Reform Act of 2015, S. 2298, 114th Cong. § 2 (2015).

applied to limit the criminal sanction. But if a given defendant does not deserve to be punished, he should not bear the hardship and stigma of a criminal conviction regardless of whether he wears a white or a blue collar. Arguments to reduce the penal sanction should be assessed on their own merits.

3. **Even more generally, further efforts should be undertaken to identify principled bases to check the tendency to punish too much and to punish too many.** These efforts might consist in either a repeal of penal statutes or an enlargement of defenses for violations of the statutes that should be retained.

# Overfederalization

Stephen F. Smith\*

*Since the 1960s, Congress has steadily expanded the crime-fighting reach of the federal government. Unfortunately, the constant drumbeat to “federalize” criminal law by passing more federal statutes, ratcheting up already severe federal punishments, and expanding the federal prison population has accomplished precious little in terms of public safety. The failed drug war proves as much. Worst still, the virtually limitless and unchecked charging authority of federal prosecutors undermines the effectiveness of American criminal justice. Instead of complementing state efforts by focusing on areas of federal comparative advantage, federal prosecutors waste scarce resources “playing district attorney”—that is to say, pursuing the same kinds of crimes that state prosecutors do. The result is a federal prison population that is bursting at the seams, and a national drug problem that has never been worse. The solution is for Congress to undertake a major overhaul of federal criminal law. The number and scope of federal criminal statutes should be drastically reduced, and the definition of federal crimes tightened and modernized, to limit federal enforcement to offenses that are of peculiar concern to the federal government and offenses that defy adequate response within the state system. Sentencing policies that generate unusually severe punishment in federal court, such as harsh statutory mandatory minimums for drug and nonviolent weapons offenses, and overbroad asset forfeiture laws, should be repealed or at least reformed to eliminate incentives for prosecutors to pursue garden-variety criminal matters in federal court. In this context, as in many others, “less is more”: a streamlined federal criminal code limited to the nation’s worst offenses, which reserves major penalties for major crimes, will better protect the public than our costly and ineffective current system of overfederalization.*

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## INTRODUCTION

Since the 1960s, the federal government has played a far more expansive role in criminal law enforcement by virtue both of the large and ever-growing number of federal criminal statutes and less restraint by federal prosecutors. As a result of this “federalization” of criminal law, “the distinction between Federal and State law is effectively dead, at least as a matter of substantive law.”<sup>1</sup> Consequently, for all but the most trivial of crimes, a determined federal prosecutor today could prosecute if he wished—and, increasingly, federal prosecutors are bringing more garden-variety criminal cases in federal court.

In addition to the usual problems associated with overcriminalization,<sup>2</sup> federalization raises serious problems of its own. That is to say, even if *state* criminal codes have been appropriately expanded, the enlarged scope of *federal* criminal jurisdiction remains troubling, particularly given the unusual severity of federal punishments. There is indeed a vital federal role in criminal law, but not to duplicate the efforts of state enforcers. In areas of overlapping authority, federal enforcement must be limited to crimes that cannot adequately be addressed by states. This simply will not happen without federal sentencing reform, a better defined federal criminal code, and more nationally uniform federal enforcement.

## I. THE FEDERALIZATION OF CRIMINAL LAW

### A. THE EXPLOSIVE GROWTH OF FEDERAL CRIMINAL LAW

From the founding of the country until the Civil War, federal criminal law enforcement was constrained by two bedrock constitutional principles. The first principle was that, unlike the states, the federal government lacked the “police power,” understood as the power to protect the health, welfare, and morals of citizens against the predation of criminals. The second constitutional principle, closely related to the first, was that the federal government had no inherent power but only limited, enumerated powers.<sup>3</sup>

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1. Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 90–91 (2000) (emphasis omitted).

2. See generally Douglas Husak, “Overcriminalization,” in the present Volume.

3. See U.S. CONST. amend. X (stating that all powers “not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”).

Together, these constitutional principles left the federal government only a limited role in criminal law. Federal enforcers “confined [their] prosecution to less than a score of offenses,”<sup>4</sup> offenses involving criminal activity that either occurred outside of state jurisdiction or uniquely threatened the operations, property, or personnel of the federal government. All other matters were for state-court enforcement.

Those days, of course, are long gone. With Congress having cast off the shackles of federalism and self-restraint in recent generations, it comes as no surprise that the loose collection of statutes known as “federal criminal law” is sprawling and virtually limitless in its reach into the domain of state criminal law. It is, however, surprising just how large, sprawling, and inaccessible the resulting collection of statutes (which, strictly speaking, is not properly referred to as a “code” at all)<sup>5</sup> has become after more than a century of statute-by-statute accumulation.

It is surprising but true that no one—not the Department of Justice, scholars in the field, nor blue-ribbon task forces that spent years studying the subject—has even a rough idea of how many federal criminal laws there are. The American Bar Association’s Task Force on Federalization, for instance, abandoned its own years-long counting effort as futile given how “large ... the present body of federal criminal law [is].”<sup>6</sup> Even defenders of the federalization of criminal law concede that its scope is “potentially infinite”: “Current federal criminal law is set forth in forty-eight titles of the United States Code, encompassing roughly 27,000 pages of printed text, as interpreted in judicial opinions found in over 2,800 volumes, containing approximately 4,000,000 printed pages.”<sup>7</sup>

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4. ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIMINAL LAW* 5 (1998) [hereinafter *FEDERALIZATION TASK FORCE REPORT*].

5. As a leading authority on white-collar crime put it: “Any discussion of federal penal law must begin with an important caveat: There actually is no federal criminal ‘code’ worthy of the name. A criminal code is defined as ‘a systematic collection, compendium, or revision of laws.’ What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.” Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) (footnote omitted).

6. *FEDERALIZATION TASK FORCE REPORT*, *supra* note 4, at 9.

7. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 15 (2012). The potential scope of federal criminal liability is broader still given that many crimes are defined in vague terms and contain inadequate mens rea requirements, which allow prosecutors even greater power to charge and convict. *See generally* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565-74 (2012).

Several factors combine with the sheer number of federal criminal laws to make it exceedingly difficult to determine how many actually exist. Federal criminal statutes are not contained in any one volume of the U.S. Code (not even the one volume, Title 18, specifically entitled “Crimes and Criminal Procedure”) but rather scattered throughout almost 50 different volumes, without useful indexing and cross-references. In addition to being difficult to find, federal criminal statutes are often quite complex and multifaceted in structure, with a single provision creating multiple separately enforceable criminal prohibitions.<sup>8</sup>

The difficulty of the Herculean (or, more accurately, Sisyphean) effort to count the number of federal criminal laws is further compounded by the fact that many regulations issued by federal agencies can result in criminal punishment. Given that many administrative regulations are criminally enforceable, a count of the number of federal criminal statutes alone cannot adequately convey the true scope of available punishment; criminally enforceable agency rules and regulations must also be taken into account. Efforts to do so put the number of federal criminal prohibitions at anywhere from 10,000, on the low side, to a staggering 300,000.<sup>9</sup>

The daunting size and utter chaos in federal criminal law resulted principally from the fact that new criminal laws are enacted by Congress at a break-neck pace, year after year. On average, Congress created 56 new crimes every year from 2000 to 2008.<sup>10</sup> Significantly, Congress enacted new criminal laws at

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8. See FEDERALIZATION TASK FORCE REPORT, *supra* note 4, at 9–10. As an example of how complexity bedevils efforts to count the number of federal criminal statutes, consider the Racketeer-Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.* RICO could be counted as just one criminal law because only one provision in it (section 1963) imposes criminal penalties. On closer inspection, however, the head count is not nearly so simple. Section 1963 authorizes punishment but does not define the RICO offense. The offense is defined in four different provisions of section 1962, contained in lettered subsections (a)–(d), and each of those subsections provides separate bases for conviction. This might make four rather than one the proper count for RICO. Nevertheless, even four might understate the true number of RICO crimes. Sections 1962(a)–(c) each provide two or more different ways of violating each subsection. Section 1962(c), for example, makes it a crime for a person employed by, or associated with, a RICO enterprise to “conduct” its affairs through a pattern of racketeering activity or to “participate ... in the conduct of” the enterprise’s affairs through such a pattern. Combined with the conspiracy provision of section 1962(d) (which makes it a separate offense to conspire to violate subsections (a)–(c)), then, section 1962(c) might be viewed as creating four different crimes: (1) conducting; (2) participation; (3) conspiring to conduct; and (4) conspiring to participate. So viewed, there are at least twelve separate RICO crimes.

9. O’Sullivan, *supra* note 5, at 649.

10. See JOHN S. BAKER, JR., HERITAGE FOUND., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 5 (2008) (estimating the number of federal criminal offenses at “over 4,000”).

roughly the same rate during this period as it did during the two prior decades<sup>11</sup> even though 2000 to 2008 was a period of uncommonly low crime rates.<sup>12</sup> The rate at which Congress has added new criminal prohibitions in recent decades is so high that, according to the ABA's Federalization Task Force, "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970."<sup>13</sup>

To be sure, federal prosecutors have not enforced these laws anywhere near the frequency they could under current law. Now, as in the prior era when federal criminal law was much smaller in scope and used mainly to protect direct federal interests, the vast majority of enforcement activity continues to take place in state courts nationwide. Indeed, it is fair to say the federal government's share of the nation's total criminal litigation is vanishingly small.<sup>14</sup> Nevertheless, it would be a mistake to conclude that the steady expansion in the size and scope of federal criminal law has been inconsequential.

Focusing on aggregate numbers of prosecutions alone unduly minimizes the role of the federal government in certain areas. For example, judging from the small number of criminal prosecutions brought annually against corporations in federal court, one might think articles of incorporation serve as "get out of jail for free" cards for corporations. That conclusion, however, would be mistaken.

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11. *Id.*

12. According to one recent account: "In the mid-1990s, crime rates plummeted all across America (in cities, suburbs, exurbs, and rural areas), across all demographic groups (rich and poor, black and white, young and old), and were seen in every crime category. By 2007, the latest year for which systematic data are available, rape, robbery, homicide, burglary, larceny, and motor vehicle theft were all down nearly 40 percent from the peak of the U.S. crime wave in 1991." Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LEGAL & SOC. INQUIRY 489, 490 (2010) (citations omitted). The 1990s crime drop "lasted over sixteen years," and was so steep that in 2000 "homicide rates reached levels last reported in the mid-1960s." *Id.*

13. FEDERALIZATION TASK FORCE REPORT, *supra* note 4, at 7 (emphasis omitted). Congress may be the prime culprit, but the federal courts share responsibility for the extreme breadth and severity of federal criminal law. As I have argued in separate work: "Far from being innocent bystanders in the federalization of crime, federal judges have been all too willing to construe federal crimes expansively, without regard to the often dramatic effects expansive interpretations will have on the punishment federal defendants face.... The inevitable result of how courts approach their interpretive tasks is a broader and more punitive federal code." Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 884 (2005).

14. See Klein & Grobey, *supra* note 7, at 18 (reporting that "from 1994-2006, federal court felony convictions comprised 5% to 6% of all felony convictions in the country annually"). The federal share would be considerably smaller if state misdemeanor prosecutions were taken into account. See generally NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009) (finding that there were more than 10 million state misdemeanor prosecutions in 2006 alone).

Of course, the federal government rarely indicts corporations, due no doubt in part to the potentially serious collateral consequences for innocent corporate stakeholders.<sup>15</sup> Even so, the Department of Justice has nonetheless played an aggressive (and, some would say, overzealous) role since the collapse of Enron in the area of corporate crime by using the threat of prosecution to compel corporations to pay billions of dollars in penalties and change their corporate structures to ensure greater future legal compliance.<sup>16</sup> The fact that the Justice Department relies principally on negotiated means, as opposed to actual prosecution, hardly means the government does little to hold corporations accountable for their crimes.

Even looking solely at actual criminal prosecutions, however, it is clear that the federal government does indeed play a significant enforcement role in certain areas. In 2006, almost one in five felony firearms offenses was prosecuted in federal court.<sup>17</sup> Roughly 10% of the nation's prosecutions for drug-trafficking and white-collar offenses also took place in federal court.<sup>18</sup> Two of the areas of most frequent federal enforcement activity (firearms and drug offenses) involve statutes passed in the 1960s and 1970s—the Omnibus Crime Control and Safe Streets Act of 1968,<sup>19</sup> and the Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>20</sup>—not laws of more ancient origin. This fact refutes any suggestion that the dizzying array of new statutes enacted in recent decades are enforced so rarely as to be of little or no consequence in debates over federalization.

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15. See U.S. DEP'T. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.1100(B) (recognizing that prosecution of corporations may "seriously harm[] innocent third parties who played no role in the criminal conduct").

16. The results of this enforcement strategy have been dramatic. As a recent Manhattan Institute report notes, such arrangements are so "commonplace" that they "might be characterized as a 'shadow regulatory state' over business." ISAAC GORODETSKI & JAMES R. COPLAND, MANHATTAN INST., *THE SHADOW LENGTHENS: THE CONTINUING THREAT OF REGULATION BY PROSECUTION* at i (2014). Since 2014, federal prosecutors have reached approximately 300 deferred or non-prosecution agreements with major corporations, including ten Fortune 100 companies. *Id.* The almost 70 agreements reached during 2014-16 alone netted the government roughly \$12 billion in fines and penalties. *Id.* See generally Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41 (2016); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

17. Klein & Grobey, *supra* note 7, at 19.

18. *Id.*

19. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 921-28).

20. Pub. L. No. 91-513, 84 Stat. 1236 (1970).



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### B. EXTREME SEVERITY IN FEDERAL SENTENCES

By virtue of the nearly complete overlap between federal and state criminal law resulting from the federalization of criminal law, most federal enforcement activity involves conduct that could be (and is frequently) prosecuted in state court. If federal criminal laws and sentencing policies mirrored those available in state court, it would be of limited significance whether offenders are prosecuted in federal or state court. In fact, however, there are substantial differences between the two forums, and so it matters greatly whether or not a prosecution takes place in federal court.

Although other differences exist, the most important difference between federal and state prosecution, and certainly the most consequential for offenders and taxpayers alike, is sentencing. Federal sentences are typically far more severe than state sentences for parallel offenses—which one might expect, given that, as Congress well knows, its harsh laws will only be applied against a small subset of available offenders, with the overwhelming majority being prosecuted in state court. This means that the severity of sentence the defendant receives for the same crime will vary dramatically if prosecuted in federal court or left to state authorities.

The sentencing difference is at its starkest in first-degree murder cases. In almost half the states and the District of Columbia, the death penalty has either been abolished or is subject to gubernatorial moratorium.<sup>21</sup> In these states, the maximum punishment for murder is effectively life imprisonment, yet, in each, a murder prosecution in federal court can result in the death penalty.<sup>22</sup> In these states, the decision between state or federal prosecution can literally make the difference between life and death—as seen most recently in the successful capital prosecution of the Boston Marathon bomber in U.S. District Court in Massachusetts, a state that abolished the death penalty more than 30 years ago.<sup>23</sup>

Harsher federal sentences are also handed down in noncapital cases. “[S]ome federal laws, most notably those dealing with drug trafficking and weapons offenses, require imposition of harsh statutory mandatory *minimum* sentences which can be as long as or longer than the *maximum* sentences

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21. See *States With and Without the Death Penalty*, DEATH PENALTY INFO.CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 16, 2017).

22. See 18 U.S.C. § 3591. For a discussion of capital punishment, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

23. See Ann O’Neill et al., *Boston Marathon Bomber Dzhokhar Tsarnaev Sentenced to Death*, CNN (May 17, 2015), <http://www.cnn.com/2015/05/15/us/boston-bombing-tsarnaev-sentence/>.

permitted under some state laws.”<sup>24</sup> This is by no means an isolated occurrence or exceptional situation applicable only to persons who are unusually dangerous or blameworthy.

As Professor Sara Sun Beale convincingly explains:

The sentences available in a federal prosecution are generally higher than those available in state court—*often ten or even twenty times higher*. For example, in one drug case the recommended state sentence was eighteen months, while federal law required a mandatory minimum sentence of ten years, and the applicable federal sentencing guidelines range was 151 to 188 months for one defendant and 188 to 235 months for the other. Another defendant ... who received a diversionary state disposition to a thirty-day inpatient drug rehabilitation program, followed by expungement of his conviction upon successful completion of the program and follow-up, was subject to forty-six to fifty-seven months of imprisonment under the applicable federal guidelines.<sup>25</sup>

Two main features of federal sentencing policy combine to produce these comparatively severe results. The first is mandatory minimums, which are much more prevalent (and much harsher) at the federal level than in most states.<sup>26</sup> The second is the rigid sentencing guidelines applicable in federal prosecutions.<sup>27</sup> By virtue of these distinctive facets of the federal approach to

24. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997) (emphasis added).

25. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits of Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 998-99 (1995) (emphasis added).

26. As I have explained elsewhere: “There are approximately one hundred different provisions in the federal criminal code imposing mandatory minimum sentences, and a number of these provisions concern the frequently prosecuted areas of drug and weapons offenses. The impact of these provisions is far greater than their number would suggest. For example, between 1984 and 1991 alone, ‘nearly 60,000 cases’ were sentenced pursuant to mandatory minimums.” Smith, *supra* note 13, at 895. The U.S. Sentencing Commission has long viewed the danger of excessive punishment as grounds for repealing mandatory minimums. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). See generally Erik Luna, “Mandatory Minimums,” in Volume 4 of the present Report.

27. Of course, the federal guidelines no longer have the force and effect of law after *United States v. Booker*, 543 U.S. 264 (2005). Still, the influence of the guidelines has remained stable in the most frequent areas of federal prosecution (namely, immigration, drugs, and firearms offenses). See U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 62–66 (2012). See generally Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report.

sentencing, “[i]t is not unusual for codefendants whose conduct is identical to receive radically different sentences, depending upon whether they are prosecuted in state or federal court.”<sup>28</sup>

## II. THE COSTS AND BENEFITS OF FEDERALIZATION

As the discussion so far indicates, the federalization of criminal law has required enormous and sustained effort on the part of the federal government over the last couple of generations. Congress has repeatedly passed new criminal laws and increased the scope of, and penalties for, existing offenses; similarly, federal prosecutors have substantially increased the number of criminal cases they bring annually. The increased number of federal criminal prosecutions has required dramatic increases in annual expenditures for the investigation and prosecution of federal offenses, not to mention the imprisonment of significantly more people than existing federal facilities were designed to accommodate.

Have these considerable expenditures of effort and resources been worth it? Unfortunately, the answer would seem to be no. Whatever the benefits associated with the federalization of criminal law, they are slight in relation to their detrimental impact on the effectiveness of America’s criminal justice system.

### A. ILLUSORY BENEFITS

The federalization of criminal law was accomplished in the name of public safety—the “crime problem,” the argument ran, was simply too large for states to tackle alone—and so it would be natural to defend federalization on crime-reduction grounds. After all, for a public perpetually obsessed with violent crime and illegal drugs, the best possible argument in favor of a robust federal crime-fighting role would be that federal enforcement meaningfully reduced violent and drug-related crimes. This case, however, simply cannot be made.

Although rates of violent crime have been surprisingly low in recent decades,<sup>29</sup> there is no evidence that law enforcement played a significant role in that welcome development. After all, Canada experienced an “almost perfectly matched” crime drop during the same period, even though the major leading

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28. Beale, *supra* note 25, at 999. It therefore is incorrect to say that critiques of “the severity of sentencing schemes ... are not directly relevant to the over-federalization debate; rather, they are criticisms that apply to state and federal drug enforcement schemes alike.” Klein & Grobey, *supra* note 7, at 25. The severity of federal sentences, particularly for drug offenses, is a—if not *the*—foundational plank in modern criticisms of the federalization of criminal law. See generally Smith, *supra* note 13; Beale, *supra* note 25; Clymer, *supra* note 24.

29. See Barker, *supra* note 12.

potential causes of the crime drop in the United States—“a decade-long economic boom, an explosive expansion of incarceration, added police—didn’t happen in Canada.”<sup>30</sup> Significantly, “no scholar credits mass imprisonment with the bulk of the crime decline.”<sup>31</sup>

Moreover, it strains credulity to think *federal* enforcement efforts were a significant causal factor in the crime drop given how tiny the federal footprint in violent crime is. Violent crime—including crimes as serious as terrorism and murder—accounts for relatively few federal prosecutions annually. In 2011, for example, *less than 5%* of offenders prosecuted in federal court were charged with crimes of violence, broken down as follows: “murder (0.1%), assault (1%), kidnapping (0.1%), robbery (1%), carjacking (0.1%), and terrorism (0%).”<sup>32</sup> Similarly, the percentage of federal inmates incarcerated for crimes of violence has hovered at or near 7% for the last few years; it has not cracked 10% in the last 16 years.<sup>33</sup> In light of such small numbers, it is highly unlikely that federal prosecution played any substantial role in the recent drop in violent crime.

Furthermore, the so-called “war on drugs” undermines any suggestion that the greater federal presence has made much of a difference in reducing crime. Drugs have been the leading area of federal enforcement since President Richard Nixon declared illegal drug use “Public enemy Number 1” in 1971. Today, the federal government alone spends \$15 billion annually on drug control, and has spent a total of \$1 trillion since 1971.<sup>34</sup> Illegal drugs remain the single largest area of federal criminal enforcement, accounting for approximately one-third

30. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE 199-200* (2007).

31. Barker, *supra* note 12, at 598; *see also* Todd R. Clear & James Austin, “Mass Incarceration,” in Volume 4 of the present Report; Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report; Shawn D. Bushway, “Incapacitation,” in Volume 4 of the present Report. The most that can be said, given the available evidence, is that “get tough” enforcement policies, combined with sustained economic growth and demographic changes, “account[ed] for less than half of the national crime drop.” *See, e.g.,* ZIMRING, *supra* note 30, at 46.

32. Klein & Grobey, *supra* note 7, at 21–22. The vast majority of today’s federal prosecutions involve immigration, drug, and fraud offenses, which together account for almost three-quarters of the annual caseload. *See id.* at 21.

33. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2013*, at 17 tbl.16 (2014). The data here may not tell the full story, insofar as prosecutions for immigration, weapons possession, or other nonviolent offenses can serve to incapacitate persons who might otherwise commit violent crimes. The point is that federal enforcers simply do not target violent crime.

34. COUNT THE COSTS, *THE WAR ON DRUGS: WASTING BILLIONS AND UNDERMINING ECONOMIES 3* (2013), <http://www.countthecosts.org/sites/default/files/Economics-briefing.pdf>.

(31.8%) of the prosecutions in fiscal 2015.<sup>35</sup> Not surprisingly, drug offenders have occupied 50% to almost 60% of the spaces in federal prisons over the last decade, showing that the “war on drugs” has been a leading driver of mass incarceration at the federal level.<sup>36</sup>

Despite these enormous efforts at the federal level to eradicate illegal drug use, few outside observers would contend that the “war on drugs” has been anything but a monumental failure. According to a RAND Corporation report, “[t]he overall trend in cocaine and heroin retail prices during most of the past two decades has been downward (after adjusting for potency),” which “suggests *greater* availability of drugs on the street in the United States, not less.”<sup>37</sup> As one would expect, ready access to illegal drugs at cheaper prices—not to mention a national drug-control strategy that prioritizes punishment over treatment—has resulted in increased drug use, even among minors.<sup>38</sup> The “war on drugs,” in short, is no nearer “victory” than when it was declared.

The failure of the drug war shows the folly of the federalization of criminal law. For decades, the federal government has devoted enormous resources and enforcement efforts, and filled federal prisons with traffickers and users of illegal drugs, yet illegal drug use is rampant, if not worse. If such sustained federal attention and enormous resources have failed to produce any meaningful progress toward winning the war on drugs, there is every reason to doubt the

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35. GLENN R. SCHMITT & ELIZABETH JONES, U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015, at 2 (2016) [hereinafter 2015 OVERVIEW], [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf).

36. CARSON, *supra* note 33, at 17 tbl.16. See generally MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 3-9 (2007) (discussing harsh federal sentencing rules for drug offenders and their impact).

37. JONATHAN P. CAULKINS, ET AL., RAND DRUG POL’Y RES. CTR., HOW GOES THE “WAR ON DRUGS”? AN ASSESSMENT OF U.S. DRUG PROBLEMS AND POLICY 7 (2005).

38. The 2014 National Survey on Drug Use and Health found that the percentage of Americans, aged 12 or older, who used an illicit drug in 2014 was higher than in every year between 2002 and 2013, driven primarily by increased heroin and marijuana use and widespread opiate abuse. See generally CENTER FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH (2016).

effectiveness of federal enforcement efforts to make a dent in violent crime—which, despite an abundance of available federal laws,<sup>39</sup> federal enforcers do little to prevent.

That said, there is a vital role for federal criminal law to play in protecting the public against the predation of criminals. To be impactful, federal enforcers should *complement*, not *duplicate*, state enforcement efforts. That is to say, in areas of overlapping enforcement authority, federal prosecutors should stop “playing district attorney,” which they do when pursuing the same kinds of offenses and offenders that state prosecutors and police do. Instead, federal enforcers should focus on crimes that are not being, or by their nature cannot be, handled appropriately at the state level, such as terrorism, major international drug trafficking, corruption, and excessive force by police.<sup>40</sup> The “band-aid” solution of new federal criminal laws that will rarely (if ever) be enforced, or increased enforcement of existing laws at levels too small to make a meaningful difference, does nothing except allow publicity-seeking federal officials to take unwarranted credit for being responsive to public-safety needs.

### B. SERIOUS PROBLEMS

In addition to offering little discernible public-safety benefit, the federalization of criminal law has created serious problems that tend to be overlooked in a field characterized by endless moral condemnation of criminals and blind faith in the power of criminal punishment to solve even the most intractable social problems. As a direct result of federalization,

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39. See, e.g., 18 U.S.C. § 36 (drug-related murders); *id.* §§ 245, 249 (hate crimes); *id.* § 875 (threats); *id.* § 924(c) (use of firearm during crimes of violence or drug trafficking); *id.* § 1201 (kidnapping); *id.* § 1844 (arson); *id.* § 1951 (robbery, extortion, and violence in furtherance thereof); *id.* § 1958 (murder for hire); *id.* § 1959 (violence in aid of racketeering); *id.* § 2113 (bank robbery); *id.* § 2119 (carjacking); *id.* § 2251 (murder involving sex offenses against children); *id.* §§ 2261, 2261A (domestic violence and stalking).

40. Organized crime illustrates the positive impact that a wise deployment of federal resources can have for public safety. Due to the international nature of the mafia and other large-scale organized criminals, not to mention their penchant to use bribery, extortion, and other misdeeds to corrupt state and local politicians, judges, and enforcers, the Justice Department made it a priority in the 1960s to eradicate organized crime. These efforts achieved “enormous successes” because federal prosecutors “are peculiarly well equipped to combat organized crime.” John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1126 (1994-95). See generally Smith, *supra* note 13, at 911 n.77 (citing sources). The federal government has no such comparative advantage when it comes to street crime or low-level drug offenses.

badly needed federal enforcement resources have been (and continue to be) squandered in areas state authorities can handle effectively on their own. This serial misallocation of federal enforcement resources has come at the expense of areas where federal resources could be more effectively deployed.

This “ready-fire-aim!” enforcement approach (“strategy” would be too strong of a word) is driven by three factors inherent in a “federalized” system of criminal law. The first is the virtually limitless scope of federal criminal law, which enables federal prosecutors to pursue all but the most localized and trivial of crimes. The second factor is the extreme severity and rigidity of federal penalties. The availability of considerably higher sentences in federal court gives enforcers (state and federal) incentives to “take federal” cases which otherwise would receive more appropriate sentences within the state system. The third factor is uncontrolled prosecutorial discretion allowing individual prosecutors in regional U.S. Attorneys’ offices nationwide the flexibility to pursue and decline the cases they wish.<sup>41</sup>

Taken together, these features of our federalized system produce a variety of adverse effects. First, they invite arbitrariness by federal prosecutors in making their all-important charging decisions. Second (and relatedly), instead of complementing the crime-fighting efforts of state enforcement officials, boundless charging authority at the federal level will sometimes be used to *undermine* state public-safety efforts. Third, and most obviously, federalization allows prosecutors to impose negative externalities on the federal judiciary and prison system in the form of significant increases in federal caseloads and prisoner volume, increases that simultaneously threaten the quality of justice meted out in the federal courts and create dangerous conditions in our nation’s prisons (and, eventually, back on the streets). Thus, in addition to offering an illusory “upside,” federalization has important “downsides”—downsides that militate in favor of a considerably narrower, better defined federal criminal code, more defensible sentencing policies, and a more transparent and coordinated approach to enforcement discretion.

### 1. Arbitrary prosecutorial discretion

A regime such as ours, in which federal prosecutors have virtually limitless (and largely uncontrolled) discretion to charge suspects who committed crimes cognizable under state law, invites arbitrariness. By virtue of the substantial difference in the severity of sanctions available in federal court as compared

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41. For discussions of prosecutorial discretion, see Ronald F. Wright, “Prosecutor Institutions and Incentives,” in Volume 3 of the present Report; and John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report.



to most state courts,<sup>42</sup> the few offenders targeted for federal prosecution will typically be punished far more severely than their many similarly situated counterparts in the state system. The incremental punishment convicted federal offenders receive, over and above the punishment available in state court, is due entirely to a federal prosecutor's charging decision, not the severity of the offender's crime.

It goes without saying that harsher federal sanctions would be warranted if the persons selected for federal prosecution were categorically more dangerous or blameworthy than prisoners sentenced in state court. That, however, is not the case. Many federal prisoners are no worse than those who committed similar offenses yet were lucky enough to escape federal prosecution. In fact, the federal prisoners may well be *less* culpable than their counterparts in the state system.

Three quick comparisons should make the point. First, the public would undoubtedly regard violent crimes as the worst offenses, yet the percentage of offenders in federal prisons for violent offenses is in the single digits and has been for years.<sup>43</sup> By contrast, state prisons are mostly filled with seriously violent offenders, such as murderers and rapists.<sup>44</sup> Second, although the public would regard drug dealing as worse than mere use, 11.5% of 2015 federal drug prosecutions involved mere possession of controlled substances, without any intent to distribute.<sup>45</sup> The percentage of people incarcerated in federal and state prisons for mere possession is roughly the same—3.7% (federal) versus 3.5% (state)<sup>46</sup>—a surprising result for those who would like to believe that only traffickers are prosecuted federally or that federal prosecutors focus more heavily on trafficking than state prosecutors do.

Third, among drug offenses, those involving “hard drugs” (such as heroin, cocaine, and methamphetamines) are commonly viewed as more serious than those involving marijuana, a drug that many Americans believe has valid medicinal or recreational uses.<sup>47</sup> This is because hard drugs, unlike marijuana, carry grave risks of overdose, addiction, and other seriously adverse consequences. Nevertheless, of all federal drug prosecutions in 2015, the

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42. See generally Smith, *supra* note 13, at 893-96.

43. See *supra* notes 29-30 and accompanying text.

44. See E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015, at 14 tbl.9 (2016).

45. See 2015 OVERVIEW, *supra* note 35, at 2.

46. See PRISONERS IN 2015, *supra* note 44, at 15-16 tbls.13-14.

47. See Alex Kreit, “Marijuana Legalization,” in the present Volume.



percentage involving marijuana (24.8%) exceeded the percentage for powder cocaine and heroin (18.4% and 12.1%, respectively), and almost equaled the percentage for methamphetamine (25.8%).<sup>48</sup>

Contrary to popular belief, a surprisingly large number of drug traffickers convicted in federal court are nonviolent, relatively small-time dealers, not “drug kingpins” or career criminals. According to U.S. Sentencing Commission data from fiscal 2015, only 17.2% of federal drug cases involved a weapon of any kind.<sup>49</sup> Almost two-thirds of persons convicted of marijuana offenses (59.5%) had the lowest criminal history possible under the Sentencing Guidelines (Category I).<sup>50</sup> Additionally, 16.7% of defendants convicted of drug trafficking were sentenced below the applicable guidelines range, based on a judicial finding that they played only a “minor or minimal” role in the drug offense.<sup>51</sup> Finally, of the roughly 22% of federal defendants convicted of offenses carrying statutory mandatory minimum sentences, 18.8% were drug offenders with such strong grounds for leniency that they qualified for reduced sentences under the “safety valve” statute,<sup>52</sup> a figure that had been as high as 39.4% as recently as 2010.<sup>53</sup>

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48. See 2015 OVERVIEW, *supra* note 35, at 2 fig.2.

49. See *id.* at 7. There is no empirical support for the notion that drug offenses are inherently correlated with violence. See generally Jeffrey A. Miron, “Drug Prohibition and Violence,” in the present Volume; Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015) (marshalling empirical and social science data showing that there is no causal link between drug crimes and violence).

50. See 2015 OVERVIEW, *supra* note 35, at 8. The vast majority (two-thirds) of federal marijuana convicts in 2009 “were ‘couriers’ or ‘mules,’ the lowest-level trafficking roles.” PEW CHARITABLE TRUSTS, ISSUE BRIEF: FEDERAL DRUG SENTENCING LAWS BRING HIGH COST, LOW RETURN 4 (2015) (hereinafter HIGH COST, LOW RETURN).

51. See 2015 OVERVIEW, *supra* note 35, at 8. Moreover, nearly half (47.8%) of federal drug offenders in 2009 were “street-level dealers” or below, with the highest-level traffickers (“high-level suppliers” and “importers”) comprising only eleven percent. HIGH COST, LOW RETURN, *supra* note 50, at 9.

52. 18 U.S.C. § 3553(f). See U.S. SENTENCING COMM’N, QUICK FACTS ABOUT MANDATORY MINIMUM PENALTIES 1 (2015) [hereinafter QUICK FACTS 2015]. The fact that Congress saw the need to enact the safety valve provision in 1994 shows that *even Congress* recognized that federal prosecutors misuse against low-level offenders harsh drug penalties intended for major players in the drug trade.

53. See U.S. SENTENCING COMM’N, QUICK FACTS ABOUT MANDATORY MINIMUM PENALTIES 1 (2010). The sharp decline was the result of a sensible Obama administration sentencing reform initiative recently reversed by the new administration. Now, as before, federal prosecutors are required to file and seek conviction on the charges that will generate the highest sentence. See Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors, Department Charging and Sentencing Policy (May 10, 2017).

As these examples show, it is not true that federal offenders are categorically worse than offenders in the state system. Many cases are in federal court not because they truly deserve to be based on the seriousness of the defendant's crime or criminal history. Rather, they are in federal court simply because federal prosecution will generate more severe punishment than in state court.

Indeed, many cases are referred to federal prosecutors by state authorities precisely *because* they will generate much stiffer prison sentences in federal court. Most federal cases in areas of overlapping federal-state authority begin with arrests by state and local police. These referrals from local authorities are critical because federal prosecutors “generally will lack the informational resources to pursue offenses in these areas without State assistance.”<sup>54</sup> This results in local authorities “shopping” their cases to federal prosecutors in situations where federal law would provide greater punishment than state law.<sup>55</sup> Seen in this light, it is unsurprising that the two leading areas of federal prosecution originating in local arrests (drug and firearms offenses) account for the lion's share of federal convictions under statutes carrying mandatory minimum sentences.<sup>56</sup>

To be sure, penalties will not always be determinative of the charging decision in cases arising in areas of overlap. There are categories of cases where federal prosecution is more or less certain, irrespective of penalty, based on the nature or gravity of the offense. Obvious examples include terrorist plots, massive corporate frauds on the scale of Enron, or large-scale drug or human-trafficking operations. Similarly, there are categories of cases, such as carjacking, failure to pay child support, drug-induced rape, and theft of

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54. Richman, *supra* note 1, at 93.

55. See, e.g., *id.* at 95: “Explaining how his agency decided whether to take a case federally or stateside, the head of the Richmond[, Virginia] police detective division noted: ‘[I]t’s like buying a car: we’re going to the place we feel we can get the best deal. We shop around.’”

56. As the Sentencing Commission has reported, “[d]rug trafficking offenses accounted for over two-thirds (66.2%) of the offenses carrying a mandatory minimum penalty, followed by firearms (15.4%).” QUICK FACTS 2015, *supra* note 52, at 1.

cellular phone service (and, yes, there are federal criminal laws on each of these subjects), that could be brought federally but almost invariably will be left to state prosecution.<sup>57</sup>

Between these polar extremes, however, are many thousands of cases nationwide that could easily go either way. These include cases involving simple drug possession, small-time frauds,<sup>58</sup> corporate wrongs,<sup>59</sup> and drug sales. It is in *these* cases that comparatively severe federal penalties—such as strict mandatory minimums, the enhanced sentencing rule for “crack” cocaine offenses,<sup>60</sup> and unusually broad forfeiture rules that have been graded as

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57. Unless, of course, a federal prosecutor with too much time on his hands (and not enough common sense) rolls the dice on a creative legal theory elevating a minor crime into a major federal felony. *E.g.*, *Yates v. United States*, 135 S. Ct. 1074 (2015) (reversing conviction under Sarbanes-Oxley’s document-preservation provision of a commercial fisherman who cast overboard undersized fish taken in violation of federal fish size rules); *Bond v. United States*, 134 S. Ct. 2077 (2014) (reversing conviction under federal law prohibiting chemical weapons of a jilted lover who put a mild irritant on the doorknob of her husband’s paramour). The fact that prosecutors ultimately lost on these abusive charges does nothing to redress the substantial costs and burdens imposed on the accused and the court system of prolonged jury trials and appeals concerning baseless charges which should never have been brought.

58. In 2015, almost 7,500 fraud cases were prosecuted federally, making fraud the third-largest area of enforcement activity (second only to drugs and immigration offenses). 2015 OVERVIEW, *supra* note 35, at 9. Although some were large-scale frauds with billions of dollars in losses, 134 cases involved *no loss whatsoever*. With a “median loss amount of \$213,831,” *id.*, it is clear that many involved fairly small losses to victims.

59. Of the 181 organizational defendants (corporations and partnerships) sentenced in federal court in fiscal year 2015, 87 were not sentenced to make restitution (which would have been ordered had the offense caused a loss to victims), and 38 paid *neither* restitution nor even a fine. *Id.* at 10. Given the recent emphasis on using federal prosecution to reform corporate structures allowing illegal conduct to occur, *see* Garrett, *supra* note 16, it is significant that only 51 of the 181 convicted organizations were ordered to make structural changes, an indication that prosecution was unnecessary for structural-reform reasons. 2015 OVERVIEW, *supra* note 35, at 10.

60. Even though both involve the same drug, for decades federal law mandated that judges treat each gram of “crack” cocaine at sentencing as equivalent to one hundred grams of powder cocaine, a mandate which subjected federal “crack” offenders (who are mostly black) to considerably longer sentences than those convicted of offenses involving powder cocaine (who are predominately white). The 100-to-1 powder-to-crack sentencing ratio was lowered to a less draconian (but equally arbitrary and discriminatory) 18-to-1 ratio in 2010. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220 § 2, 124 Stat. 2372, 2372 (2010) (codified as amended at 21 U.S.C. § 841(b)(1)(B)(iii)).

“among the nation’s worst”<sup>61</sup>—can and do often tilt the balance in favor of federal prosecution.

Attorney General Eric Holder’s 2013 “Smart on Crime” initiative, recently reversed by the new administration, was a recognition that, as this chapter contends, the public interest demands “a significant change in [the federal government’s] approach to enforcing the nation’s laws.”<sup>62</sup> The proposal called upon federal prosecutors to develop more-restrictive charging guidelines, limit their use of drug mandatory minimums against lower-level offenders, and pursue alternatives to imprisonment in suitable cases.<sup>63</sup> Though a step in the right direction, only drastic, long-overdue statutory reform can guarantee a more effective redeployment of federal crime-fighting resources in the face of opposition from ideologues who prefer to be “tough” (rather than “smart”) on crime.

Although the present state of affairs of disproportionately severe federal penalties results in unequal treatment of similarly situated offenders, far more is at stake than mere fairness to federal offenders. In a system of incredibly broad laws and uncontrolled, decentralized prosecutorial discretion, it is difficult to achieve the optimal “mix” of federal and state enforcement when severe federal penalties incentivize federal prosecutors to duplicate the work of state prosecutors. Federal prosecutors can best promote public safety in areas of overlap with state criminal law by focusing their efforts on offenses that defy adequate response within the state system—offenses such as terrorism, organized crime, large-scaled trafficking in “hard drugs” and firearms, massive frauds, violations of federal civil rights, and corruption by high-ranking state and local officeholders. The “value added” of federal prosecution cannot simply be regarded as higher penalties, especially for low-level and other comparatively minor offenses, in situations where local authorities are perfectly willing and able to act.

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61. DICK M. CARPENTER ET AL., INST. FOR JUSTICE, *POLICING FOR PROFIT: THE ABUSE OF CIVIL FORFEITURE* 6 (2d ed. 2015). The Justice Department uses forfeiture actions in federal court to assist (it is tempting to say “aid and abet”) their state-system counterparts in getting around state law limits on a troubling phenomenon known as “policing for profit”—and to get a “piece of the action” in the process. Euphemistically termed “equitable sharing,” the Justice Department initiates proceedings to have assets seized by participating state and local police agencies declared “forfeited” based on federal criminal violations and then returns the proceeds to the arresting agency, minus the Justice Department’s 20% “skim.” See *id.* at 25-31.

62. U.S. DEP’T OF JUSTICE, *SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY* 1 (2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

63. *Id.*

Counterintuitive though it may seem to defenders of the status quo, the position that federal enforcers should focus on distinctly national threats should be obvious to all after the terrorist attacks of September 11, 2001, claimed the lives of thousands of innocent Americans. During the 1990s, the local offices of the FBI prioritized “traditional crimes such as white-collar offenses and those pertaining to drugs and gangs” over counterterrorism, and “very little of the sprawling U.S. law enforcement community was engaged in countering terrorism.”<sup>64</sup> Congress likewise focused attention and resources on fighting the last war—the so-called “war” on crime—and did not see, until it was much too late, that global terrorists had declared war against the United States and were poised to strike at the homeland.<sup>65</sup>

Then 9/11 happened. After the Twin Towers came tumbling down and the Pentagon stood in flames just outside the nation’s capital, the work of a highly organized and well-financed global terrorist network, Attorney General John Ashcroft had an epiphany: “We cannot do everything we once did because *our lives now depend on us doing a few things very well*. The [D]epartment [of Justice] will not be all things to all people.”<sup>66</sup>

Although the FBI changed considerably after 9/11 to give priority to disrupting terrorist plots against U.S. interests worldwide,<sup>67</sup> old habits die hard elsewhere in the Justice Department. Reminiscent of Nero fiddling as Rome burned, while impoverished black and Latino residents of Chicago endure unimaginable levels of gun violence,<sup>68</sup> and the nation reels from an

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64. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 74, 82 (2004). Even when terrorism came into focus as a serious threat, FBI leaders in Washington were “unwilling to shift resources to terrorism from other areas such as violent crime and drug enforcement” and allowed local offices to continue with their emphasis on crimes where progress can be measured (and careers advanced) in terms of “numbers of arrests, indictments, prosecutions, and convictions.” *Id.* at 74.

65. See *id.* at 104-07.

66. Jess Bravin & Chris Adams, *Ashcroft Unveils Restructuring of FBI, Immigration Agencies*, WALL ST. J. (Nov. 9, 2001), <https://www.wsj.com/articles/SB1005238264725888360> (emphasis added).

67. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-751, FBI REORGANIZATION: PROGRESS MADE IN EFFORTS TO TRANSFORM, BUT MAJOR CHALLENGES CONTINUE 2-18 (2003) (statement of David M. Walker, Comptroller General of the United States).

68. See Aamer Madhani, *Chicago, After Trump’s “Carnage” Comment: Show Us The Money*, USA TODAY (Jan. 25, 2017), <https://www.usatoday.com/story/news/2017/01/25/chicago-trump-send-money-vioence/97045356/> (reporting that Chicago had 762 murders and 4,300 shootings in 2016, the most in nearly two decades).

unprecedented opioid epidemic,<sup>69</sup> federal prosecutors spend precious time and resources racking up easy convictions in relatively minor drug, gun-possession, and fraud cases. This essential disconnect between the nation's most pressing public-safety needs and federal enforcement activity will likely continue as long as Congress allows federal prosecutors to bring the cases that generate the highest sentences, instead of the cases where federal prosecution is truly essential to safeguard the public.

## 2. Interference with state-level enforcement

In light of the above discussion, it is difficult to contend that the federalization of criminal law has done terribly much to make the nation safer. Nevertheless, it might be possible to defend the federalization of criminal law if it bolsters the effectiveness of state enforcement. Episodic and comparatively rare though it may be in light of the total number of prosecutions nationwide, the argument would go, federal prosecution of cases involving drugs and guns can be a useful means of relieving resource constraints on an overloaded state system.

This potential defense is surprisingly weak. Federal prosecution on the order of roughly 72,000 cases a year (the number brought in federal court in the most recent fiscal year)<sup>70</sup> would be of little use in expanding the resources of state enforcers. Divided over 50 states, the reduced caseload for each state would be an average of 1,440 cases at most, and, realistically, closer to half that amount given that roughly half of the 72,000 cases brought federally in 2015 were immigration cases which, by definition, could only be prosecuted in federal court. No matter how resource-constrained states may be, taking such a small number of cases off their hands will be of little or no consequence—and, of course, the most logical federal response to inadequate state resources would be to grant funding for expanded state enforcement.<sup>71</sup>

The more fundamental response to this line of argument is that the federalization of criminal law can actually undermine the effectiveness of the state system. Once this point is understood, it can no longer be assumed that the two systems operate independently of one another, with seamless cooperation in

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69. See generally Rose A. Rudd et al., CDC, *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445 (Dec. 30, 2016) (“During 2015, drug overdoses accounted for 52,404 U.S. deaths, including 33,091 (63.1%) that involved an opioid.”).

70. 2015 OVERVIEW, *supra* note 35, at 1.

71. The Clinton administration's 1994 effort to fund the hiring of 100,000 new state and local officers nationwide is a pertinent example, albeit one that was flawed in execution. See generally GARETH DAVIS ET AL., HERITAGE FOUND., *THE FACTS ABOUT COPS: A PERFORMANCE OVERVIEW OF THE COMMUNITY ORIENTED POLICING SERVICES PROGRAM* (2000).

areas of mutual interest. The expansive reach of federal criminal law, combined with the potential for robust enforcement at the federal level, can operate as an impediment to state-level public-safety efforts—which, of course, would be much less likely if federal law focused on truly national problems that defy adequate response in the state system and left all other problems to states.

The clearest example of federal interference in state enforcement involves marijuana. Without question, there is a strong trend at the state level to decriminalize marijuana. Nearly half of the states have legalized marijuana use in some form, and just last year, four states (California, Maine, Massachusetts, and Nevada) completely legalized marijuana, even for purely recreational use.<sup>72</sup> These laws can be understood as signals that state and local police should switch their drug-control efforts away from marijuana to the kind of drugs which pose serious risks of overdoses and addiction. Potentially, these laws represent the first step toward a comprehensive harm-reduction approach to drug control, substituting a more promising approach based on treatment and regulation for failed prohibition.<sup>73</sup>

Although a principal virtue of federalism is that it allows states to function as social laboratories,<sup>74</sup> the federal government remains determined to keep the entire nation mired in its failed drug war. As Professor Erik Luna has explained:

[D]rug enforcers took an aggressive approach to interpreting the U.S. government's drug war prerogative, arguing successfully in court that there were no exceptions or limitations to federal prosecutions involving medical marijuana. Federal law enforcement conducted hundreds of raids on medical marijuana dispensaries, and sought criminal prosecution of medical marijuana providers even when they were in full compliance with local and state law. One particularly pathetic raid involved a

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72. Ben Gilbert, *4 States Just Voted to Make Marijuana Completely Legal—Here's What We Need to Know*, BUSINESS INSIDER (Nov. 9, 2016), <http://www.businessinsider.com/marijuana-states-legalized-weed-2016-11>; see also Kreit, *supra* note 47.

73. See generally GLOB. COMM'N ON DRUG POLICY, *WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY* (2011) (calling for a harm-reduction approach to drugs and an end to the war on drugs).

74. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).



collective hospice, located on a farm in Santa Cruz, California, that had “approximately 250 member-patients who suffer from HIV or AIDS, multiple sclerosis, glaucoma, epilepsy, various forms of cancer, and other serious illnesses.”<sup>75</sup>

Without the omnipresent threat of federal enforcement—criminal, civil, and administrative alike—uninhibited state experiments with legalized, government-regulated marijuana could take place, easing the suffering of terminally ill patients and paving the way for more promising drug-control strategies.

Even apart from the widening gulf between federal and state policy on marijuana, federal drug laws create substantial problems for states. The culprit here is statutes authorizing asset forfeiture for violations of federal drug laws. A number of state legislatures fear that economics may lead to “policing for profit”—namely, police diverting scarce enforcement resources to the search for crimes that will generate revenue for the arresting agency through asset forfeiture.<sup>76</sup> Understandably fearing this perverse incentive might jeopardize public safety, not to mention the security of property rights of innocent third parties, some states have imposed limits on the ability of local police agencies to retain the proceeds of asset forfeitures.<sup>77</sup>

Enter the Department of Justice. Eager to secure greater cooperation from local police in the war on drugs, the federal government essentially buys their assistance through aggressive use of federal forfeiture laws. Under the federal “Equitable Sharing Program,”<sup>78</sup> participating police agencies bypass state forfeiture laws, invoking the assistance of federal enforcers. Federal prosecutors

75. Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813, 880 (2016). The Clinton and George W. Bush administrations sought to obstruct state efforts to legalize marijuana for medical use, and the Obama administration ultimately gravitated toward a similar approach after an initial period of deference to state experiments with medicinal marijuana. See generally Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 635-40 (2011). After the recent change in presidential administrations, the Justice Department is now headed by an attorney general who believes that marijuana is “only slightly less awful” than heroin. Alexandra Sifferlin, *Jeff Sessions Says Marijuana Is Only “Slightly Less Awful” Than Heroin. Science Says He’s Wrong*, TIME (Mar. 16, 2017), <http://time.com/4703888/jeff-sessions-marijuana-heroin-opioid/>.

76. See generally Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998); Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

77. Consider two examples: the District of Columbia and New Hampshire. Under D.C. law, the proceeds of local forfeiture actions must go into a fund for drug prevention and treatment. New Hampshire caps at 10% the amount of state forfeiture proceeds that law enforcement can keep. See generally LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 149-50 (1996).

78. See *supra* note 61.



obtain forfeiture in federal proceedings and then return the proceeds (minus a 20% cut for the Department of Justice) to the arresting agencies for their own use, free and clear of state-law limits on the use of the proceeds of forfeited assets.

The Equitable Sharing Program seriously complicates efforts within the state system to keep state and local police focused on preventing and solving crimes instead of profiting on them. Apart from the federal intrusion into local policing, the incentive and ability to “police for profit” would be reduced or eliminated in states with restrictive forfeiture laws, with some or all of the proceeds received as a result of drug arrests going into the state treasury, where they might be used for the benefit of all state residents. Through the complicity of federal enforcers, however, money resulting from seizures within the state system is redirected back to the arresting agency for its use alone.<sup>79</sup> This gives police incentives to overinvest in traffic stops (which, in addition to being the easiest way to find drugs and drug proceeds, involve valuable assets for seizure, *i.e.*, automobiles) as well as other drug interdiction efforts, small as well as large.

Although advocates of strict drug prohibition may not fret about over-enforcement problems, the perverse incentives equitable sharing creates for police on the front lines of the drug war are troubling. Quite simply, equitable sharing gives police strong incentives to target major *assets* instead of major *crimes*. As a senior Customs Service official memorably put it, if police had “a guy with a ton of marijuana and no assets versus a guy with two joints and a Lear jet, I guarantee you they’ll bust the guy with the Lear jet.”<sup>80</sup>

The concern over policing for profit is far from theoretical only. Consider, for example, how asset forfeiture distorts police tactics. Conventional “stings” target dealers, with undercover police acting as buyers. Ideally, police would arrest dealers as soon as possible to prevent the distribution and use of illegal drugs, but seizing the drugs provides no financial benefit to the police. Asset forfeiture, however, dramatically changes the enforcement calculus.

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79. As one critical review notes, “not only does federal law allow forfeiture proceeds to be spent by law enforcement, but equitable sharing rules actually mandate that funds go to law enforcement.... If state law directs proceeds elsewhere, the Justice Department will cut off the flow of funds.” CARPENTER ET AL., *supra* note 61, at 28.

80. LEVY, *supra* note 77, at 152. As bad as targeting minor drug crimes in the interest of forfeiting major assets is, forfeiture is also used to target cash *not derived from illegal activity*. When fairly large sums of money are discovered during traffic stops, “it is presumed to be drug money, seized, and handed over to the federal government for forfeiture,” putting the burden on the owner to retain counsel and prove the money was legally obtained. CARPENTER ET AL., *supra* note 61, at 29.

With forfeiture in the picture, police may *allow* illegal drug activity they might otherwise prevent. By postponing arrests until dealers have accumulated large amounts of cash, the police can ensure that the resulting arrests will generate significant assets for seizure.<sup>81</sup> Police have the same incentive to concentrate interdiction efforts on the export of drug proceeds rather than on the import of illegal drugs: pursuing proceeds produces cash and other valuable assets for seizure to a much greater degree than stopping the drugs.<sup>82</sup> Similarly, instead of targeting dealers, who may often have only drugs, police frequently conduct “reverse sting operations” targeting *buyers*.<sup>83</sup> This allows police to choose the buyers and locations involving major assets to seize, such as residences and automobiles.

Seen in this light, asset forfeiture does not merely ensure that crime does not pay. Instead, it leads to policing for profit, which causes police to “make business judgments that can only compete with, if not wholly supplant, their broader law enforcement goals.”<sup>84</sup> This is what state laws limiting asset forfeiture seek to prevent—and what the Justice Department’s Equitable Sharing Program allows police to do, potentially in violation of state law.<sup>85</sup> Even the euphemism of “sharing” cannot mask a perverse state of affairs in which the funding wishes of individual law enforcement agencies trump public safety.

There are other examples in which broad federal criminal law interferes with the effective functioning of the state system. One concerns what Professor Robert Mikos terms “federal supplemental sanctions”<sup>86</sup> attaching adverse collateral consequences (such as deportation or disqualification to carry

81. See generally Blumenson & Nilsen, *supra* note 76, at 67-73 (discussing examples of how the pursuit of forfeitable assets has changed police drug enforcement tactics).

82. See, e.g., *id.* at 68 (quoting testimony of former New York City police commissioner concerning the advantages to police of targeting proceeds instead of drugs); see generally Conor Friedersdorf, *Police Ignore Illegal Drugs, Focus on Seizing Cash*, THE ATLANTIC (May 24, 2011), <https://www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349/> (citing investigation finding that police in Tennessee conducted ninety percent of their seizures on westbound traffic routes through which drug proceeds flow back to Mexican importers instead of eastbound traffic routes bringing drugs to U.S. markets).

83. See generally Blumenson & Nilsen, *supra* note 76, at 67-73.

84. *Id.* at 78. Importantly, prosecutors are hardly immune to the perverse incentives of asset forfeiture. As Blumenson and Nilsen explain: “Forfeiture laws promote unfair, disparate sentences by providing an avenue for affluent drug ‘kingpins’ to buy their freedom. This is one reason why state and federal prisons now confine large numbers of men and women who had relatively minor roles in drug distribution networks, but few of their bosses.” *Id.* at 71.

85. As one might expect, police agencies in states with laws combatting “policing for profit” receive the biggest payouts from the Equitable Sharing Program. See generally CARPENTER ET AL., *supra* note 61, at 26 (citing studies).

86. Robert A. Mikos, *Enforcing State Law in Congress’s Shadow*, 90 CORNELL L. REV. 1411 (2005).

firearms) to certain kinds of state-court criminal convictions. States cannot effectively combat domestic violence, for example, if undocumented victims cannot call the police for help or participate in state court proceedings without exposing themselves or their loved ones to deportation or federal prosecution.<sup>87</sup>

An even broader example of the mischief that limitless federal criminal laws can produce for the state system involves empowering state and local police to sidestep state limits on law enforcement. Equitable sharing is but one instance of state and local police using federal criminal enforcement to evade state-system controls on their authority. Others include breaking down the “bilateral monopoly”<sup>88</sup> that otherwise would give higher state authorities (legislatures, prosecutors, and courts) the authority to regulate and control the activities and investigative methods of state and local police. Without the ability to hand off their arrests and seizures to the federal government, state and local police would have to comply with state legislative and judicial limits on their authority and investigative methods, not to mention the priorities of state prosecutors. Federalization, however, allows police to disregard these limits by using federal prosecutions to achieve their local objectives, flouting the very state authority from which their powers derive.<sup>89</sup>

As a consequence, it cannot be maintained that the federalization of criminal law promotes more-effective state enforcement. In most cases, federalization does not appreciably aid state enforcement—and, in some cases (such as legalized marijuana, equitable sharing, and federal supplemental sanctions for state-law offenses), it actually undermines the effective enforcement of state law. In these areas of federal-state conflict, federal prosecutors insist on rigid adherence to federal policy, however outmoded, giving short shrift to important countervailing interests states wish to protect.<sup>90</sup> Without federal prosecutorial

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87. Similar complications arise if convicting an abusive spouse in state court will cause him to lose his job as a police officer because federal law will preclude him from carrying firearms. *See generally id.* at 1444-74 (describing five areas where federal supplemental sanctions complicate the enforcement of state law).

88. Richman, *supra* note 1, at 98.

89. *See id.* at 98-99. Attorney General Holder essentially conceded as much in the forfeiture context by limiting the use of equitable sharing in cases where assets were seized by local police on their own initiative and only later “adopted” by the federal government for seizure. The move was largely symbolic, however, because “adoptions” constitute only a “small piece” of forfeiture actions. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 935-36 (2015).

90. The dismissive attitude of the U.S. Attorney for Los Angeles on the subject of legal medical marijuana says it all: “California law doesn’t matter.” *See* Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 19 (2013).

discretion as a reliable means of resolving conflicts between federal and state enforcement, the only solution is narrower, more-targeted federal law that will restrict federal enforcers to areas of truly national concern, leaving broader space for state law to operate free from federal interference.

### 3. Negative externalities

The best potential defense of the federalization of criminal law is that the virtual overlap between federal and state criminal law merely sets the stage for negotiations between federal and state enforcers about how the two bodies of law should be enforced. As Professor Dan Richman notes, limitless federal criminal laws do not compel limitless enforcement; rather, they leave “the precise boundaries of Federal and State responsibility” to be determined “through explicit or tacit negotiation among enforcement agencies.”<sup>91</sup> Presumably, federal and state enforcers, with their specialized knowledge of the public-safety needs of the areas within their jurisdictions, are well-positioned to determine where state responsibility should end and federal responsibility should begin.

The obvious problem with this line of argument (as Richman himself notes) is that it ignores agency costs. It can safely be assumed the deals federal and state enforcers strike will serve their own interests. There is, however, no reason to assume those deals will advance or even take into account the interests of third parties. Indeed, the risk is that the parties to the negotiations affecting the size and makeup of the federal criminal docket will sacrifice the interests of others for their own benefit, creating what is known in economics as “negative externalities.”

Asset forfeiture through equitable sharing is an illustration of federal and state enforcers striking deals benefiting themselves at the expense of other important interests.<sup>92</sup> In states that limit or preclude police from keeping the proceeds of forfeited assets for their own use, equitable sharing means more funding for police than permitted under state law. The Justice Department benefits, too, by getting a 20% cut, plus more vigorous local drug enforcement.

This, however, is no “win/win” scenario. States necessarily lose in the process because forfeiture proceeds they would have received and been able to spend for broader public purposes go instead back to the arresting agency. Ultimately, of course, the public loses. Equitable sharing incentivizes police to engage in

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91. Richman, *supra* note 1, at 92.

92. See *supra* notes 76-84 and accompanying text.

less-effective policing in a variety of ways, such as by putting less effort into stopping the flow of illegal drugs than capturing lucrative proceeds of past drug sales.

The result of negotiated federal-state boundaries in criminal law has been to stretch existing federal judicial and correctional resources to the breaking point. The growth in the number of federal criminal prosecutions in recent decades has been dramatic: “The total number of federal cases has almost tripled from 29,011 in fiscal year 1990 to 83,946 in fiscal year 2010.”<sup>93</sup> Although the average prison sentence decreased from 62 months to 54 months from 1991 to 2010,<sup>94</sup> the prison population grew nonetheless because “the size of the federal docket has tripled over the same time period, and the proportion of offenders sentenced to prison has increased.”<sup>95</sup>

Although federal prosecutors have been given the tools necessary to manage the larger caseload, overworked federal trial judges have struggled to keep pace with their swollen criminal dockets. Due to disparate funding for federal judges and prosecutors, increased caseloads put greater pressure on the judiciary than on U.S. Attorneys’ offices: “Federal justice personnel almost doubled between 1982 and 1993, but the number of authorized federal judgeships in the district courts increased by only 26%.”<sup>96</sup> The resulting strain on federal judicial resources has been described as “one of the most serious problems facing [the judiciary] today”—problems that, according to the late Chief Justice William H. Rehnquist, ultimately stem from “[t]he trend to federalize crimes that traditionally have been handled in state courts.”<sup>97</sup>

Even more ominously, increased federal criminal litigation has produced an explosion in prison population that has made federal correctional institutions more dangerous and less effective in rehabilitating the prisoners who will

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93. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 66 (2011).

94. *Id.* at 70.

95. *Id.* In the years since 2010, the annual number of offenders sentenced in federal court has “fallen steadily,” resulting in a fiscal-year 2015 total (71,003) that was almost eighteen percent less than in the 2011 fiscal year. 2015 OVERVIEW, *supra* note 35, at 1. Nevertheless, the federal prison population continued to increase from 2010–12. *See* PRISONERS IN 2015, *supra* note 44, at 3 tbl.1. From that point on, the number of federal prisoners shrank from 209,771 in 2010 to 196,455 in 2015. *See id.*

96. FEDERALIZATION TASK FORCE REPORT, *supra* note 4, at 35.

97. WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (1998), *reprinted at* 1 FED. SENT’G REP. 134, 134 (1998). *See generally* FEDERALIZATION TASK FORCE REPORT, *supra* note 4, at 38 (“Nearly all of those who have examined the impact of federalization have concluded that the federal courts are being overburdened with cases traditionally handled in state courts.”).

eventually be back on streets across America.<sup>98</sup> According to a recent report by the Congressional Research Service, the last three decades have seen “a *historically unprecedented increase* in the federal prison population.”<sup>99</sup> Starting in 1980—which marked the beginning of a “nearly unabated, three-decade increase” in the federal prison population—the number of federal inmates increased from approximately 25,000 to over 205,000 in fiscal year 2015, with an annual influx of almost 6,000 prisoners.<sup>100</sup>

Since 1997 the Bureau of Prisons has had to rely on private prisons to alleviate prison overcrowding. As of 2015, roughly 12% of federal prisoners are being held in private prisons.<sup>101</sup> Prior to the recent change in presidential administrations, the Justice Department had decided to phase out private prisons. Not only do private prisons “compare poorly to our own Bureau [of Prisons] facilities” on a number of fronts, including “safety and security” and “correctional services, programs, and resources,” but they “do not save substantially on costs.”<sup>102</sup> At best, then, private prisons are a band-aid solution for the problems caused by decades-long increases in the number of people in federal lockup. In fact, however, they may represent a cure that is worse than the disease—a short-sighted approach that puts the safety of prison staff and inmates alike at greater risk, and returns to streets across America people who are more likely to reoffend than they might have been with more effective rehabilitation.<sup>103</sup>

Whether or not private prisons are an appropriate response to overcrowding may be debated, but the enormous cost of federalization for American taxpayers is beyond dispute. The skyrocketing federal prison population has required an additional \$7 billion in expenditures on corrections over the last generation, from \$330 million in fiscal year 1980 to almost \$7.5 billion in fiscal year

98. For a discussion of rehabilitation, see Francis T. Cullen, “Correctional Rehabilitation,” in Volume 4 of the present Report.

99. NATHAN JAMES, CONG. RESEARCH SERV., *THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS 1* (2016) (emphasis added). By comparison, with few fluctuations, the number of federal prisoners “remained at approximately 24,000” from 1940–1980. *Id.* at 2.

100. *Id.* As of December 31, 2015, the rated capacity for the entire federal prison system was 134,461, putting the federal system at 119.7% of capacity. See PRISONERS IN 2015, *supra* note 44, at 27, app. tbl.1. This is worse overcrowding than all but four states. *Id.*

101. See OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, *REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS 1* (2016).

102. Memorandum from Sally Q. Yates, Deputy Att’y Gen., to Acting Director, Federal Bureau of Prisons, at 1 (Aug. 18, 2016).

103. Be that as it may, the new administration has pledged to expand the use of private prisons. See Editorial, *Under Trump, Private Prisons Thrive Again*, N.Y. TIMES (Feb. 24, 2017), [https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html?\\_r=0](https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html?_r=0).

2015.<sup>104</sup> To put these figures in perspective: “From 1980 to 2013, federal prison spending increased 595 percent, from \$970 million to more than \$6.7 billion in inflation-adjusted dollars. Taxpayers spent almost as much on federal prisons in 2013 as they paid to fund the *entire* U.S. Justice Department—including the Federal Bureau of Investigation, the Drug Enforcement Administration, and all U.S. Attorneys—in 1980, after adjusting for inflation.”<sup>105</sup>

The federalization of criminal law is thus not just an abstract problem, or a problem only for those who are “soft on crime” (whatever that might mean) or pine for earlier days of limited federal power. It is a real problem that should trouble *everyone* who truly wants effective public protection through the most cost-effective means possible.

### RECOMMENDATIONS

To correct the many problems associated with the overfederalization of criminal law—and more effectively achieve the vital goal of public safety—a series of sweeping reforms is necessary:

1. **Congress must chart a new, more effective path to protecting the public safety.** In a federalized system of criminal law enforcement, Congress gives prosecutors unchecked power to determine the scope of federal criminal law and to select from the much larger universe of potential defendants the few who will face unusually harsh federal sentences. Prosecutors, however, have shown little restraint in the use of these awesome powers. The result has been dramatic increases in federal criminal filings and prisoners over the last three decades—and skyrocketing costs to American taxpayers. Meaningful, long-lasting reform will not occur unless Congress boldly reasserts its institutional prerogatives by concentrating federal power and resources exclusively on the nation’s most serious criminal threats. The so-called Rohrabacher-Farr amendment barring the Justice Department from interfering with marijuana legalized under state law is a rare but important example of the kind of congressional leadership that is sorely needed to rein in the unrestrained use of federal enforcement authority.<sup>106</sup>
2. **Congress should sharply reduce the number and scope of existing federal criminal laws and create new crimes only as a last resort.** Instead of limiting their attention to offenses that can be effectively addressed only at the federal level, prosecutors make the proverbial “federal case” out

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104. JAMES, *supra* note 99, at 1.

105. HIGH COST, LOW RETURN, *supra* note 50, at 4 (emphasis added).

106. See Consolidated and Further Continuing Appropriations Act, Pub L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015).



of a surprising number of comparatively minor, small-time crimes each year—crimes that could be easily and more economically handled in the state system. Restricting the roster of federal crimes to areas of exclusive federal jurisdiction and areas where state law enforcement has proven inadequate will keep federal enforcers focused, as they ought to be, on the nation's more serious crimes instead of needlessly duplicating (or even interfering with) state enforcement efforts. New federal crimes should be created sparingly, and only in areas that both defy adequate response within the state system and are not effectively addressed by existing federal laws and regulations.

3. **Congress should repeal unusually severe federal sentencing laws because they distort the exercise of prosecutorial discretion and prevent wise exercises of judicial sentencing discretion.** Congress has enacted harsh statutory mandatory minimums, sweeping asset forfeiture laws, and other sentencing policies far more severe than most states' in the expectation that prosecutorial discretion would restrict them to the nation's most blameworthy offenders. Such confidence is unfounded: federal prosecutors pursue the offenses that generate the highest sentences, as opposed to the worst offenders, and they seek the highest supportable sentences instead of the sentences that "fit" the crime. Congress has repeatedly addressed itself to these problems in the past—examples include laws repealing the 100/1 "crack" cocaine sentencing rule, authorizing judges to sentence minor drug offenders below applicable mandatory minimums, and restricting civil asset forfeiture. The time has come for Congress to address itself more systematically to the serial misuse of strict federal sentencing policies and the many distortions they create in the proper functioning of the criminal justice system.
4. **Congress should use conditional federal funding to states, not new criminal laws, in situations where greater enforcement is desired.** Overfederalization resulted from the belief that enacting more federal criminal laws would expand upon existing levels of state enforcement. This view is mistaken. The vast majority of laws Congress has enacted are enforced only rarely, if at all, and such low-level enforcement invites arbitrariness in charging. Of even greater concern, federal enforcement is often wasted on comparatively minor offenses that are vigorously prosecuted by states, squandering resources that might have been better expended on prosecutions more deserving of federal attention. The most effective way for Congress to expand enforcement of crimes prosecuted at the state level is to grant states the funding necessary for increased enforcement.



Expanded authority in an already overburdened federal system, one that necessarily reaches only a small fraction of total prosecutions nationwide, will be inefficient at best, if not wholly ineffective.

5. **Congress should require the attorney general to formulate binding, publicly available enforcement guidelines and to publish an annual national crime-fighting strategy with measurable goals and cost estimates.** When Congress delegates lawmaking power to executive branch agencies, it typically requires them to develop rules, regulations, or other authoritative guidance concerning their interpretation and intended use of delegated authority. This promotes rule-of-law values by giving notice to the regulated public and enabling oversight to ensure congressional objectives are pursued in a faithful and responsible manner. Unfortunately, the Justice Department does not operate in the law-like manner that other executive branch agencies do. Uncontrolled discretion exercised by line prosecutors results in substantial variation and arbitrariness in the enforcement of federal law nationwide—which, in turn, makes it difficult to have a coordinated, nationally uniform approach to crime reduction. Binding enforcement guidelines, coupled with an articulated crime-fighting strategy with benchmarks and cost estimates, are necessary to bring much-needed transparency and coordination to the enforcement of federal criminal law.
6. **Congress should eliminate perverse incentives for federal enforcers to give inadequate attention to pressing public-safety needs.** In a system of overfederalization, enforcers have wide latitude to pursue their own interests at the expense of the public interest committed to their charge. Broad asset forfeiture laws are a case in point. Forfeiture laws create powerful financial incentives to (a) pursue major *assets* instead of major *crimes*, (b) give severe sentences to minor players in the drug trade but not their more dangerous bosses who trade assets for undeserved lenience, and (c) prioritize crimes for which asset forfeiture is allowed (such as drug and white-collar offenses) over crimes for which forfeiture is unavailable (such as violent crime and deprivations of civil rights). Although forfeiture has netted the Justice Department billions of dollars in additional revenue, it is not in the public interest for the pursuit of forfeitable assets to take precedence over the public safety.

To keep federal agents and prosecutors focused exclusively on the public interest, Congress should require that all federal forfeiture proceeds be paid into the Treasury instead of being retained within the seizing agency.

Similarly, Congress should outlaw all sharing of federal forfeiture funds with state and local police departments—the purpose and effect of such sharing, after all, is to incentivize “policing for profit” at the state level, often in defiance of state law. These reforms will help ensure that public safety, not profit, is the foremost consideration for law enforcement.

**7. State policymakers should mobilize to lobby Congress for more-effective responses to crime than new federal laws and higher penalties, and for federal cooperation with innovative state public-safety efforts.**

States have, for the most part, been complicit in the federalization of crime, evidently in the belief that greater federal involvement could only aid their own crime-fighting efforts. This blind faith in federal involvement is unjustified in light of recent high-profile conflicts between federal and state enforcers. Using the broad tools at their disposal, federal authorities have obstructed state experiments with alternative means of reducing the harms caused by illegal drug use, as well as state efforts to eliminate incentives for police departments to use forfeiture laws to pad their budgets at the expense of more-pressing needs. Similar conflicts have arisen in recent efforts by the Trump administration to conscript state and local police as federal immigration agents despite objections that doing so will complicate efforts by police and state court officials to maintain law and order within immigrant communities.<sup>107</sup>

Particularly now, as they consistently prove themselves more innovative and responsive than their federal counterparts—other important examples of state-level innovation include drug and mental-health courts, and alternatives to imprisonment—states should realize that, in many areas, federal involvement is far from costless. Even apart from possible interference with the pursuit of important public-safety goals by the states, the funds spent on federal involvement could often be more effectively utilized at the state level, where the vast majority of enforcement activity takes place. Investing in more capacity within the state system to deal with antisocial conduct is a far better way of protecting the public than expanding a costly, one-size-fits-all federal system that deals only with a small fraction of the offenders prosecuted annually in state courts nationwide. A considerably smaller federal footprint in criminal law would mean greater freedom for continued public-safety innovation by states, a worthwhile goal in its own right, and could mean greater respect and federal funding for state law-enforcement initiatives.

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107. For a discussion of these issues, see Jennifer M. Chacón, “Crimmigration,” in the present Volume.

# Misdemeanors

Alexandra Natapoff\*

*The enormous misdemeanor system is an increasingly important and fertile area of criminal justice reform. With over 10 million cases filed each year, vastly outnumbering felonies, the petty-offense process is how most Americans experience the criminal justice system. Characterized largely by speed, informality, and a lack of regulation and transparency, the petty-offense process generates millions of criminal convictions as well as burdensome punishments that affect employment, housing, education, and immigration. This chapter explains the major policy issues raised by the misdemeanor system, including its assembly-line quality, high rates of wrongful conviction, its racial skew, and how it quietly impoverishes working people and the poor. Key targets of reform include arrest, bail, prosecutorial policies, the right to counsel, diversion, decriminalization, debtor's prison, criminal records, and collateral consequences.*

## INTRODUCTION

Although we rarely think about them this way, misdemeanors constitute the vast majority of the American criminal justice system. With over 10 million minor cases filed every year, compared to 3 to 4 million felonies, misdemeanors constitute approximately 80% of state dockets. Most criminal convictions in this country are misdemeanors, and most Americans experience criminal justice through the petty offense process. Indeed, in a system that is internationally infamous for its size and harshness, misdemeanors are one of the largest yet least appreciated sources of overcriminalization. While the war on drugs, terrorism, and the death penalty command center stage in the national debate, it turns out that the lowly misdemeanor is in fact the paradigmatic American crime.<sup>1</sup>

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1. Some of this material has been adapted from previous publications, including Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015); Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255 (2015); and Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, in THE OXFORD HANDBOOK OF CRIMINAL LAW (2016).

At the same time, the misdemeanor world operates by its own peculiar and often disturbing rules. Enormous, fast, and highly informal, the system sweeps up and processes millions of people in ways that diverge wildly from traditional criminal justice ideals. People often do not get a lawyer; evidence is rarely scrutinized; proceedings can take mere minutes. Most people plead guilty, typically very quickly. Many convictions are inaccurate; many violate the Constitution. Because misdemeanors are often underestimated as petty or as a form of leniency compared to felonies, the petty-offense process has been permitted to function less rigorously than the serious felony machinery. In effect, because we punish low-level offenders less heavily at the back end, we make it easier to convict them at the front end. As a result, millions of criminal convictions are produced in ways that contradict fundamental notions of fairness and due process, and pose a significant threat to the accuracy and evenhandedness of the system overall.

The impact of misdemeanor punishment is profound. Individuals are arrested, jailed, tracked, placed on restrictive supervision, and heavily fined. Minor convictions mark people for life in ways that interfere with jobs, education, housing, child rearing, and immigration. These burdens, moreover, are distributed unequally throughout the population. Punishments are heavier and more destructive for the poor; like much of the criminal system, misdemeanor arrests and prosecutions are disproportionately aimed at people of color. Visited on millions of people every year, petty convictions have become a socioeconomic regulatory tool in their own right, affecting employment markets, welfare policy, and immigration.

The petty-offense process is one of democracy's most important regulatory systems. It protects against low-level harms such as domestic violence, drunk driving, and theft, and enforces important social values against violence and disorder. At the same time, it produces many social tensions and inequalities, quietly punishing the poor, the homeless, people of color, and disadvantaged communities. It is highly localized and diverse: The petty-offense process in New York looks very little like the one in Mississippi, and what works in Seattle may not work in Baltimore. But it has some global features and poses some large identifiable challenges. Specifically, the misdemeanor system fuels three key dysfunctions of the American criminal process: they revolve around innocence, race, and money. The fast and sloppy quality of the process generates large numbers of wrongful convictions. Racial disparities in misdemeanor policing contribute heavily to the racial skew of the entire criminal justice population. And the system's differential treatment based on wealth is a powerful aspect of American social inequality. Like underfunded public schools and low-quality

housing, the misdemeanor system is an integral part of what it means to be disadvantaged in America: The poor and people of color are more likely to encounter the system, and those encounters in turn make the disadvantaged worse off. For all these reasons, the petty-offense process invites major reform.

Misdemeanor reform is a quintessentially local affair. States, counties, and municipalities control every aspect of the petty-offense system, from defining and decriminalizing offenses, setting penalties, providing counsel, running jails and probation programs, to collecting fines and fees. While the federal criminal system occupies an outsized place in the national conversation over serious crime, in the misdemeanor world, federal authority is something of a footnote. Regardless of who the U.S. attorney general is at any given time, the size and nature of the misdemeanor system will be determined by state and local players. On the one hand, this makes top-down uniformity unrealistic; change typically occurs on a retail basis—state by state, or even city by city. On the other hand, the local nature of the process creates enormous opportunities for experimentation and reform that can improve thousands of lives in meaningful ways without the need for national consensus or federal approval. This makes misdemeanors one of the more fertile areas for criminal justice reform in the coming years.

This chapter proceeds as follows. It explains briefly what misdemeanors are (What is a Misdemeanor), how the petty-offense process works (Overview), how it punishes people (Punishment and Collateral Consequences), and its national policy implications (Innocence, Race, and Money). Leading scholarship and policy analyses on each issue are identified in the footnotes. The final section (Recommendations) discusses 10 key areas of reform: arrest, bail, prosecution, right to counsel, diversion, decriminalization, fines and fees, records and collateral consequences, data collection, and public education.

## **I. WHAT IS A MISDEMEANOR?**

The law typically defines misdemeanors as offenses for which a person can serve no more than one year in jail, but this definition is partial. Some jurisdictions have misdemeanors that carry two- or three-year jail terms; some low-level drug felonies are punished very much like misdemeanors and are processed in comparable assembly-line ways. The functional hallmark of misdemeanors is sloppy, informal speed: Convictions are produced through plea bargaining quickly and in bulk, without much due process or adversarial testing, and people are punished less by long incarcerations than through supervision, debt, and long-term tracking and stigma that skew heavily based on race and wealth.

There are thousands of misdemeanors but a handful are particularly important—benchmark crimes that capture the strengths and weaknesses of the low-level process. At one end of the spectrum, certain low-level crimes look and work very much like felonies. They forbid harmful or dangerous conduct that society has agreed should be deterred and punished. Driving under the influence of alcohol (DUI) and domestic violence are paradigmatic examples: Not only do such offenses define clearly wrongful conduct and protect identifiable victims, but the process often devotes extra attention to them. There are special rules for managing cases and punishments, and courts typically count and monitor them. These are the least problematic classes of misdemeanor, in part because they have already been subject to decades of debate and reform, and because they are handled in ways that adhere most closely to the standard rules and values of criminal justice.

At the other end of the spectrum are offenses where the underlying conduct is not particularly harmful or wrong at all, or where there is little social consensus on whether or how it should be punished. The paradigmatic cases are order maintenance or quality-of-life offenses like loitering, trespassing, and disorderly conduct. These offenses do not define dangerous or culpable conduct so much as empower police to target and arrest a wide array of people who are not engaged in serious harm or wrongdoing. Such offenses famously sit at the heart of controversies over stop-and-frisk and urban order policing that disparately impact African American communities; these crimes generate much of the misdemeanor system's racial skew.<sup>2</sup> Unlike DUIs or domestic violence, moreover, such cases receive few resources and little attention. They are generated in bulk; defendants are swept quickly through the process, often without lawyers. Comprising a large percentage of low-level dockets, these cases are some of the misdemeanor system's most problematic and a particularly important area for reform.<sup>3</sup>

Another class of misdemeanor with especially important implications is drug possession, particularly marijuana. Marijuana possession is the most common U.S. drug offense, and it fuels many of the most controversial aspects of the war on drugs. First, it sweeps millions of people into the criminal system for conduct that is widely perceived as harmless and, in some states, is now legal

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2. *Floyd v. City of New York*, 283 F.R.D. 153, 159 (S.D.N.Y. 2012) (finding New York stop-and-frisk practices unconstitutional); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 490 (S.D.N.Y. 2013) (finding New York police trespassing arrest policies unconstitutional); see also Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043 (2013).

3. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001); Jeffrey Fagan & Garth Davis, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457 (2000).

as a matter of state law. Enforcement is also heavily skewed by race. Although blacks and whites use marijuana at the same rates, arrest rates are four times as high for blacks as for whites nationwide; in some cities rates are 10, 15, even 30 times as high.<sup>4</sup> The trends toward marijuana decriminalization and legalization are thus not only important steps toward a more proportionate, less punitive criminal system, they are steps toward a more racially evenhanded one as well.<sup>5</sup>

The final types of low-level offense and punishment ripe for reform are those that criminalize based on income. The leading candidate is driving on a suspended license—an enormous category that constitutes up to 30% of some dockets.<sup>6</sup> Licensure offenses typically occur when individuals cannot afford to pay traffic fines thereby leading to license suspension, job loss, and further impoverishment. They primarily affect the poor and working class, since the well-resourced can pay their fines and keep their licenses. Similarly, misdemeanors such as sleeping on the sidewalk punish the poor and the homeless for lacking resources that the law says they should have: a place to sleep, a private place to eat, drink, or perform bodily functions.<sup>7</sup> Finally, the widespread imposition of fines and fees is itself highly regressive, punishing the poor more severely than the wealthy and leading to the resurrection of what many now refer to as new “debtor’s prisons,” where working, low-income and poor individuals are incarcerated solely because they cannot afford to pay their legal financial obligations. These phenomena drive many of the wealth effects of the misdemeanor process and thus deserve special attention.

## II. OVERVIEW OF THE PROCESS

The misdemeanor machinery extends from the street all the way into the courtroom: from arrest to bail to prosecution, defense, and the judge’s legal resolution of the case. Each stage contributes to the speedy and sloppy quality of misdemeanor adjudication that has earned it nicknames such as “assembly-line justice,” “cattle herding,” “meet ’em and plead ’em” lawyering,

4. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (2011) [hereinafter *THE WAR ON MARIJUANA*]; see also Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591 (2010).

5. See Natapoff, *Decriminalization*, *supra* note 1.

6. LAWYERS COMMITTEE FOR CIV. RTS., *NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA* (2015) [hereinafter *NOT JUST A FERGUSON PROBLEM*]; ROBERT BORUCHOWITZ, AM. CONST. SOC. L. & POL’Y, *DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE \$1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL* (2010); ROBERT BORUCHOWITZ ET AL., NAT’L ASS’N CRIM. DEF. LAW, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* (2009) [hereinafter *MINOR CRIMES*].

7. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 17 (2014).



and “McJustice.” The process is driven by its large numbers, an emphasis on summary justice rather than careful adjudication, and the enormous pressure placed on defendants to plead guilty as quickly as possible.<sup>8</sup>

### A. POLICE

Police are the first and most powerful players in the misdemeanor world. They decide who will encounter the criminal system in the first instance: Policing policies and practices fill the enormous petty-offense pipeline. With approximately 11 million arrests per year, the vast majority of which are for misdemeanors, the scope and nature of low-level policing determine who will sustain a misdemeanor conviction and what sorts of offenses will be pursued.<sup>9</sup>

Police make low-level arrests for all kinds of reasons. They may be responding to a 911 call or a victim’s report of a theft or assault, the kind of reactive, investigatory policing common to felonies where a crime has already been committed. But much of misdemeanor policing is proactive, preventative, and highly discretionary. Police may use arrests to clear a corner, to send a message of authority in a high-crime neighborhood, to collect information, or to move the homeless off the street.<sup>10</sup> Police may also be under pressure to make arrests for professional reasons. Many departments impose formal or informal quotas under which officers are required to generate large numbers of arrests to gain promotion.<sup>11</sup> Police may also make arrests under orders to raise revenue for the misdemeanor court system itself. In Ferguson, Missouri, for example, the U.S. Department of Justice found that Ferguson police were required by supervisors, who in turn were pressured by municipal officials, to increase arrest rates in order to generate the fines and fees that flowed from low-level convictions.<sup>12</sup> In all these ways, the misdemeanor pipeline is filled

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8. Natapoff, *Misdemeanors*, *supra* note 1; see also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2001).

9. U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2015, tbl.29 (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29>.

10. See FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW (2016); PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT 114–15, 119–20, 55 (2008).

11. Complaint, *Raymond v. City of New York*, No. 15-CV-6885 (S.D.N.Y. Dec. 10, 2015); Saki Knafo, *A Black Officer’s Fight Against the N.Y.P.D.*, N.Y. TIMES (Feb. 18, 2016); see also U.S. DEP’T OF JUSTICE, CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE POLICE DEPARTMENT (2016) [hereinafter BALTIMORE POLICE].

12. U.S. DEP’T OF JUSTICE, CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter INVESTIGATION OF FERGUSON].



with arrests prompted by a wide range of policies that may have only a remote connection to evidence of crime or to public safety.

### B. BAIL

Once a person is arrested, they may be required to pay bail. Bail is an amount of money set by the court to ensure that the defendant shows up: Defendants pay it at the beginning of the case and get it back at the end.<sup>13</sup> Many courts use “bail schedules” with set amounts for each offense, regardless of whether a defendant actually poses a flight risk.<sup>14</sup> Low-income defendants typically cannot afford bail and thus remain incarcerated. Indeed, they may end up serving more time pretrial for failure to make bail than they would be sentenced to as a result of being found guilty. As a result, many plead guilty, not because they are in fact guilty, but because it is the only way to secure release without waiting months in jail to resolve their cases.<sup>15</sup>

A series of lawsuits have been filed around the country challenging the constitutionality of money bail.<sup>16</sup> Because bail results in incarceration only for those who cannot afford to pay it, it can constitute a violation of equal protection principles. Moreover, pretrial incarceration has been shown to lead to disparate outcomes: People incarcerated before trial are more likely to plead guilty and more likely to receive harsher sentences.<sup>17</sup> As a result, numerous jurisdictions are in the process of reconsidering or eliminating money bail altogether.

### C. PROSECUTION

Prosecutors are responsible for the all-important decision whether arrests should convert to formal criminal charges or whether charges should be “declined” or dismissed. Prosecutors are also the most powerful decision-makers in the plea-bargaining process, controlling what charges to bring, what

13. See Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in Volume 3 of the present Report.

14. E.g., SUPERIOR CT. OF CAL., CTY. OF L.A., 2017 BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS (2017), <https://www.lacourt.org/division/criminal/pdf/misd.pdf>; HARRIS CTY. CRIM. CTS. OF L., RULES OF COURT 15 (2016), <http://www.ccl.hctx.net/attorneys/rules/Rules.pdf>.

15. WHITE HOUSE COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [hereinafter FINES, FEES, AND BAIL]; George Joseph, *Eric Holder Wants to End Bail as We Know It*, THE ATLANTIC (Nov. 8, 2016).

16. E.g., Opinion, *Jones v. City of Clanton*, No. 2:15cv34-MHT (M.D. Ala. 2015); ODonnell v. Harris County, 2017 WL 1735456, No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017) (memorandum and opinion setting out findings of fact and conclusions of law).

17. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

sentence the defendant will face, and how much pressure to exert on defendants to plead guilty.<sup>18</sup>

The prosecutorial screening function is diminished in the misdemeanor world. In some low-level courts, for example, there are no prosecutors at all and police directly charge and prosecute their own cases. This means that individuals must defend themselves against, or work out a plea bargain with, the same officer who arrested them in the first place.

In courts where there are prosecutors, declination and dismissal rates vary widely by jurisdiction—in some cities such as Baltimore and New York, up to 50% of misdemeanor arrests are eliminated along the way.<sup>19</sup> By contrast, in Mecklenburg, North Carolina, a Vera Institute study found prosecutorial declination rates of only 3 or 4%, meaning that nearly all arrests converted into criminal charges.<sup>20</sup> The effect of low declination and dismissal rates is powerful: arrests that remain in the system typically convert to convictions because the vast majority of defendants plead guilty. This means that, in effect, police acquire the power to decide who will be convicted merely by arresting them.<sup>21</sup> This is not the way it is supposed to work, and not the way it works for felonies. But it is an unintended effect of prosecutorial caseloads, the emphasis on speed, and deference to police arrest decisions.

#### D. DEFENSE COUNSEL

Many misdemeanor defendants never get a lawyer. Some are not entitled to counsel by law: The U.S. Supreme Court held in *Scott v. Illinois*<sup>22</sup> that a misdemeanor defendant who is not incarcerated does not have a Sixth Amendment right to an attorney. As a result, defendants who face “fine only” charges—charges that carry only a fine and no possibility of jail—do

18. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); see also Ronald F. Wright, “Prosecutor Institutions and Incentives,” in Volume 3 of the present Report.

19. MARYLAND JUDICIARY, *ANNUAL STATISTICAL ABSTRACT FISCAL YEAR 2015*, tbl. DC-4 (2015), <http://mdcourts.gov/publications/annualreport/reports/2015/fy2015statisticalabstract.pdf> (discussing the manner of disposition for criminal cases); *Adult Arrests 2007-2016*, N.Y. ST. DIV. OF CRIM. JUSTICE SERV., <http://criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYork.pdf> (last visited May 10, 2017).

20. *Racial Disparities in the Criminal Justice System: Hearing Before the S. Comm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (testimony of Wayne S. McKenzie, Director, Prosecution & Racial Justice Program at the Vera Institute of Justice) [hereinafter McKenzie Testimony].

21. Alexandra Natapoff, *A Stop is Just a Stop: Terry’s Formalism*, 15 OHIO ST. J. CRIM. L. (forthcoming 2017).

22. *Scott v. Illinois*, 440 U.S. 367 (1979).

not have the right to a lawyer at all. Conversely, the Court held in *Alabama v. Shelton*<sup>23</sup> that defendants who are ultimately incarcerated, or who could be subject to incarceration under the terms of their probation, do have the right to counsel. But many such defendants do not receive lawyers even though they are constitutionally entitled to them.<sup>24</sup> Low-level courts often fail to appoint a public defender, requiring defendants to work out their cases directly with prosecutors. A chief justice of the South Carolina Supreme Court once explained that she expressly told judges not to appoint counsel even when required by *Alabama v. Shelton*:

*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably ... by dragooning lawyers out of their law offices to take these cases in every magistrate's court in South Carolina, and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.<sup>25</sup>

Where counsel is provided, quality varies enormously. Some misdemeanor public-defender offices provide robust representation to their misdemeanor clients, investigating cases and going to trial. But most offices lack the resources to do so.<sup>26</sup> Misdemeanor public-defender caseloads are famously enormous—numbering in the hundreds and even thousands of cases, even though the ABA recommends a maximum of 300 misdemeanor cases per year per attorney.<sup>27</sup> This contributes to a so-called “meet ’em and plead ’em” culture in which attorneys meet their clients briefly, explain the prosecutor’s offer, and get their clients to agree. Even where defenders are prepared to litigate their cases, defendants may decide to plead guilty because they cannot afford bail and must wait the weeks or even months that a trial might require. In effect, the size and speed of the process—and the hydraulic pressures on defendants to plead

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23. *Alabama v. Shelton*, 535 U.S. 654 (2002).

24. MINOR CRIMES, *supra* note 6; ALISA SMITH & SEAN MADDAN, NAT’L ASS’N CRIMINAL DEF. LAWYERS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 15 (2011); DIANE DEPIETROPAOLO PRICE ET AL., NAT’L ASS’N CRIMINAL DEF. LAWYERS, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA’S SUMMARY COURTS 19–20 (2016) [hereinafter SUMMARY INJUSTICE].

25. MINOR CRIMES, *supra* note 6, at 15.

26. Roberts, *supra* note 8; MINOR CRIMES, *supra* note 6; *see also* Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report.

27. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 72, 72 n.13 (3rd ed. 1992).

guilty—impose structural limitations on defense counsel’s ability to provide vigorous representation to their clients.<sup>28</sup>

### E. COURTS

Low-level courts are notorious for their quick-and-dirty atmosphere. The leading report on national misdemeanor courts described how they work as follows:

In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. Misdemeanor courtrooms often have so many cases on the docket that an attorney has mere minutes to handle each case. Because of the number of cases assigned to each defender, “legal advice” often amounts to a hasty conversation in the courtroom or hallway with the client. Frequently, this conversation begins with the defender informing the defendant of a plea offer. When the defendant’s case is called, he or she simply enters a guilty plea and is sentenced. No research of the facts or the law is undertaken. This process is known as meet-and-plead or plea at arraignment/first appearance.<sup>29</sup>

Numerous scholars who have studied low-level courts around the country describe the same phenomenon.<sup>30</sup>

Because of the rushed and informal nature of these courts, judges may affirmatively discourage defense attorneys from litigating legal issues. Law professor Eve Brensike Primus—a former public defender—recalls misdemeanor judges who would not permit her to raise legal issues, telling her to “save it for appeal.”<sup>31</sup> In many municipal courts, judges are not themselves lawyers.<sup>32</sup> In other courts, municipal judges also serve as part-time

28. Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013).

29. MINOR CRIMES, *supra* note 6, at 31.

30. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80 (2012); Roberts, *supra* note 8; Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157 (2004); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

31. Primus, *supra* note 30, at 81.

32. Brendan Smith, *Legislative Efforts Requiring Judges to Hold JD Meet with Mixed Results*, ABA J. (July 1, 2011), [http://www.abajournal.com/magazine/article/is\\_there\\_a\\_lawyer\\_in\\_the\\_court/](http://www.abajournal.com/magazine/article/is_there_a_lawyer_in_the_court/) (24 states do not require judges to have law degree); *see also* SUMMARY INJUSTICE, *supra* note 24.

prosecutors.<sup>33</sup> This inattention to law, due process, and neutrality is one of the defining characteristics of the misdemeanor process.

Low-level courts are also infamous for the disrespectful and inhumane treatment of the hundreds of defendants who speed through their doors. In Houston, people sat in long lines outside one misdemeanor courtroom for hours; some days the judge never showed up.<sup>34</sup> A bankruptcy judge who visited misdemeanor court in New York came away dismayed. “I was shocked by the casual racism emanating from the bench.”<sup>35</sup> As Professor Jonathan Simon put it:

[T]he whole structure of misdemeanor justice ... seems intended to subject the urban poor to a series of petty but cumulative blows to their dignity as citizens of equal standing. The exposure to constant petty (as well as not so petty) degradation and domination by police, and the absence of an advocate, or a protective judicial role, produces a constitutive lesson of the lack of accord for dignity.<sup>36</sup>

#### F. THE INDIVIDUAL DEFENDANT

With so many official players under pressure to move cases along, the person with the strongest incentive to demand time and attention is the individual accused of a crime. But misdemeanor defendants are typically ill-equipped to stand up for their own rights. The petty-offense process tends to sweep up the disadvantaged: the undereducated, the poor, people of color, the young, addicted, or homeless.<sup>37</sup> Without meaningful representation or education, misdemeanor defendants are left to navigate their options alone. They may not know whether they are actually innocent or whether they have legal defenses that could be raised. Without legal advice, they may not appreciate the substantial burden that sustaining a misdemeanor conviction will impose on the rest of their lives. Even if they are not incarcerated, contesting their cases may require them to return to court multiple times, forcing them to miss work or struggle with transportation or child care. Such pressures often make pleading guilty seem like the only realistic option.

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33. NAT’L CTR. FOR ST. CTS., MISSOURI MUNICIPAL COURTS: BEST PRACTICE RECOMMENDATIONS (2015), <https://www.courts.mo.gov/file.jsp?id=95287> [hereinafter MISSOURI MUNICIPAL].

34. Emily DePrang, *Poor Judgment*, TEX. OBSERVER (Oct. 12, 2015), <https://www.texasobserver.org/poor-judgment/>.

35. Hon. Shelley C. Chapman, *I’m a Judge and I Think Criminal Court is Horrifying*, MARSHALL PROJECT (Aug. 11, 2016), <https://www.themarshallproject.org/2016/08/11/i-m-a-judge-and-i-think-criminal-court-is-horrifying#.Mh9gFKKVg>.

36. Jonathan Simon, *Misdemeanor Injustice and the Crisis of Mass Incarceration*, 85 S. CAL. L. REV. POSTSCRIPT 113 (2012).

37. Natapoff, *Misdemeanors*, *supra* note 1; Roberts, *supra* note 8.

### III. PUNISHMENT AND COLLATERAL CONSEQUENCES

Once a person sustains a misdemeanor conviction, a wide array of formal punishments and informal burdens accrue.<sup>38</sup> Probation and fines are the most common legal punishment; jail sentences are less frequently imposed but hover in the background as a threat against those who violate their probation or fail to pay their fines. In addition to the formal conviction, offenders may lose their jobs, welfare benefits, housing, and immigration status. Fines and fees often sink offenders deeper into poverty while saddling them with years of debt and poor credit. While such consequences still pale in comparison to long felony sentences, petty offenders are often punished in cumulative ways over long periods of time that far outweigh the seriousness of their crimes. Such punishments typically fall most heavily on the disadvantaged: While the wealthy can pay their fines and fees, or take time from work for a probation meeting, the poor often end up indebted and incarcerated because they lack the resources necessary to comply. This has led to what many have labeled the resurgence of “debtor’s prison,” where thousands of poor defendants are incarcerated not for their original offenses, but because they could not afford bail, fines, or fees.<sup>39</sup>

#### A. JAIL

In 1985, sociologist John Irwin wrote in his seminal work *The Jail*, “[i]n a legal sense, the jail is the point of entry into the criminal system. ... [It] was invented, and continues to be operated, in order to manage society’s rabble ... meaning the ‘disorganized’ and ‘disorderly,’ ‘the lowest class of people.’”<sup>40</sup> Today, over 11 million people pass through American jails every year; approximately 750,000 people are in jail at any given time. Forty percent of jail inmates are serving sentences; 60% are pretrial detainees who have not yet been adjudicated

38. Roberts, *supra* note 8; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Gabriel J. Chin, “Collateral Consequences,” in Volume 4 of the present Report.

39. *The New Debtors’ Prison: If You Are Poor, Don’t Get Caught Speeding*, THE ECONOMIST (Nov. 16, 2013), <http://www.economist.com/news/united-states/21589903-if-you-are-poor-dont-get-caught-speeding-new-debtors-prisons>; REBEKAH DILLER, ALICIA BANNON & MITALI NAGRECHA, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010) [hereinafter A BARRIER TO REENTRY]; AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010) [hereinafter IN FOR A PENNY]; *see also* AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO’S DEBTOR’S PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES (2013) [hereinafter THE OUTSKIRTS OF HOPE].

40. JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* 1–2 (1985).

or convicted of anything.<sup>41</sup> Most defendants who are offered bail cannot afford to pay it, which means that many inmates are effectively incarcerated due to their poverty.<sup>42</sup> The average pretrial detainee spends over a month in jail.<sup>43</sup>

Civil-rights litigation and the mass-incarceration debate have focused largely on the harms of prison, but jails are often just as harsh and dangerous, sometimes more so. Designed for short-term stays, jails typically lack the facilities, mental-health care, drug treatment, and other programs that prisons have. Violence, sexual assault, and disease are common.<sup>44</sup> And although it is not the most frequent initial sentence, the threat of incarceration hovers continually in the background if offenders fail to meet the conditions of their probation or cannot afford to pay their fines and fees.

### B. PROBATION

Probation, sometimes referred to as community supervision, places defendants on a period of court supervision with conditions, such as the requirement that they maintain employment or remain drug-free. It is the most common misdemeanor sentence—over 4 million Americans are on some form of probationary supervision.<sup>45</sup> While probation is often understood as a form of leniency—a substitute for incarceration—it can be highly burdensome in its own right. Probationers lose their privacy rights—probation officers can search them and their homes at any time.<sup>46</sup> Probation typically requires periodic drug tests, visits to the probation office, electronic monitoring, and other reporting requirements that can be difficult to meet. A violation of any probation condition can subject the defendant to incarceration. A typical misdemeanor probation term can last from six months to several years.<sup>47</sup>

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41. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MID-YEAR 2014, at 1–4 (2015).

42. See RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (2015).

43. DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PROFILE OF JAIL INMATES, 2002 (2004).

44. JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS (2006); *Since Sandra: Here Are the 815 People (and Counting) Who Have Lost Their Lives in Jail in the Year after Sandra Bland Died*, HUFFINGTON POST, <http://data.huffingtonpost.com/2016/jail-deaths> (last visited May 10, 2017).

45. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016); see also Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

46. *Samson v. California*, 547 U.S. 843 (2006); *United States v. Knights*, 534 U.S. 112 (2001).

47. Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51 (2013).



One of the most important conditions of misdemeanor probation is the requirement to pay fines and fees. Thousands of misdemeanor defendants are incarcerated every year because they cannot pay their legal financial obligations (LFOs) and thus violate the terms of their probation. In over a dozen states, private probation companies profit from this arrangement, providing supervision services to the state for free and charging defendants monthly supervision fees.<sup>48</sup> If the defendant fails to pay the company, they can be jailed until they pay.

### C. FINES AND FEES

Most misdemeanor offenders are punished through fines. While fines are an important and long-standing criminal justice tool, they have unintended consequences in the misdemeanor arena because so many defendants cannot afford to pay them. Such defendants thus receive not only their original fine, but are punished with long-term debt, the loss of their credit, and pressure to forgo necessities of life such as rent, food, health care, and education. If they do not pay, they may be incarcerated. In addition, courts and other criminal justice institutions now impose a wide array of fees, including booking fees, court costs, public-defender fees, jail fees, and late fees that can amount to hundreds or even thousands of additional dollars.<sup>49</sup>

A number of recent reports and lawsuits have documented the resurgence of debtor's prison for defendants who are too poor to pay their fines and fees or who cannot afford bail.<sup>50</sup> The 2015 U.S. Department of Justice Report on the Ferguson Police Department concluded that police practices and municipal courts in Ferguson, Missouri, were largely designed to extract revenue from low-income residents through the imposition of fines and fees for petty crimes and traffic offenses.<sup>51</sup> The Conference of State Court Administrators (COSCA)

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48. JASON BLALOCK, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY (Feb. 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>.

49. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010); see also Beth A. Colgan, "Fines, Fees, and Forfeitures," in Volume 4 of the present Report.

50. IN FOR A PENNY, *supra* note 39; A BARRIER TO REENTRY, *supra* note 39.

51. INVESTIGATION OF FERGUSON, *supra* note 12.



and the Conference of Chief Justices have come out strongly against the practice, stating that it violates core notions of judicial integrity and neutrality to treat courts as tax collectors.<sup>52</sup>

#### D. EMPLOYMENT AND OTHER COLLATERAL CONSEQUENCES

Beyond formal legal sentences of jail, probation, and fines, misdemeanor offenders are subject to numerous collateral civil penalties for their minor convictions.<sup>53</sup> Perhaps the most important is the impact on employment: Most employers check criminal records, and a misdemeanor conviction can impede job prospects for years.<sup>54</sup> Additional consequences can include losing driver's licenses, jobs, professional licenses, public housing, food stamps, immigration status, and creditworthiness.<sup>55</sup> The Council of State Governments has assembled a database of statutory provisions that impose civil collateral consequences for a criminal conviction: For misdemeanors, the database contains nearly 9,000 provisions.<sup>56</sup> The collective collateral punishments that attach to a minor conviction can thus far outweigh the formal sentence itself.

### IV. BIG CHALLENGES: INNOCENCE, RACE, AND MONEY

The misdemeanor process distorts many aspects of the criminal justice institution. Three especially critical challenges lie in the arenas of wrongful conviction, race, and wealth inequality.

#### A. INNOCENCE

Since 2014, there have been dozens of exonerations in Houston, Texas, of innocent people who pled guilty to low-level drug charges even though they did not possess drugs. They were arrested based on inaccurate roadside drug tests, and then succumbed to the heavy pressures to plead guilty in order to

52. CONF. OF ST. CT. ADMIN., 2011–2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS (2012) [hereinafter COURTS ARE NOT REVENUE CENTERS]; Lorri Montgomery, *Top National State Court Leadership Associations Launch National Task Force on Fines, Fees and Bail Practices*, NAT'L CTR. FOR ST. CTS. (Feb. 3, 2016), <http://www.ncsc.org/Newsroom/News-Releases/2016/Task-Force-on-Fines-Fees-and-Bail-Practices.aspx> [hereinafter NCSC News Release].

53. Pinard, *supra* note 38; Roberts, *supra* note 8; Chin, *supra* note 38.

54. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMELM, NAT'L EMP. L. PROJECT, 65 MILLION NEED NOT APPLY (2011); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015).

55. See Jennifer M. Chacón, "Crimmigration," in the present Volume.

56. COUNCIL OF ST. GOV. JUST. CTR., <https://niccc.csjusticecenter.org/search/> (last visited May 10, 2017).

escape jail and the threat of longer sentences if they did not plead.<sup>57</sup> These inaccurate \$2 drug tests are used to make arrests and generate convictions all over the country.

In New York, many innocent people were wrongfully convicted of trespassing under a New York Police Department policy called “Operation Clean Halls.” Under that program, which was eventually found unconstitutional, police arrested large numbers of African Americans and Latinos for trespassing in or around public housing projects.<sup>58</sup> Often the individuals were not actually trespassing—many were visiting friends or family—but upon being arrested they pled guilty to escape jail and the long, burdensome process of contesting their cases. Public defender Chris Fabricant described the dynamic as follows:

Before coming to the Bronx Defenders (where I am a staff attorney), I had never had a misdemeanor case, and rare was the client I was certain was innocent. In the Bronx, well over half of my cases are misdemeanors, and I have had a disgraceful number of innocent clients, many of whom plead guilty to a trespassing charge, either in a ‘Clean Halls’ building or a New York City Public Housing building.<sup>59</sup>

The threat of these types of wrongful conviction is inherent in the quick and dirty misdemeanor process: arrests based on weak evidence, a process ill-equipped to check the evidence, and heavy pressure to plead guilty. Because misdemeanor dockets are so large, they likely generate hundreds if not thousands of such wrongful convictions every year.<sup>60</sup>

### B. RACE

The misdemeanor process is the first step in the racialization of crime in America. While the racial influences of the war on drugs and long mandatory minimum sentences are now well recognized,<sup>61</sup> the misdemeanor system plays

57. Ryan Gabrielson & Topher Sanders, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES (July 7, 2016), [https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?\\_r=0](https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?_r=0).

58. *Ligon v. City of New York*, 925 F. Supp. 2d 478, 490 (S.D.N.Y. 2013).

59. M. Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD’s Apartheid-Like Trespassing Crackdown*, VILLAGE VOICE (Oct. 30, 2007), <http://www.villagevoice.com/news/rousting-the-cops-6419395>.

60. Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* (Daniel Medwed ed., 2017); see also Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report.

61. See Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report.

an enormous yet underappreciated role. The dynamic has its roots in the fact that low-level policing is heavily racially skewed.<sup>62</sup> Nationally, marijuana arrests are disproportionately aimed at African Americans, with black arrest rates four times as high as white arrest rates.<sup>63</sup> In New York, at the height of the city's order maintenance policy, 80% of people stopped and frisked by police were African American or Latino: most of those wrongful trespassing arrests described above were imposed on people of color.<sup>64</sup> In San Jose, California, a media investigation found that Latinos were subject to 70% of arrests for disturbing the peace, 57% of arrests for resisting, and 57% of arrests for public intoxication, even though the group comprises only approximately 30% of San Jose residents.<sup>65</sup> In Baltimore, 657 people were arrested for "gaming" or "playing cards" between 2010 and 2015: Five were white.<sup>66</sup> In these cumulative ways, the enormous net of the petty-offense process sweeps in hundreds of thousands of African Americans and other minorities every year, marking them as criminal, often inaccurately, and burdening their personal and economic lives in perpetuity. Addressing the misdemeanor racial dynamic is thus key to addressing the racial imbalance of the entire criminal system.

### C. MONEY

Finally, the misdemeanor system has become an engine of wealth redistribution and a powerful socioeconomic institution in its own right. The process criminalizes poverty—for example by punishing and incarcerating individuals who cannot afford to pay bail, fines, or fees.<sup>67</sup> It exacerbates that poverty, for example by suspending driver's licenses of people who already cannot afford traffic fines, and imposing late fees and interest on those who cannot pay immediately.<sup>68</sup> And it links poverty to incarceration by jailing those who cannot afford bail or who have missed a payment.<sup>69</sup>

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62. See Devon W. Carbado, "Race and the Fourth Amendment," in Volume 2 of the present Report; see also David A. Harris, "Racial Profiling," in Volume 2 of the present Report.

63. THE WAR ON MARIJUANA, *supra* note 4.

64. Floyd v. City of New York, 283 F.R.D. 153 (S.D.N.Y. 2012); see also Henry F. Fradella & Michael D. White, "Stop-and-Frisk," in Volume 2 of the present Report.

65. CHRISTY E. LOPEZ, AM. CONST. SOC'Y FOR L. & POL'Y, DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH "CONTEMPT OF COP" ARRESTS 1, 7 (2010).

66. BALTIMORE POLICE, *supra* note 11.

67. Harris, Evans & Beckett, *supra* note 49.

68. NOT JUST A FERGUSON PROBLEM, *supra* note 6.

69. Laura Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016); Wayne Logan & Ronald Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175.

The system's heavy reliance on fines and fees is no accident: Many municipal courts, probation offices, and local governments rely on the income stream generated by misdemeanor adjudication. Small towns around the country raise millions in revenue through arresting, citing, and convicting low-level offenders.<sup>70</sup> In Ferguson, Missouri, the Justice Department concluded:

Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community.<sup>71</sup>

In effect, the system taxes its low-income population through fines and fees in order to fund the operation of the petty-offense process itself.

### RECOMMENDATIONS

Cost has long been an impediment to criminal justice reform in general, and to misdemeanor reform in particular. It is often thought that stronger procedures, more defense counsel, data collection, and individuated justice are too expensive given the petty nature of the underlying offenses. But this impression is incorrect. Some misdemeanor reforms actually save the state money: It can be cheaper to find housing for homeless people than it is to lock them up. Community service is less expensive than arresting and incarcerating people who cannot afford to pay their fines and fees. Decriminalization and legalization mean that the state no longer has to pay for defense counsel, prosecutorial resources, or jail. Moreover, the individual and social costs of misdemeanor overcriminalization are very high. Society—especially local budgets—bears the cost when millions of individuals are incarcerated, impoverished, and rendered jobless by the misdemeanor experience. Or, as California State Sen. Bob Hertzberg bluntly put it: “We’re not even getting the dough. How intelligent is that? We’re just ruining people’s lives.”<sup>72</sup> Misdemeanor reform can thus be both fiscally responsible and socially beneficial.

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70. IN FOR A PENNY, *supra* note 39; COURTS ARE NOT REVENUE CENTERS, *supra* note 52.

71. INVESTIGATION OF FERGUSON, *supra* note 12, at 2.

72. Sen. Bob Hertzberg, A Cycle of Incarceration: Prison, Debt and Bail, White House Conference (Dec. 3, 2015), *available at* <https://www.youtube.com/watch?v=ErcSHP12deE> (comments at 2:14:33).

The reforms below address weaknesses and counterproductive incentives at crucial stages of the misdemeanor process: arrest, adjudication, incarceration, and punishment. Some reforms are aimed at specific actors; some involve multiple institutions. Numerous jurisdictions across the country are experimenting with such reforms—the examples provided are the tip of the iceberg, offering a window into the possibilities for experimentation and success. More extensive details and reform proposals are contained in the sources in the footnotes.

**1. Reduce the flow of low-level arrests that fill the misdemeanor pipeline.**

Many police departments impose formal or informal quotas on police officers to make citations and arrests. This leads to unnecessary arrests and charges that fill the misdemeanor pipeline while disproportionately impacting low-income and minority neighborhoods. For example, New York police officers filed a lawsuit against the NYPD, arguing that such quotas violate their professional standards and put pressure on officers to make unconstitutional arrests.<sup>73</sup> The Department of Justice concluded that quotas were pressuring Baltimore police officers to engage in unconstitutional practices.<sup>74</sup> Eliminating such quotas and pressures would not only improve police working conditions but stem the flow of unnecessary and unfounded arrests into the petty-offense system in the first place.<sup>75</sup>

State legislatures also have the power to restrict police authority to arrest for minor offenses, requiring police to issue citations and summonses instead.<sup>76</sup> Legislatures should identify offenses, such as traffic offenses, order-maintenance crimes, and marijuana possession, where the purposes of the statute can be fulfilled by issuing a summons and the costs of arrest to the individual and to the state can be avoided. In New York, for example, the city recently converted a number of criminal offenses into violations for which police can issue summonses instead of making arrests.<sup>77</sup>

73. Complaint, *Raymond v. City of New York*, No. 15-CV-6885 (S.D.N.Y. Dec. 10, 2015).

74. BALTIMORE POLICE, *supra* note 11.

75. See Rachel A. Harmon, “Legal Remedies for Police Misconduct,” in Volume 2 of the present Report.

76. See *Atwater v. Lago Vista*, 532 U.S. 318, 355–60 (2001) (collecting statutory provisions authorizing and/or limiting police arrest power for all 50 states).

77. Criminal Justice Reform Act, N.Y.C. ADM. CODE § 14-155 (2016), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2553507&GUID=BF52096B-1917-4914-977F-91E604025A50&Options=&Search=>; see *Virginia v. Moore*, 553 U.S. 164 (2008) (noting state authority to create non-arrestable offenses).

It is important that such legislative restrictions on arrest be mandatory so as to reduce confusion and racial disparities. For example, in Illinois, marijuana decriminalization statutes gave police discretion over whether to make an arrest or issue a citation: Upon implementation, arrest rates went down in white neighborhoods but increased in black neighborhoods.<sup>78</sup>

2. **Eliminate money bail and bail schedules for low-level offenders.** There is new public appreciation for the regressive and unconstitutional impact of bail. As a result, many jurisdictions are eliminating money bail entirely for low-level offenses. A federal judge in Harris County, Texas, recently declared the county's misdemeanor bail system unconstitutional.<sup>79</sup> In Maryland, the state's attorney general issued an opinion stating that Maryland's use of money bail to incarcerate the poor is likely unconstitutional; the Maryland Court of Appeals subsequently changed the rules.<sup>80</sup> Bail schedules likewise impose bail without consideration for the defendant's personal circumstances, actual flight risk, or ability to pay. Schedules should thus be eliminated, and bail determinations—if made at all—should always be individualized.<sup>81</sup> This will not only eliminate the equal protection violation that occurs when only the poor are incarcerated, but lessen pressures on the poor to plead guilty. Moreover, as the Maryland attorney general points out, eliminating money bail is both efficient and cost-effective:

In the District of Columbia, where courts rely heavily on supervised pretrial release rather than bail, 90% of defendants appear for trial and are not rearrested before their cases are resolved. Similarly, after Kentucky shifted to a nonfinancial pretrial release program and adopted an evidence-based risk assessment tool, its pretrial release

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78. KATHLEEN KANE-WILLIS ET AL., ILL. CONSORTIUM ON DRUG POL'Y, PATCHWORK POLICY: AN EVALUATION OF ARRESTS AND TICKETS FOR MARIJUANA MISDEMEANORS IN ILLINOIS (2014).

79. *ODonnell v. Harris County*, 2017 WL 1735456, No 4:16-cv-01414, at 3, 99 (S.D. Tex. Apr. 28, 2017) (memorandum and opinion setting out findings of fact and conclusions of law).

80. Advice Letter from Sandra Benson Brantley, Couns. to the Gen. Assemb., Off. of the Attorney Gen., to the Standing Comm. on Rules of Prac. & Proc. (Oct. 11, 2016), [http://www.marylandattorneygeneral.gov/News%20Documents/Rules\\_Committee\\_Letter\\_on\\_Pretrial\\_Release.pdf](http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf); Kevin Rector, *Maryland Judges, Commissioners Shifting Away from Cash Bail as Reform Debate Continues*, BALT. SUN (Feb. 25, 2017), <http://www.baltimoresun.com/news/maryland/bs-md-bail-reform-effects-20170225-story.html>.

81. *United States v. Salerno*, 481 U.S. 739, 750, 755 (1987) (upholding the constitutionality of bail on the assumption that determinations will be individualized); *see also* Brief of the United States as Amicus Curiae, *Walker v. City of Calhoun*, No. 16-10521-HH, 2017 WL 929750 (11th Cir. 2017) (arguing that bail schedules are unconstitutional).

rate increased from 68 to 70%, its court appearance rate rose from 89 to 91%, and arrests for new criminal activity while on pretrial release dropped by 15%. A Colorado risk-assessment tool documented a 95% court appearance and a 91% public safety rate for its lowest risk defendants. ... These systems also experienced a reduction in the costs of housing defendants pretrial and prevented the injustice and collateral consequences attached to wealth-based pretrial detention.<sup>82</sup>

3. **Prosecutorial decisions: Incentivize screening and dismissals.** When prosecutors fail to screen cases rigorously, low-level arrests convert too easily into criminal charges. Misdemeanor prosecutors should thus be trained and incentivized to engage in strong screening practices and to decline or dismiss higher percentages of misdemeanors, particularly order-maintenance and possession offenses, which are overused as policing tools.<sup>83</sup> For example, in Milwaukee, Wisconsin, the Vera Institute's study revealed particularly low declination rates for nonwhite defendants in drug-paraphernalia cases. Upon investigation, it turned out that misdemeanor dockets were being staffed by junior, less experienced prosecutors. The office assigned experienced attorneys to the unit to better train the new prosecutors. Declination rates rose and racial disparities declined.<sup>84</sup> A Missouri study of prosecutorial offices concluded that "misdemeanor units are typically operated by experienced support staff and inexperienced attorneys," and that screening is key to efficiency as well as fairness.<sup>85</sup> Because new prosecutors typically train in misdemeanors before they move onto felonies, the misdemeanor training experience is an opportunity not only to improve petty-offense processing and outcomes but to set rigorous standards from the beginning of young prosecutors' careers.

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82. Letter from Brian E. Frosh, Md. Attorney Gen., to Hon. Alan M. Milner, Chair, Standing Comm. on Rules (Oct. 25, 2016), [http://www.marylandattorneygeneral.gov/News%20Documents/Rules\\_Committee\\_Letter\\_on\\_Pretial\\_Release.pdf](http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretial_Release.pdf).

83. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

84. McKenzie Testimony, *supra* note 20; WAYNE MCKENZIE ET AL., VERA INST. OF JUST., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 7 (2009).

85. JOAN E. JACOBY ET AL., JEFFERSON INST. FOR JUST. STUD., PROSECUTOR'S GUIDE TO MISDEMEANOR CASE MANAGEMENT 33–34 (2001) (9 jurisdiction study of prosecutors' offices).

4. **Enforce the constitutional right to counsel and due process.** The Sixth Amendment guarantees an attorney to defendants who are incarcerated, or who are placed on jailable probation.<sup>86</sup> As numerous reports and investigations have demonstrated, this right is routinely violated in lower courts around the country.<sup>87</sup> Courts and state governments must therefore find the resources to provide meaningful counsel to the thousands of defendants who come before lower courts, which includes reducing defender caseloads to ABA-recommended levels. Where states are unwilling to pay for this constitutionally mandated right, they have the option of converting criminal offenses into civil infractions to remove the possibility of incarceration and thereby eliminating the attendant right to counsel.<sup>88</sup>

Courts are responsible for enforcing the Sixth Amendment in particular and due process in general. The right to counsel is not satisfied merely by the appointment of a lawyer: Judges must ensure that attorneys on both sides have the time and opportunity to raise legal issues, that unrepresented defendants understand their rights and the nature of the proceedings, and that the courtroom is a place where defendants can be confident of respectful treatment. As the National Center for State Courts put it:

High performing courts are procedurally fair. They treat those who appear before the court with respect, dignity, and understanding. Procedural fairness is not a feel-good, vague ideal; it is a tangible operational philosophy that promotes the highest ideals of justice.<sup>89</sup>

The reports cited here contain numerous recommendations for improving access to counsel and strengthening the integrity of lower-court procedures.<sup>90</sup>

5. **Increase the availability of diversion.** Diversion is an alternative disposition and punishment that permits defendants to avoid formal convictions by submitting to a period of supervision. Some jurisdictions refer to it as pretrial diversion; New York has a comparable procedure called an “adjournment in contemplation of dismissal” (ACD). Diversion is a central mechanism through which prosecutors can funnel people out of the criminal system where outright dismissal is inappropriate, giving

86. *Alabama v. Shelton*, 535 U.S. 654 (2002).

87. AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004); MINOR CRIMES, *supra* note 6; SUMMARY INJUSTICE, *supra* note 24.

88. Boruchowitz, *supra* note 6; Roberts, *supra* note 8.

89. MISSOURI MUNICIPAL, *supra* note 33.

90. See note 86, *supra*.



people a chance to keep their records clean. For example, the suspended-license diversion program in King County, Washington, has permitted thousands of defendants to keep their licenses, avoid criminal convictions, and pay off their fines, while saving the county over \$300,000.<sup>91</sup>

All diversion reform should ensure that programs are free and available equally to rich and poor alike. Some prosecutors' offices charge defendants for the privilege of entering diversion, which precludes low-income individuals from taking advantage of the opportunity. As a *New York Times* investigation concluded:

[I]n many places, only people with money [can] afford a second chance. Though diversion was introduced as a money-saving reform, some jurisdictions quickly turned it into a source of revenue. Prosecutors exert almost total control over diversion, deciding who deserves mercy and at what price[.] The prosecutors who grant diversion often benefit directly from the fees, which vary widely from town to town and can reach \$5,000 for a single offense.<sup>92</sup>

In felony diversion programs and diversionary drug programs, researchers have found racial discrepancies where more white than black defendants are given the opportunity to keep their records clean.<sup>93</sup> Because diversion programs are discretionary, prosecutors' offices should be particularly attuned to the challenges of implicit bias in their implementation.<sup>94</sup>

While diversion is clearly better for defendants than an outright conviction, it has its costs. In New York, for example, an ACD marks the defendant's record during the period of diversion, which can lead to job loss and other ill effects.<sup>95</sup> While most diversion programs promise that defendants will not sustain a permanent record, the realities of commercial data collection and inaccurate criminal justice databases make such promises hard to

91. Boruchowitz, *supra* note 6, at 7–9.

92. Shaila Dewan & Andrew Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html>.

93. Lisa Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3 RACE & JUST. 210 (2013); John MacDonald et al., *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*, 43 J. LEGAL STUD. 155 (2014).

94. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1141–42 (2012).

95. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014).

keep.<sup>96</sup> As a result, even diversions and dismissals can leave a permanent criminal mark, sometimes unbeknownst to the defendant.<sup>97</sup>

6. **Reduce incarceration and increase decriminalization.** Incarceration is overused for petty offenses, not only to punish minor conduct but also to enforce the collection of fines and fees. States should end the debtor's prison phenomenon by restricting courts from using incarceration, including civil contempt, to enforce the payment of legal financial obligations (LFOs).<sup>98</sup> Where legislatures do not act, courts should step into the breach, reducing the use of incarceration as punishment for failure to pay and eliminating it as a debt collection tactic against the poor.<sup>99</sup>

Decriminalization is one of the most promising misdemeanor reforms but it is also a double-edged sword.<sup>100</sup> Decriminalization has various meanings, but its essence is the elimination of jail time for existing offenses. In some jurisdictions, decriminalized offenses remain criminal in nature but punishable only by a fine, so-called "non-jailable misdemeanors." Other jurisdictions engage in more robust decriminalization by converting offenses into civil infractions or violations. This latter option is the most effective, since it eliminates not only jail time but the stigma of a criminal conviction and the many collateral consequences that still attach to non-jailable misdemeanors.

On the one hand, decriminalization eases many of the misdemeanor system's worst features. It reduces incarceration, especially for overpoliced populations. It can represent a more proportionate, fairer response to conduct widely perceived as harmless or only mildly blameworthy. And it saves state resources by averting the need for defense counsel, prosecution costs, and jail space. Professor Robert Boruchowitz estimates that increasing diversion and decriminalization could save over \$1 billion nationwide:

A University of Oregon study found that the marginal cost of prosecuting and convicting a misdemeanor in Oregon was \$1,679. Testimony presented to the Washington

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96. JACOBS, *supra* note 54; *see also* Dewan, *supra* note 91.

97. Rothgery v. Gillespie Cty., 554 U.S. 191 (2008).

98. *See, e.g.,* A BARRIER TO REENTRY, *supra* note 39 (documenting how states use civil contempt to incarcerate for the nonpayment of criminal fines).

99. Each of the following reports on the debtor's prison phenomenon contains detailed policy recommendations to this end: IN FOR A PENNY, *supra* note 39; A BARRIER TO REENTRY, *supra* note 39; Blalock, *supra* note 48.

100. Natapoff, *Decriminalization*, *supra* note 1; Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319 (2014).

state Legislature in 2009 showed that changing simple possession of marijuana to a violation could save \$16 million per year. ... Nationally, if only half of the 758,593 marijuana-possession cases, and half of the 1,106,314 disorderly conduct, drunkenness, vagrancy, and curfew and loitering arrests were diverted or treated as non-criminal violations, 932,453 cases across the country could be removed from the system, saving more than \$1.5 billion per year.<sup>101</sup>

Accordingly, every state should comprehensively review its misdemeanor crimes and violations and eliminate incarceration as a penalty for traffic, order-maintenance, and other offenses that do not involve harmful or dangerous conduct. For example, Hawaii undertook a thorough review of its non-criminal codes in order to decriminalize regulatory offenses that once carried the potential for incarceration.<sup>102</sup> In addition to marijuana possession, Massachusetts decriminalized the first-time offenses of disturbing the peace and operating a vehicle while uninsured or with a suspended license.<sup>103</sup>

On the other hand, decriminalization is not legalization.<sup>104</sup> It is a famous net-widener, making it easier to sweep large numbers of people into the criminal system without counsel or due process. Non-jailable misdemeanors still mark people with criminal records and impose wide-ranging collateral consequences, and employers often ignore technical distinctions between civil infractions and criminal violations. Because citations are easy to issue and prosecute, decriminalization also increases the risk that governments will be tempted to use low-level offenses as revenue generators. And finally, for defendants who cannot pay the hefty fines and fees associated with decriminalized offenses, incarceration is not so much eliminated as postponed.<sup>105</sup> Accordingly, decriminalization should be deployed with careful attention to its unintended negative side effects, and legalization should be considered where possible.

101. Boruchowitz, *supra* note 6.

102. THE SPANGBERG PROJECT, AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING (2010) (reclassification included agricultural, animal, conservation, and transportation offenses).

103. MASS. GEN. LAWS ANN. ch. 272 § 53(b); JOEL SCHUMM, AM. BAR ASS'N & NAT'L ASS'N. OF CRIM. DEF. LAW., NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 16 (2012).

104. See Alex Kreit, "Marijuana Legalization," in the present Volume.

105. Natapoff, *Decriminalization*, *supra* note 1.

7. **Overhaul fines, fees and the taxation function.** Misdemeanor fines and fees have taken on a life of their own, disconnected from the minor nature of the underlying offenses and the economic realities of the misdemeanor population. To restore balance, criminal fines should be interchangeable with community service or keyed to defendant income. In Europe, for example, some courts impose what are called “day fines,” fines that are multiples of the person’s daily income so that rich and poor people are punished proportionately to their ability to pay.<sup>106</sup>

Fees imposed by courts, probation offices, and jails should be eliminated for the indigent and severely limited overall. Unlike fines, which serve a punitive purpose, fees are revenue-generating mechanisms that force a largely impoverished defendant population to subsidize its own punishment. Thomas Edsall of the *New York Times* called this phenomenon “poverty capitalism,” a “unique sector of the economy [where the] costs of essential government services are shifted to the poor.”<sup>107</sup> The White House Counsel of Economic Advisers concluded that reliance on fines and fees “places large burdens on poor offenders who are unable to pay criminal justice debts and, because many offenders assigned monetary penalties fall into this category, has largely been ineffective in raising revenues.”<sup>108</sup> The criminal justice population is already heavily disadvantaged based on education, wealth, and personal resources: It should not also be required to fund the very criminal system that exacerbates its disadvantage. Accordingly, indigent defendants should not be charged fees for counsel, diversion, community service, jail, probation, drug testing, electronic monitoring, or any other aspect of their own adjudication and punishment.

In order to end the incentives for local courts and law enforcement to use misdemeanors to generate revenue, the link between fines and fees and local budgets should be severed. The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) recommend that the judiciary be funded from general state funds to ensure its stability and neutrality. As they put it, “CCJ and COSCA have long taken the position that court functions should be funded from the general operating fund of state and local governments to ensure that the judiciary can fulfill its obligation of upholding the Constitution and

106. Sally T. Hillsman, *Fines and Day Fines*, 12 CRIM. JUST. 49 (1990).

107. Thomas B. Edsall, *The Expanding World of Poverty Capitalism*, N.Y. TIMES (Aug. 26, 2014), <https://www.nytimes.com/2014/08/27/opinion/thomas-edsall-the-expanding-world-of-poverty-capitalism.html>.

108. FINES, FEES, AND BAIL, *supra* note 15.

protecting the individual rights of all citizens.”<sup>109</sup> Fines and fees should go into a general state fund used to support rehabilitation and otherwise improve the criminal process; this will eliminate the incentive for courts and municipalities to misuse misdemeanors as a covert form of taxation. In Maryland, for example, fines from decriminalized marijuana offenses go into a drug-treatment fund controlled by the Department of Health and Mental Hygiene.<sup>110</sup> In California, Proposition 47 reduced many drug crimes from felonies to misdemeanors; the savings are earmarked for drug treatment.<sup>111</sup> While state governments will still have incentives to rely on misdemeanor revenue, state officials lack the direct control over arrest, prosecution, and punishment that local officials exercise and which cause the most severe conflicts of interest.<sup>112</sup>

8. **Eliminate criminal records and collateral consequences.** Criminal records and collateral consequences covertly ratchet up misdemeanor punishments far beyond the seriousness of the original offense, extending the burden of conviction deep into people’s economic and personal lives. Misdemeanor criminal records for all but the most serious misdemeanors should thus be routinely expunged after an appropriate waiting period so as to minimize the impact on future employment.<sup>113</sup> Statutory collateral consequences for all but the most serious misdemeanors should be repealed. In particular, legislatures and courts should no longer use license suspensions to enforce debt collection, or as supplemental punishment for crimes that are unrelated to dangerous driving.<sup>114</sup>
9. **Require collection of court data.** There is no national mechanism for collecting data on low-level courts; data on misdemeanors are scarce, disorganized, and difficult to find. In states that do not have unified court systems, there are hundreds of low-level courts that do not make their caseload data public or may not even collect them at all. Such courts go by

109. NCSC News Release, *supra* note 52.

110. MD. CODE ANN. CTS. & JUD. PROC. § 7-302(g).

111. Annie Gilbertson, *Prop 47: Tracking Lawmakers’ Promise of Drug Treatment Over Prison*, 89.3 KPCC (Mar. 17, 2016), <http://www.scpr.org/news/2016/03/17/58455/prop-47-promised-drug-treatment-instead-of-prison/>.

112. *Ward v. Monroeville*, 409 U.S. 57 (1972); *COURTS ARE NOT REVENUE CENTERS*, *supra* note 52; *MISSOURI MUNICIPAL*, *supra* note 33, at 26–29.

113. Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WISC. L. REV. 321; Michael Pinard, *Criminal Records, Race, and Redemption*, NYU J. LEGIS. & PUB. POL’Y 963, 989–991 (2013). *But see* JACOBS, *supra* note 54, at 308 (“Expunging or sealing criminal records is largely futile.”).

114. NOT JUST A FERGUSON PROBLEM, *supra* note 6.

a variety of names—municipal courts, summary courts, justice courts, and mayor’s courts—and they issue thousands of convictions without public transparency or oversight.<sup>115</sup> Indeed, it was not until 2015 that Missouri even had a mechanism for knowing how many *courts* it had, since cities could create and dissolve their local courts at will.<sup>116</sup> States should thus pass legislation mandating that every court at every level collect, report, and make public their data through a centralized repository.<sup>117</sup>

Data should be collected and reported on the most salient and influential aspects of misdemeanor dockets. These include: the number of cases filed; declinations; dismissals; guilty-plea rates; trial rates; diversionary dispositions; defendant characteristics such as gender, race, age, and ethnicity; and whether defendants had counsel. Only with such data will we be able to fully understand the workings of the enormous misdemeanor system and its impact on millions of Americans every year.

10. **Educate defendants, decision-makers and the public.** Because the misdemeanor process has escaped oversight and scrutiny, the people who pass through it often do not understand how it works.<sup>118</sup> Defendants typically do not know their rights, what to expect when they get to court, or the potentially severe consequences of pleading guilty. Particularly when offenses are decriminalized, people may not realize that pleading guilty can nevertheless subject them to criminal stigma, employment consequences, and incarceration if they do not pay. Indeed, many legislators and judges themselves do not realize the enormous and influential scope of the misdemeanor institution and thus the significance of their various decisions to preserve or change it. Accordingly, decision-makers and members of the public—and people swept into the system in particular—need to be educated about the size, workings, and impact of the misdemeanor process. Like knowing how to vote or register a car, understanding misdemeanors is part of the civic knowledge base necessary to survive and thrive in American democracy.

115. THE OUTSKIRTS OF HOPE, *supra* note 39, at 7; SUMMARY INJUSTICE, *supra* note 24.

116. MISSOURI MUNICIPAL, *supra* note 33.

117. Thirty-two states plus the District of Columbia currently report aggregate caseload data to the National Center for State Court (NCSC)—the remaining 18 states should do so as well. COURT STATISTICS PROJECT, <http://www.courtstatistics.org/> (last visited May 10, 2017).

118. Natapoff, Gideon *Skepticism*, *supra* note 28.

# Drug Prohibition and Violence

Jeffrey A. Miron\*

*This chapter reviews the literature on the relation between drugs and violence. Drugs and violence might be related because drug use causes violent behavior, because drug trafficking is inherently violent, or because prohibition creates violence by forcing the drug market underground. The report concludes that the main reason for a drugs-violence connection is the third of these three possibilities: Enforcement of drug prohibition increases violence. The policy implication is that countries can save criminal justice resources and reduce violence by scaling back attempts to enforce drug prohibition.*

## INTRODUCTION

Popular discussion, policy debates, and social-science research have long recognized a connection between drugs and violence. According to both common perceptions and many policy treatments, the connection occurs partially because drug use causes violent behavior and partially because drug trafficking is inherently violent.<sup>1</sup> Social scientists, however, have suggested a different interpretation of the link between drugs and violence; namely, that drug prohibition makes the drug industry violent by forcing it underground. According to this view, an observed link between drugs and violence does not indicate that drug use or drug trafficking causes violence.

Determining the true causal relations between drugs and violence is crucial for choosing policies that might reduce violence. If drug use or drug trafficking causes violence, then policies aimed at reducing use or trafficking might make sense. If drug prohibition generates violence, then attempts to enforce prohibition not only fail to reduce violence but actually increase it.

This chapter reviews the literature on the relation between drugs, drug trafficking, drug prohibition, and violence. The review presents two main conclusions. First, economic theory suggests that drug prohibition can generate violence by forcing the drug market underground. Second, existing evidence

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1. Paul J. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 15 J. DRUG ISSUES 493 (1985).

indicates that the main reason for the drugs-violence link is that enforcement of drug prohibition causes violence. This suggests that policymakers can lower violence and reduce government expenditure at the same time. A reduction in drug-prohibition enforcement would decrease violence directly and fund increased expenditure on other polices to reduce violence.

The remainder of this chapter is organized as follows. Section I discusses the conditions under which drug prohibition might increase violence. Section II examines the relation between drugs, drug trafficking, and prohibition. Section III addresses policy implications.

### **I. DRUGS, PROHIBITIONS AND VIOLENCE: THEORETICAL CONSIDERATIONS**

The popular view of the relation between drugs and violence relies on two assumptions: that drug use causes violence via its psychopharmacological effects, and that drug trafficking is inherently violent. Before addressing these hypotheses, this section examines a third hypothesis, namely, that prohibition generates the observed correlation between drugs, drug trafficking, and violence.

The hypothesis that prohibitions increase violence is based on the following reasoning. Prohibitions do not typically eliminate the market for the prohibited good. Instead, prohibitions drive markets underground.<sup>2</sup> In these markets, participants cannot easily resolve disputes via standard, nonviolent mechanisms. For example, black-market producers of a good cannot use the legal system to adjudicate commercial disputes such as non-payment of debts. Black-market employers risk legal penalties if they report their employees for misuse of “company” funds or property. Buyers of black-market goods cannot sue for product liability, nor can sellers use the courts to enforce payment. Along a different line, rival firms cannot compete via advertising and thus might wage violent turf battles instead. Thus, in black markets, disagreements are more likely to be resolved with violence.

This hypothesis is related to, but partially distinct from, the “crack cocaine” hypothesis advanced by Fryer, Heaton, Levitt and Murphy (FHLM).<sup>3</sup> FHLM suggest that the major upturn in U.S. violence in the 1980s and the subsequent decline in the 1990s resulted from crack’s introduction and spread. When crack arrived in cities beginning in the early 1980s, the property rights to distribution (e.g., street corners) were not assigned, and since crack dealers could not use

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2. MARK THORNTON, *THE ECONOMICS OF PROHIBITION* (1991).

3. Roland G. Fryer, Jr. et al., *Measuring the Impact of Crack Cocaine*, 51 *ECON. INQUIRY* 1651 (2005).



advertising or lawsuits to capture market share or property rights, they used violence instead. Over time, according to FHLM, these property rights evolved (de facto), so violence subsided.

This hypothesis is reasonable but incomplete. First, disputes arise in markets for many reasons beyond the initial assignment of property rights, and these disputes would presumably continue as long as a market operates. Second, the FHLM hypothesis does not explain fluctuations in violence outside the sample of the 1980s and early 1990s, or in other countries.

The hypothesis that prohibitions increase violence is consistent with a number of stylized facts. Numerous sources, anecdotal and otherwise, report the use of violence in the alcohol trade during U.S. Alcohol Prohibition (1920-1933), but not before or after.<sup>4</sup> Violence committed by pimps or johns against prostitutes is widely regarded as a feature of prostitution markets, since prostitutes cannot report violence without risking legal sanctions themselves.<sup>5</sup> Similarly, violence was an important feature of the gambling industry during its early years in the United States, when entry was prohibited in most places.<sup>6</sup> Violence in this industry has disappeared as legal gambling has mushroomed.<sup>7</sup>

Nevertheless, the hypothesis that prohibitions alone increase the use of violence to resolve disagreements is incomplete, since many prohibitions are associated with minimal levels of violence. For example, compulsory schooling laws are prohibitions against not attending school, yet little violence is associated with this prohibition. Minimum-wage laws are prohibitions against hiring employees at sub-minimum wages, yet at least in the United States, little violence is associated with this prohibition. More generally, a broad range of regulatory polices (environmental, OSHA, labor market) can be characterized as prohibitions yet do not appear to generate violence, nor were the pre-1920, state-level prohibitions of alcohol or the 1940s and 1950s federal prohibitions

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4. Gary F. Jensen, *Prohibition, Alcohol, and Murder: Untangling Countervailing Mechanisms*, 4 HOMICIDE STUD. 18 (2000).

5. Jody Raphael & Deborah L. Shapiro, *Violence in Indoor and Outdoor Prostitution Venues*, 10 VIOLENCE AGAINST WOMEN 126 (2004).

6. ROGER DUNSTAN, GAMBLING IN CALIFORNIA (1997).

7. Peter Ferentzy & Nigel Turner, *Gambling and Organized Crime—A Review of the Literature*, 23 J. GAMBLING ISSUES 111 (2009).

of drugs associated with nearly the level of homicide experienced in the last several decades.<sup>8</sup> Western European countries have drug-prohibition laws similar to those in the United States, yet substantially lower rates of violence.<sup>9</sup>

Some of these prohibitions, such as compulsory education, do not generate violence because they do not interfere with a substantial number of transactions. Other prohibitions, such as minimum-wage laws, do not generate violence because they prohibit actions for which insufficient demand exists to generate large-scale black markets (since the minimum wage is sometimes not much above the wage at which the supply and demand of workers are equal in a free market). Still other prohibitions do not generate violence because they outlaw goods for which reasonable substitutes exist.

Most importantly, however, prohibitions are unlikely to create violence unless enforcement is substantial, and the amount of violence caused will increase with the degree of enforcement. This argument has two parts.

First, prohibitions are unlikely to create substantial black markets unless the degree of enforcement is significant, and the size of the black market increases with the degree of enforcement. The reason is that prohibitions generally contain exceptions that permit legal or quasi-legal production and consumption of the good, thus allowing use of standard, nonviolent mechanisms to resolve many disagreements related to the prohibited product. Increased enforcement, however, in the form of new laws that decrease the scope of the exceptions, or increased monitoring of existing exceptions, places some additional transactions outside the realm of legal-dispute resolution mechanisms.

For example, the United States did not treat the maintenance of opiate users by physicians as prescribed until several years after prohibition took effect.<sup>10</sup> Similarly, England allowed doctors relatively free rein in dispensing heroin for the first several decades of its drug prohibition, but since the 1960s it has imposed greater limits on heroin maintenance.<sup>11</sup> The gun-control systems in many countries have also become more restrictive over time.<sup>12</sup>

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8. Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSP. 175 (1995).

9. See, e.g., Global Study of Homicide, UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), <http://www.unodc.org/gsh/en/index.html>.

10. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL* 200 (1973).

11. John Strang & Michael Gossop, *Heroin Prescribing in the British System: Historical Review*, 2 EUR. ADDICTION RES. 185 (1996).

12. See, e.g., DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* (1992); Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 HAMLINE L. REV. 399 (1999).

Similarly, it was legal during Alcohol Prohibition to produce small quantities of alcohol for personal use, to produce certain kinds of low-alcohol wine and beer, to put alcohol in medicines and sacramental wines, and to use alcohol in industrial products. When monitoring and enforcement were lax, these exceptions provided substantial amounts of legal alcohol and thereby kept the scope for violent dispute resolution low. In the case of drug prohibition, doctors can prescribe many otherwise prohibited drugs, and several countries operate treatment programs that provide prohibited drugs to certain consumers. Under lax enforcement, these sources of supply meet much of the market demand legally. In the case of prostitution, various escort services are legal, even though prostitution itself is illegal, so these services meet much of the demand without generating violence so long as enforcement is lax.<sup>13</sup> In the case of prohibitory gun laws, exceptions for collectors or existing owners are common, and government use of the prohibited firearms often remains legal.<sup>14</sup> With little enforcement, these exceptions supply much of the market.

The critical aspect of all these examples is that when exceptions to the prohibition law exist, at least some manufacturing, transportation, and distribution of the good is legal; thus, this activity is unlikely to generate violence. Violence might be associated with the illegal diversion of the good, but far less than if the good is prohibited entirely.

The second reason that enforcement is critical to the degree of violence under prohibition is that participants in black markets are likely to develop mechanisms for avoiding violence, but enforcement makes this more difficult. For example, rival suppliers might agree to cartelize a market, thus reducing the need for advertising. The arrest of one of these suppliers, however, can generate violence among the remaining suppliers, who attempt to capture new market share. Alternatively, black-market suppliers might create private, nonviolent mechanisms for resolving disputes, but enforcement that creates turnover among suppliers destroys reputational capital and makes such arrangements difficult to maintain. Still another mechanism is that given higher dispute-resolution costs, participants in a black market will choose production and distribution methods that minimize transactions (e.g., home production), but

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13. Australia provides a good example of this phenomenon. See Barbara Sullivan, *When (Some) Prostitution is Legal: The Impact of Law Reform on Sex Work in Australia*, 37 J. L. & Soc'y 85 (2010).

14. See, e.g., WASH. REV. CODE § 9.41.060.

heightened levels of enforcement make this difficult. Likewise, consumers of the prohibited commodity might purchase repeatedly from a reliable supplier, but enforcement that generates turnover among suppliers makes this harder, increasing the scope for disagreements.

Beyond the two effects of increased enforcement discussed above—increasing the black market’s share of the prohibited commodity, and increasing the likelihood of violence for a given sized black market—several other mechanisms cause greater enforcement to increase the level of violence under a prohibition.

First, increased enforcement of a prohibition might be accompanied by a redistribution of criminal justice resources away from other violence-reducing government policies, such as crime deterrence,<sup>15</sup> the provision of an efficient system for protecting property rights, or suppression of other sources of violence. For example, increased enforcement of drug prohibition for a given sized police budget implies reduced enforcement of laws against homicide, robbery, assault, and the like. This issue arises, for example, when violent prisoners are released early to make room for drug offenders.<sup>16</sup> In places like Russia, the resources devoted to drug-prohibition enforcement might “crowd out” general enforcement of property rights, thus encouraging participants in other sectors to employ violence. In countries like Colombia or Peru, the resources devoted to drug enforcement are unavailable for fighting guerilla groups, who generate substantial violence for independent reasons.<sup>17</sup>

A different reason why prohibitions might generate violence is that prohibitions often raise the price of the prohibited commodity. Elevated prices constitute a negative income shock to consumers of the prohibited good, which can encourage increased income-generating crime to finance purchases of the good. This mechanism does not necessarily imply violence directly, since many income-generating crimes are nonviolent (e.g., theft, shoplifting, prostitution). Some income-generating crimes are violent, however (e.g., robbery), and violence can occur incidentally as a result of otherwise nonviolent crimes. Assuming that increased enforcement implies higher prices, increased enforcement implies more income-generating crime and related violence.

15. For a discussion of deterrence, see Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report.

16. Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2043 (2004).

17. William M. LeoGrande & Kenneth E. Sharpe, *Two Wars or One? Drugs, Guerrillas, and Colombia’s New ‘Violencia,’* 17 WORLD POL’Y J. 1 (2000).

The higher prices caused by prohibition might also encourage violence by increasing the rents to certain factors. One view of what occurs under prohibition is that suppliers enter the prohibited market until the total return from black-market activity equals the total return from legal activity, taking into account the risks of incarceration, injury, or death and any stigma/glamor associated with working in a black market. Assuming homogeneity in the willingness to accept the special features of black-market activity, prohibition does not imply any excess profits in the prohibited as opposed to the legal sector. If the willingness to work in the black market varies across the population, however, then those more willing to do so select into this sector, earn rents to this characteristic, and are better off under prohibition. Such persons have more to protect under prohibition and might therefore have an additional reason to engage in violence—namely, protecting these rents. The magnitude of this effect is likely increasing with enforcement, assuming prices increase with enforcement as well.

Prohibition might also encourage violence by making consumers or producers of the prohibited commodity less likely to use the official dispute-resolution system for disputes not related to the prohibited commodity. For example, a drug user or seller who has been robbed of non-drug items might not report this to the police—since this could risk penalties related to possession or sale of drugs—and instead attempt to punish the perpetrator of the robbery himself, possibly using violence. Higher enforcement is likely to increase this effect. If police routinely overlook small quantities of prohibited substances, the effect is likely to be small; if police routinely hassle anyone thought to be associated with the prohibited good, the effect is likely to be large.<sup>18</sup> Relatedly, prohibition encourages corruption of law enforcement and judicial personnel, which further weakens the official dispute-resolution system.<sup>19</sup>

The reasoning outlined above suggests that two key determinants of violence in a country are whether it prohibits drugs and whether it enforces this prohibition vigorously.

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18. An effect might also operate in the other direction; locking up people who commit both drug crime and non-drug crime might lower general crime. Kuziemko & Levitt, *supra* note 16.

19. For evidence of prohibition-induced corruption in the U.S., see, for example, U.S. GEN. ACCOUNTING OFFICE, *LAW ENFORCEMENT: INFORMATION ON DRUG-RELATED POLICE CORRUPTION* (1998); SCOTT HENSON, *TOO FAR OFF TASK: WHY, AFTER TULIA, TEXAS SHOULD RE-THINK ITS BIG GOVERNMENT APPROACH TO THE DRUG WAR, ABOLISH NARCOTICS TASK FORCES, AND SAVE \$200 MILLION THIS BIENNIIUM* (2002).

## II. THE RELATION BETWEEN DRUGS, PROHIBITION, AND VIOLENCE

This section reviews evidence on the relation between drugs and violence. The discussion first summarizes the evidence on drug use and crime. The next subsection examines some basic facts about violence rates across countries. The remainder of the section then considers detailed analyses of the relation between drug trafficking, prohibition, and violence.

### A. DRUG USE AND VIOLENCE

The view that drug use directly causes violence has a long history, and certain kinds of data might appear to suggest such an effect. Persons arrested for violent crimes, for example, test positive for recent drug use at a rate well above the population average.<sup>20</sup> Such evidence does not necessarily indicate, however, that drug use *causes* violent behavior. Some people happen to be both violent and likely to use drugs. Although cognitive biases might lead us to associate drugs with violence and infer that the former therefore causes the latter, policymakers should be careful not to assume a causal relationship in the absence of more conclusive evidence. The standard data used to link drugs and violence, moreover, are a biased sample because they are based on arrestees or people in drug treatment. This indicates something about a subset of those who use drugs, but it does not provide information about those who use drugs without running into difficulties.

Thus, the right question is not whether many people who have committed violence have also used drugs, but whether a disproportionate share of people who use drugs become violent. Even casual inspection casts doubt on this claim. Consider, as illustration, the evidence on alcohol, a widely used “legal drug” that is often associated with violence and for which data exist on all users, not just those who develop problems related to use. Everyone knows many people who consume alcohol socially and even heavily, yet never commit acts of violence; more systematic data make the same point.<sup>21</sup> In assessing the claim that drug use causes violence, therefore, it is critical to focus on experimental or controlled evidence.

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20. Lana Harrison & Joseph Gfroerer, *The Intersection of Drug Use and Criminal Behavior: Results from the National Household Survey on Drug Abuse*, 38 CRIME & DELINQUENCY 422 (1992); CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DRUG USE AND DEPENDENCE: STATE AND FEDERAL PRISONERS, 2004 (2007).

21. For further discussion of this point, see JACOB SULLUM, SAYING YES: IN DEFENSE OF DRUG USE (2004).

The medical and social-science literatures on drug use and crime consistently find little evidence that drug use causes crime. For example, Fagan concludes that “there is limited evidence that alcohol or drugs directly cause violence” and that “several reviewers have concluded that alcohol is the substance most likely to lead to psychopharmacological violence,” although “there is some evidence that cocaine, barbiturates, amphetamines, phencyclidine (PCP), and steroids also have psychopharmacological properties that can motive violence.”<sup>22</sup> He also notes that “the most consistent and predictable relationship between substances and violence is a result of trafficking in illicit drugs.”<sup>23</sup> Duke and Gross and the U.S. Department of Justice reach similar conclusions.<sup>24</sup>

Given the abundance of literature that finds little or no causal link between drug use and crime, is the drugs-violence link a total myth? Is it completely wrong to conclude that some drugs make certain users more violent by impairing judgment or by reducing inhibitions? Under certain circumstances, there may be a small grain of truth to this perception. A very limited number of studies have identified a handful of substances which, if abused frequently and consumed in very large quantities, may lead to neurophysiological effects that may help give rise to violent behavior. For example, two studies suggest that, in rare cases, sustained periods of heavy amphetamine use or extremely acute doses of it can provoke a sort of “toxic psychosis” almost identical to schizophrenia.<sup>25</sup> Similarly, a handful of clinical studies documented rare cases of delusions, paranoia, or psychosis following extremely heavy use of phencyclidine.<sup>26</sup> That said, many of these studies noted that the most pronounced effects occurred among patients with prior histories of emotional instability or patients with other situational influences. More importantly, these findings represent a very small sample of medical studies conducted on this question; the vast majority of research has found no evidence that drug use overall engenders violence at the individual level.<sup>27</sup>

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22. Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence*, 12 J. HEALTH AFFAIRS 65, 67-68 (1993).

23. *Id.* at 70.

24. STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CURSADE AGAINST DRUGS* (1993); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *DRUGS, CRIME, AND THE JUSTICE SYSTEM: A NATIONAL REPORT* (1992).

25. See Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291 (1998).

26. *Id.*

27. *Id.*

The fact that drug use does not significantly cause violence is distinct from the question of whether drug trafficking causes violence. Abundant evidence of every kind shows that violence is a common feature of illicit drug markets.<sup>28</sup> No reasonable theory, however, explains why drug production, distribution, or sale should be any more violent than any other industry; after all, the nature of the supply process is no different than for legal pharmaceuticals, alcohol, food, or any other commodity. The natural inference, therefore, is that prohibition increases violence in the drug industry. The next section evaluates evidence on this issue.

### *B. VIOLENCE RATES ACROSS COUNTRIES*

Table 1 presents vital statistics data on homicide rates across countries in 2001.<sup>29</sup> The data show first that homicide rates differ substantially across countries. Several countries in Central and South America (Mexico, Bahamas, Brazil, Colombia, Venezuela) have homicide rates above 10 per 100,000, and a few have rates that exceed 20; Colombia has a homicide rate in excess of 60. These rates are higher than for most other countries or groups of countries. A number of former Soviet Bloc countries (Kazakhstan, Latvia, Lithuania, Moldova, Russia, Ukraine) also have elevated homicide rates. The Organization for Economic Cooperation and Development (OECD) countries generally have low homicide rates; Mexico and the United States are the exceptions, although these are still well below those in many other countries. The U.S. homicide rate is two to three times the rate in most Western-style democracies. At the same time, the U.S. homicide rate is similar to or less than the rate in many other nations. Thus, the level of homicide in the United States stands out in comparison to other rich, democratic countries, but not in comparison to the world as a whole.

These data are consistent with the hypothesis that drug prohibition generates violence. Most notably, homicide rates are high especially in Caribbean and Latin American countries, many of which are key producers of, or transit points for, illegal drugs. In many of those nations, powerful gangs and cartels are directly responsible for high rates of violence, but prohibited drug trafficking is more often than not the underlying force that motivates their killing. Violence rates are also high in former Soviet Bloc countries, which are less obviously important producers or shippers of illegal drugs. These elevated rates are nevertheless consistent with the theoretical considerations discussed above, according to which violence is high when the number of disputes is elevated

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28. Peter Reuter, *Systemic Violence in Drug Markets*, 52 CRIME L. & SOC. CHANGE 275 (2009).

29. ANGELA DILLS, SIETSE GOFFARD & JEFFREY MIRON, DOSE OF REALITY: THE EFFECT OF STATE MARIJUANA LEGALIZATIONS (Cato Inst. Pol'y Analysis No. 799, 2016).



and when the costs of nonviolent dispute resolution are high. Many formerly communist countries have poorly defined property rights and ineffective criminal justice systems, which means lots of disputes and inefficient official resolution of these disputes.

More detailed evidence further suggests a crucial role for drug prohibition in increasing violence. Goldstein and colleagues, using police reports and police evaluations, examined the causes of all homicides in a sample of New York City precincts during part of the year 1988.<sup>30</sup> They determined that more than half of the homicides were due to drug-related factors, but of these, almost three-quarters were due to “systemic” factors, meaning disputes over drug territory, drug debts, and other drug-trade related issues. Thus, approximately 39% of total homicides resulted from the inability of drug-market participants to settle disputes using the official dispute-resolution system; only 7.5% resulted from the psychopharmacological effects of drugs or alcohol.

Brumm and Cloninger compared homicide offense rates, homicide arrest rates, and drug-prohibition arrest rates across cities.<sup>31</sup> They found that drug-prohibition arrest rates were negatively associated with homicide arrest rates, and that homicide arrest rates were negatively associated with homicide offense rates, implying that higher drug-prohibition arrest rates were associated with higher homicide offense rates. They interpreted these results as suggesting that increased enforcement of drug prohibition takes resources away from deterrence of other criminal activity, such as homicide. The positive correlation between drug arrests and homicide rates might reflect reverse causation stemming from a political response of prohibition enforcement to violence, but these data nevertheless fail to suggest that prohibition reduces violence.

Rasmussen, Benson, and Sollars found that a higher drug arrest rate was positively associated with the violent-crime rate in a cross-section of Florida jurisdictions in 1989.<sup>32</sup> They also found that a higher drug arrest rate implied a higher violent-crime rate in neighboring jurisdictions, presumably because increased drug enforcement in one jurisdiction disrupted the market equilibrium in neighboring jurisdictions.

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30. Paul J. Goldstein et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 651 (1989).

31. Harold J. Brumm & Dale O. Cloninger, *The Drug War and the Homicide Rate: A Direct Correlation?*, 14 CATO J. 509 (1995).

32. David W. Rasmussen, Bruce L. Benson & David L. Sollars, *Spatial Competition in Illicit Drug Markets: The Consequences of Increased Drug Law Enforcement*, 23 REV. REGIONAL STUD. 219 (1993).

Fajnzylber, Lederman, and Loayza regressed crime statistic measures of homicide rates for the period 1970-1994 on a broad range of variables—including GNP per capita, Gini indices (a measure of income inequality), average years of schooling, urbanization rates, deterrence measures (e.g., the death penalty), religious composition, and region—plus indicator variables for whether a country produces drugs and for the drug-possession arrest rate.<sup>33</sup> Across a broad range of specifications, they found that being a drug-producing country or having a high drug-possession arrest rate is positively associated with a higher homicide rate. They also considered panel regressions of five-year average homicide rates and again obtained a consistently positive relation between the drug-production or arrest variables and homicide rates. Fajnzylber, Lederman, and Loayza obtained a similar result for the drug-producer indicator variable using vital statistics data on homicide rates.<sup>34</sup>

In one study, I documented that increases in enforcement of drug and alcohol prohibition over the past 100 years have been associated with increases in the homicide rate, and auxiliary evidence suggests that this positive correlation reflects a causal effect of prohibition enforcement on homicide.<sup>35</sup> Controlling for other potential determinants of the homicide rate—the age composition of the population, the incarceration rate, economic conditions, gun availability, and the death penalty—does not alter the conclusion that drug and alcohol prohibition have substantially raised the homicide rate in the United States over much of the past century.

In another study, I used cross-sectional, country-level data to show that one measure of enforcement—seizures of illegal drugs—is positively correlated with homicide rates.<sup>36</sup> This evidence needs to be interpreted with caution. Some countries might choose greater enforcement of drug prohibition in response to higher levels of violence. Thus, a positive relation between drug-prohibition enforcement and violence does not establish a causal effect of enforcement on violence. Nevertheless, several factors likely contribute to differences in drug-prohibition enforcement other than the homicide rates themselves. For example, the strong degree of drug-prohibition enforcement in Latin America

33. PABLO FAJNZYLBER, DANIEL LEDERMAN & NORMAN LOAZYA, *DETERMINANTS OF CRIME RATES IN LATIN AMERICAN AND THE WORLD: AN EMPIRICAL ASSESSMENT* (1998).

34. Pablo Fajnzylber, Daniel Lederman & Norman Loayza, *What Causes Violent Crime?*, 43 *EUR. ECON. REV.* 1323 (2002).

35. Jeffrey A. Miron, *Violence and the U.S. Prohibitions of Drugs and Alcohol*, 1 *AM. L. & ECON. REV.* 78 (1999); see also Dan Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, 22 *INT'L J. DRUG POL'Y* 87 (2011).

36. Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 *J.L. & ECON.* 615 (2001).

results in part from U.S. attempts to address its own drug or crime problems, not just from events in Latin America. Thus, although not strictly exogenous (i.e., independent from the variable in question), the differences in drug-prohibition enforcement are plausibly predetermined relative to homicide rates over the time horizons considered here, in which case a causal interpretation of the results is likely to be approximately correct.

Dills, Summers, and I reported regressions of annual U.S. homicide rates on measures of arrest rates, policing levels, incarceration rates, execution rates, guns, right-to-carry gun laws, abortion legalization, lead exposure, and drug- and alcohol-prohibition enforcement.<sup>37</sup> Each of these factors has received substantial attention in the recent economic literature on the determinants of crime.<sup>38</sup> The regressions also controlled for the age structure of the population, economic conditions, and education levels. The samples were taken from the years 1900 through 2005 and various sub-periods.

Our results provide little evidence that arrest rates, policing levels, incarceration rates, execution rates, guns, right-to-carry gun laws, abortion legalization, or lead are important determinants of violence. Enforcement of prohibition, however, is strongly associated with increased homicide. One must again exercise caution in drawing structural conclusions, but these regressions are not consistent with the view that standard deterrence variables, or other factors recently addressed in the economics of crime literature, are robust

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37. Angela Dills, Jeffrey A. Miron & Garrett Summers, *What Do Economists Know About Crime?*, in *THE ECONOMICS OF CRIME: LESSONS FOR AND FROM LATIN AMERICA* (2010).

38. For arrest rates, see Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973); and Isaac Ehrlich, *Crime, Punishment, and the Markter for Offenses*, 10 J. ECON. PERSP. 43 (1996). For police, see Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270 (1997); and Justin McCrary, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime: Comment*, 92 AM. ECON. REV. 1236 (2002). For incarceration, see Steven Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q. J. ECON. 319 (1996). For the death penalty, see John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005). For right-to-carry laws, see John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997); Ian Ayres & John J. Donohue, *Shooting Down the 'More Guns, Less Crime' Hypothesis*, 55 STAN. L. REV. 1193 (2003); and Ian Ayres & John J. Donohue, *The Latest Misfires in Support of the 'More Guns, Less Crime' Hypothesis*, 55 STAN. L. REV. 1371 (2003). For abortion legalization, see John J. Donohue & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379 (2001); and Christopher L. Foote & Christopher F. Goetz, *The Impact of Legalized Abortion on Crime: A Comment*, 123 Q. J. ECON. 407 (2008). For lead, see Jessica Wolpaw Reyes, *Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime*, 7 B.E. J. ECON. ANALYSIS & POL'Y 1 (2007).

determinants of crime. At the same time, they are consistent with the view that drug-prohibition enforcement plays an important role, especially with regards to greater homicide.

It should come as no surprise, then, that *relaxing* prohibition enforcement standards or repealing drug prohibition altogether has been associated with reduced rates of violence. Dills, Goffard, and I analyzed city-level crime data in the United States and revealed that violent-crime rates decreased slightly—or at a minimum, remained flat—in the years following the decriminalization or legalization of cannabis in various states.<sup>39</sup> Hughes and Stevens studied the aftermath of Portugal’s decriminalization of drug use on crime and drug-trafficking arrests; they reported that after the country’s loosened drug laws took effect, fewer drug-related offenses were recorded, which in turn helped alleviate overcrowding in the criminal justice system.<sup>40</sup> Although one should interpret these findings with caution, these studies further support the hypothesis that drug-prohibition enforcement is not just positively associated with crime and violence, but also an important cause of them.

### III. POLICY IMPLICATIONS

The theory and evidence summarized above makes a consistent case that a key determinant of violence in modern societies is enforcement of drug prohibition. This reflects both the fact that resources devoted to prohibition enforcement increase violence within the drug trade and the fact that resources devoted to enforcement are not available for other violence-reducing policies.

The implication of these findings is that societies can both save criminal justice resources and reduce violence by devoting less effort to enforcing prohibition. In many countries, the amount of resources involved is substantial. The U.S., for example, expends roughly \$50 billion per year on drug-prohibition enforcement. The degree of enforcement is far smaller in many countries, but in a few (e.g., Columbia, Mexico) the effort is also quite significant. In particular, the U.S. devotes a significant amount of its own resources, and pressures other countries to devote theirs, to enforcing prohibition in Afghanistan, Colombia, and other Latin American countries. Moreover, as demonstrated by Becker, Murphy, and Grossman,<sup>41</sup> legalizing drugs and taxing consumption is, under broad conditions, more efficient than prohibition at reducing drug use and associated ills.

39. DILLS, GOFFARD & MIRON, *supra* note 29.

40. Caitlin E. Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs*, 50 BRIT. J. CRIMINOLOGY 999 (2010).

41. GARY S. BECKER, KEVIN M. MURPHY & MICHAEL GROSSMAN, *THE ECONOMIC THEORY OF ILLEGAL GOODS: THE CASE OF DRUGS* (Nat’l Bureau of Econ. Research, Working Paper No. 10976, 2004).

The best alternative use of any reduction in prohibition enforcement is likely to vary across countries. The best uses will not necessarily be policies that aim to reduce violence but instead might be increased expenditure for education, health, or simply lower taxes. Even if these freed-up resources are used for anti-violence policies, however, the best use might be expanded deterrence activities in one place; better definition of property rights in another; or anti-guerrilla activities in a third. In every case, however, these alternative expenditures would be far more productive uses of public funds than enforcement of drug prohibition.

### RECOMMENDATIONS

The evidence discussed above suggests that drug prohibition is primarily responsible for the violence associated with drug markets. Based on the analysis above, this report offers the following policy recommendations:

1. **Governments should legalize the currently illegal drugs.** This applies especially at the federal level, since the combination of state legalization with federal prohibition generates several conflicts and ambiguities. Nonetheless, state-level legalizations, and/or those for only some drugs, are also likely to diminish violence.<sup>42</sup>
2. **Where full legalization of all drugs is not yet politically feasible, governments should scale back enforcement and liberalize their drugs laws,** via partial measures like decriminalization or medicalization of marijuana.

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42. For a discussion of such efforts, see Alex Kreit, “Marijuana Legalization,” in the present Volume.

**Table 1: Homicides per 100,000 population, various countries (circa 2001)**

<b>United States</b>	<b>7.06</b>				
<b>OECD countries</b>					
Australia	1.57	Hungary	2.43	New Zealand	1.43
Austria	0.95	Iceland	0.70	Norway	0.73
Belgium	1.74	Ireland	1.04	Poland	1.72
Canada	1.49	Italy	0.97	Portugal	1.30
Czech Republic	1.32	Japan	0.58	Slovakia	2.06
Denmark	1.26	Korea	1.59	Spain	1.03
Finland	2.97	Luxembourg	2.04	Sweden	0.97
France	0.83	Mexico	10.10	Switzerland	1.13
Germany	0.68	Netherlands	1.26	UK	0.40
Greece	1.05				
<b>OECD average</b>	<b>1.62</b>				
<b>Other countries</b>					
Albania	7.17	Croatia	1.96	Romania	3.49
Argentina	6.93	Cuba	5.38	Russian Federation	29.85
Armenia	1.76	Estonia	15.17	Serbia and Montenegro	2.92
Azerbaijan	2.59	Georgia	3.92	Singapore	0.75
Bahamas	20.79	Hong Kong	0.77	Slovenia	0.80
Barbados	10.47	Israel	5.64	Tajikistan	2.47
Belarus	11.23	Kazakhstan	15.52	Macedonia	6.44
Brazil	26.37	Kuwait	1.74	Thailand	5.65
Bulgaria	3.08	Kyrgyzstan	6.72	Trinidad and Tobago	8.52
Cayman Islands	11.51	Latvia	12.31	Turkmenistan	7.07
Chile	9.98	Lithuania	10.23	Ukraine	12.65
China	1.98	Malta	2.29	Uruguay	5.54
Colombia	62.38	Mauritius	2.78	Uzbekistan	3.13
Costa Rica	6.05	Moldova	11.21	Venezuela	26.23
<b>Other average</b>	<b>9.37</b>				

Source: World Health Organization (WHO). Most figures are constructed from the WHO Mortality database. Data for Mauritius and Denmark are for 2000; data for China are for 1999; data for Belgium are for 1997. Some figures are constructed from the WHO Statistical Information System (WHOSIS). These include Mexico, New Zealand (2000), Argentina, Bahamas (2000), Barbados (2000), Brazil (2000), Cayman Islands (2000), Chile, Colombia (1999), Costa Rica, Cuba, Thailand (2000), Trinidad and Tobago (1998), Turkmenistan (1998), Uruguay (2000), Uzbekistan (2000), and Venezuela (2000). No data were available for a nearby year for Turkey. Population for the Cayman Islands is from the CIA World Factbook.

# Marijuana Legalization

Alex Kreit\*

*After decades of waging war on marijuana, a majority of Americans have come to see prohibition as a costly failure and believe that legalization is a better option. Since 2012, eight states have passed marijuana-legalization laws. Polls now consistently show a majority of adults nationwide favor legalizing marijuana. To date, however, legislatures have mostly remained on the sidelines. Every state to legalize marijuana has done so via ballot measure. Legislators should not miss the opportunity to shape this important issue, especially because the details matter a great deal when it comes to marijuana legalization. This chapter outlines the case for marijuana legalization, including the evidence from states that have already implemented legalization laws, and highlights key recommendations for lawmakers and stakeholders who may be interested in reforming their state's marijuana laws.*

## INTRODUCTION

Not long ago, marijuana legalization was considered to be far outside the political mainstream. The idea that it could actually become law seemed so remote that when President Barack Obama was asked for his thoughts on marijuana legalization in a 2009 online town-hall event, he treated the question as a joke. “I don’t know what this says about the online audience,” he chuckled, before tersely answering that, no, he did not think legalizing marijuana would be “a good strategy to grow our economy.”<sup>1</sup> President Obama’s drug czar was similarly dismissive when asked about the topic in 2009, saying that

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1. Sam Stein, *Obama Takes Pot Legalization Question During Townhall*, HUFFINGTON POST (Apr. 26, 2009), [http://www.huffingtonpost.com/2009/03/26/obama-takes-pot-legalizat\\_n\\_179563.html](http://www.huffingtonpost.com/2009/03/26/obama-takes-pot-legalizat_n_179563.html).

“[l]egalization was not in the President’s vocabulary.”<sup>2</sup> On the same night Obama was elected to a second term, however, Colorado and Washington became the first states to pass marijuana-legalization ballot measures. All of a sudden, marijuana legalization was no longer a laughing matter.

Since then, six more states—Alaska, California, Maine, Massachusetts, Nevada, and Oregon—have legalized marijuana, all via ballot initiative. In Washington, D.C., voters approved a law making it legal to possess and grow small amounts of marijuana, although commercial distribution and sale remain prohibited. Politicians have, slowly, started to come around on the issue. In California, Lieutenant Gov. Gavin Newsom—who was ahead of many other politicians on the issue of marriage equality—has also become a leading voice in favor of marijuana legalization. Marijuana-legalization bills have also received serious consideration in a few state legislatures, including in New Hampshire, Vermont, and Rhode Island.

Meanwhile, the threat of federal interference continues to lurk in the background. Even as states have passed sweeping marijuana reforms (with state medical-marijuana laws dating back to California’s 1996 Compassionate Use Act), marijuana’s legal status under federal law has remained unchanged. When the federal Controlled Substances Act was passed in 1970, marijuana was placed in the most restrictive category, Schedule I, alongside heroin. And there it stays. Despite this fact, the Department of Justice adopted an enforcement policy in 2013 that advises federal law enforcement officials not to use their resources to go after people in compliance with state marijuana-legalization laws. Since that time, states have been able to implement marijuana-legalization laws with minimal interference from the federal government. Whether this will continue to be the case under President Donald Trump remains to be seen.

This chapter discusses why so many states have begun to legalize marijuana and examines some of the key issues state policymakers who are interested in reforming marijuana laws should consider. Part I outlines the evidence that marijuana prohibition has not worked. Despite expending significant law-enforcement resources on enforcing laws that criminalize marijuana, marijuana use and availability have remained relatively steady for decades. At the same time, marijuana-possession arrests can have devastating consequences for the users, who might lose their jobs, government benefits, or even their freedom. Finally, marijuana prohibition is unevenly enforced. For a variety of reasons, people of color are much more likely than whites to be arrested and

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2. Nick Gillespie, “*Legalization Is Not in the President’s Vocabulary ... Marijuana Is Dangerous and Has No Medical Benefit*,” Love, Obama’s Drug Czar, REASON HIT & RUN BLOG (July 23, 2009), <http://reason.com/blog/2009/07/23/legalization-is-not-in-the-pre>.



prosecuted for violating marijuana laws. Part II provides recommendations for policymakers and other concerned parties who may be interested in reforming state-level marijuana laws. Part III concludes.

## I. THE PROBLEMS WITH PROHIBITION

### A. A BRIEF HISTORY OF MARIJUANA PROHIBITION

Marijuana-prohibition laws in the United States date back to the early 1900s, when the first state laws criminalizing marijuana emerged. New York Sanitary Laws prohibited marijuana “as early as 1914” and “in 1915, Utah passed the first state statute prohibiting sale or possession of the drug.”<sup>3</sup> By 1931, 22 states had adopted marijuana-prohibition laws.<sup>4</sup> One year later, marijuana made its way into the Uniform Narcotic Drug Act, the model legislation for state drug-prohibition laws. And, in 1937, Congress effectively adopted federal prohibition with passage of the Marihuana Tax Act. Between the Marihuana Tax Act and the Uniform Narcotic Drug Act, marijuana prohibition was national policy by the end of the 1930s.<sup>5</sup>

Like other early federal anti-drug laws, the Marihuana Tax Act prohibited marijuana through a “cumbersome system of taxes,”<sup>6</sup> an approach necessitated by the narrow interpretation of the interstate commerce power that held sway at the time. By the late 1960s, the Supreme Court had adopted a broader interpretation of Congress’s commerce authority and Congress set about transforming what had been a “patchwork”<sup>7</sup> approach to drug prohibition into a single drug-control regime.

This effort led to passage of the 1970 Controlled Substances Act (CSA), which is still with us today. The CSA replaced nearly every federal drug law then in existence with a comprehensive scheme for controlling and prohibiting

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3. Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

4. *Id.*

5. Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 577 (2016) (“Pretty much the whole country was already covered by state drug prohibitions before the Marihuana Tax Act was enacted.”).

6. Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 CATH. U. L. REV. 586, 606 (1973); *see also id.* at 600 (describing how the Marijuana Tax Act operated).

7. *See Nat’l Org. for the Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 126–28 (1980) (explaining that the CSA “ended the patchwork federal effort against drug abuse and signaled a national commitment to deal with this problem by committing federal funds for rehabilitation programs”).

drugs with recreational uses. The CSA divides drugs into five “schedules” based on their potential for abuse, medicinal value, and addictiveness. Marijuana is a Schedule I substance, meaning that the Drug Enforcement Administration (DEA) has concluded it has (a) a high potential for abuse (b) no currently accepted medical use in treatment in the United States and (c) a lack of accepted safety for use under medical supervision.<sup>8</sup>

After the federal Controlled Substances Act became law, most states reformed their own anti-drug laws in its image. Today, almost every state has enacted a version of the Uniform Controlled Substances Act, which was drafted by the National Conference of Commissioners on Uniform State Laws in order to maintain consistency between state and federal drug laws.<sup>9</sup> In most of these states, marijuana remains illegal to manufacture, sell, or possess, at least for non-medical purposes.

After passage of the Controlled Substances Act, the federal government declared “war” on drugs, including marijuana. As discussed below, the drug war saw a dramatic rise in marijuana enforcement, especially arrests. Meanwhile, people convicted of marijuana offenses found themselves subject to an increasing number of collateral restrictions. Despite the significant expenditure of resources, the war on marijuana has not achieved its stated goals.

### *B. ARRESTS AND POLICE RESOURCES*

There is perhaps no clearer manifestation of drug-war ideology than the strategy of “seek[ing] out and punish[ing] casual, nonaddicted drug users.”<sup>10</sup> In 1970, when the Controlled Substances Act was passed, there were a little more than 400,000 drug arrests nationwide.<sup>11</sup> This number climbed quickly during the Nixon administration, to over 600,000 by 1974, followed by a period of relative stability until 1980.<sup>12</sup> Then, beginning in 1980, drug arrests rose fairly steadily and dramatically, from 581,000 to a height of almost 1.9 million in 2005.<sup>13</sup>

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8. 21 U.S.C. § 812(b)(1).

9. GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* § 1:30 (2016) (providing an overview of the Uniform Controlled Substances Act).

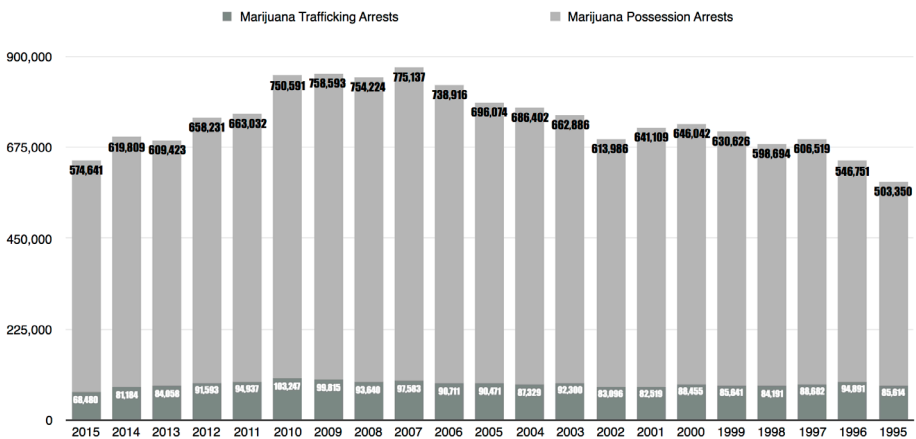
10. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 16 (1992).

11. RYAN S. KING, *THE SENTENCING PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES* 5 (2008), <http://www.sentencingproject.org/publications/disparity-by-geography-the-war-on-drugs-in-americas-cities/>.

12. *Id.* at 4-5.

13. *Id.* (reporting statistics from 1970 to 2005).

Marijuana enforcement was central to the rise in drug arrests. Indeed, arrests for simple possession—particularly marijuana possession—were chiefly responsible for the rise in drug arrests after 1990. Between 1990 and 2002, marijuana possession was responsible for 78.7% of the 450,000 additional drug arrests.<sup>14</sup> While arrests for all offenses decreased by 3% during that period, marijuana arrests rose by 113%.<sup>15</sup> The trend continued for the better part of the last decade. The year 2010 saw approximately 140,000 more marijuana arrests than 2001, with a total of 889,133—“300,000 more than arrests for all violent crimes combined—or one every 37 seconds.”<sup>16</sup> Marijuana arrests have declined in recent years, in part because of state legalization laws. Still, in 2015, there were 574,641 arrests for marijuana possession alone, “about 13.6 percent more than the 505,681 arrests made for all violent crimes” that year.<sup>17</sup>



Source: FBI Uniform Crime Report.

State and local police are responsible for the lion’s share of marijuana arrests. The effort is a costly one. The police put resources toward investigating marijuana cases. People charged with a marijuana offense must then be processed through the court system. And, of course, the correctional system must pay to house those incarcerated for marijuana offenses and monitor probationers. In 2010, Harvard economist Jeffrey Miron estimated that state

14. Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 9, 2006, at 3, <http://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-3-6>.

15. *Id.* at 4.

16. ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf>.

17. Timothy Williams, *Marijuana Arrests Outnumber Those for Violent Crimes, Study Finds*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/marijuana-arrests.html>.

and local police nationwide would save \$10.4 billion by legalizing marijuana, after factoring in lost revenue from fines and forfeitures.<sup>18</sup> Miron's estimate included only costs that could be readily calculated and did not account for other ancillary costs of marijuana prohibition, such as the violence that results from black-market disputes or the property and environmental damage caused by illegal growing operations.<sup>19</sup>

### C. INCARCERATION AND COLLATERAL CONSEQUENCES

Although hundreds of thousands of people are arrested for marijuana offenses every year, marijuana offenders make up only a small fraction of the prison population. As discussed above, the overwhelming share of marijuana arrests are for simple possession, which is treated as a misdemeanor in most states. In addition, in most states, the penalties for non-possession offenses, such as manufacture and distribution, are not severe. Even when a marijuana conviction exposes a defendant to the possibility of a lengthy prison sentence, judges are often able to use their discretion to impose probation or a shorter period of confinement. As a result, "few marijuana cases result in prison time ... even for distribution, and most drug offenders serve relatively short terms in prison."<sup>20</sup>

There are exceptions, to be sure. In Louisiana, for example, state recidivist sentencing laws have resulted in shockingly long sentences for some small-time marijuana offenders.<sup>21</sup> But, on the whole, only a small percentage of marijuana offenders serve significant time behind bars. One recent estimate put the number of state and federal prisoners with a current "controlling conviction" involving marijuana at about 40,000 with "perhaps half of them ... in prison for marijuana alone."<sup>22</sup>

But incarceration is only one consequence of a conviction. A marijuana arrest can be a life-changing event, even if it does not result in a lengthy jail or prison sentence. An arrest record "can disrupt legitimate careers and impair

18. JEFFREY A. MIRON, *THE BUDGETARY IMPLICATIONS OF DRUG PROHIBITION* 10 (2010), [http://scholar.harvard.edu/files/miron/files/budget\\_2010\\_final\\_0.pdf?m=1360041410](http://scholar.harvard.edu/files/miron/files/budget_2010_final_0.pdf?m=1360041410).

19. *Id.* at 6. See also Jeffrey A. Miron, "Drug Prohibition and Violence," in the present Volume.

20. John Pfaff, *The War on Drugs and Prison Growth: Limited Importance, and Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 203 (2015).

21. See HUMAN RIGHTS WATCH & ACLU, *EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES* 101-02 (2016) (discussing the case of Corey Ladd, who was sentenced to 17-years in prison in Louisiana for possession of half an ounce of marijuana), [https://www.aclu.org/sites/default/files/field\\_document/usdrug1016\\_web.pdf](https://www.aclu.org/sites/default/files/field_document/usdrug1016_web.pdf).

22. JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 99 (2016).

future job prospects.”<sup>23</sup> Fines and court fees can also add up—for a minimum-wage worker, a \$200 fine “could consume the take-home pay from the better part of a full week of work.”<sup>24</sup> Marijuana offenses also carry a range of collateral consequences.<sup>25</sup> These additional legal penalties can range from the revocation of a professional license to a bar on receiving food stamps or adopting a child.<sup>26</sup>

The story of Rebecca Kennedy, profiled in a recent *Houston Press* article, provides an example of how an ordinary marijuana-possession arrest can disrupt a person’s life.<sup>27</sup> Kennedy, a Navy veteran living in Texas, was arrested after a police officer discovered marijuana in her car, which she “used to quell her bad episodes of post-traumatic stress disorder.”<sup>28</sup> As a result of the arrest, “Kennedy was fired from her UPS job as she sat in jail waiting for her mom to drive from Georgia to bail her out.”<sup>29</sup> Out on bond, Kennedy “had to drop out of the University of Houston because, as a condition of her bond, she would need to go live with her mom in Georgia.”<sup>30</sup> This caused Kennedy to lose her GI benefits.

Kennedy’s ordeal seems small in comparison to Penelope Harris’s. The police found about one-third of an ounce of marijuana in Harris’s Bronx, New York apartment—an amount “below the legal threshold for even a misdemeanor” in New York.<sup>31</sup> Harris had a 10-year old son and was serving as a foster parent to her 8-year old niece. Even though prosecutors declined to charge Harris with a crime, the police “reported her arrest to the state’s child welfare hotline,

23. JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 42 (2015), [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR800/RR864/RAND\\_RR864.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR864/RAND_RR864.pdf).

24. *Id.* For a discussion of the potentially devastating impact of fines and fees resulting from a criminal conviction, see Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

25. For a discussion of collateral consequences, see Gabriel J. Chin, “Collateral Consequences,” in Volume 4 of the present Report.

26. See RICHARD GLEN BOIRE, LIFE SENTENCES: THE COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES (2007), [http://www.cognitiveliberty.org/pdf/col\\_sanc\\_pdfs/report\\_narrative.pdf](http://www.cognitiveliberty.org/pdf/col_sanc_pdfs/report_narrative.pdf).

27. Megan Flynn, *How a Small-Time Pot Possession Charge Can Ruin Your Life in 24 Hours*, HOUS. PRESS (Oct. 26, 2015), <http://www.houstonpress.com/news/how-a-small-time-pot-possession-charge-can-ruin-your-life-in-24-hours-7876104>.

28. *Id.*

29. *Id.*

30. *Id.*

31. Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), <http://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html>.

and city caseworkers quickly arrived and took the children away.”<sup>32</sup> Harris’s son “spent more than a week in foster care” and her niece “was placed in another home and not returned by the foster care agency for more than a year.”<sup>33</sup> Harris did not have a criminal record “and had never before been investigated by child welfare authorities” but her marijuana arrest caused her to endure “a lengthy child neglect inquiry.”<sup>34</sup>

#### D. PROHIBITION HAS NOT ACHIEVED ITS GOALS

Every year, we spend billions of dollars to enforce marijuana prohibition, introducing hundreds of thousands of Americans to the criminal justice system. The costs are significant. Still, marijuana prohibition might be worth the price if it were achieving its goals of significantly reducing marijuana use and availability.<sup>35</sup> Unfortunately, the evidence suggests this is not the case.

Despite our decades-long war on drugs, marijuana use remains widespread. According to the National Survey on Drug Use and Health, as of 2013, 19.8 million Americans (7.5% of people over the age of 12) were current marijuana users, defined as someone who uses marijuana at least once a month.<sup>36</sup> Of these, 8.1 million were daily or near-daily marijuana users.<sup>37</sup>

With so many marijuana users in the United States, it should come as no surprise that marijuana is both relatively inexpensive and readily available, despite prohibition laws. Regarding price, “even at today’s illicit-market prices, being stoned costs an occasional user without a developed tolerance to THC less than \$1 per hour.”<sup>38</sup> At these prices, a relatively heavy user—someone in “the top 10 percent of monthly users”—spends about the same amount on their marijuana habit as a “pack-and-a-half-a-day cigarette smoker paying Vermont retail prices spends on tobacco.”<sup>39</sup>

32. *Id.*

33. *Id.*

34. *Id.*

35. In addition to the costs and benefits, some argue that marijuana prohibition exceeds the proper role of government by punishing people for “victimless crimes” and contributing to the erosion of civil liberties. *E.g.*, Douglas Husak, *Illicit Drugs: A Test of Joel Feinberg’s The Moral Limits of the Criminal Law*, 10 *LIBERTARIA* 39 (2008) (considering whether drug prohibition is consistent with the harm principle); Erik Luna, *Drug Exceptionalism*, 47 *VILL. L. REV.* 753, 757-68 (2002) (examining the drug war’s effect on constitutional interpretation).

36. U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 1 (2014), <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

37. *Id.*

38. CAULKINS ET AL., *supra* note 23, at 99.

39. *Id.*

Marijuana is widely available, even for the group prohibition is most intended to protect: minors. “[O]ver the last 30 years of cannabis prohibition the drug has remained ‘almost universally available to American 12th graders,’ with approximately 80-90% saying the drug is ‘very easy’ or ‘fairly easy’ to obtain.”<sup>40</sup>

Finally, marijuana potency sharply increased during the 1990s and 2000s. Between 1990 and 2007, “scientific monitoring of cannabis potency show[ed] that the estimated delta-9-tetrahydrocannabinol (THC) content of US cannabis” rose by about 145%, from 3.5% THC to 8.5% THC.<sup>41</sup>

Deterrence theory helps to explain why the rates of marijuana use have remained high in the face of heavy enforcement. Research has shown that “it is the certainty of apprehension not the severity of the ensuing consequences that is the more effective deterrent.”<sup>42</sup> And, even though marijuana arrests soared throughout the 1990s and early 2000s, marijuana use is so widespread that the risk of getting caught remains quite low. In 2010, Beau Kilmer and colleagues estimated the risk of arrest for marijuana users in a RAND Corporation report on marijuana legalization in California. They found that, “[i]f calculated per joint consumed, the figure nationally is trivial—perhaps one arrest for every 11,000-12,000 joints.”<sup>43</sup> The team also estimated the probability that a regular marijuana user in California—a person who uses at least once a month—would be arrested during a year of consumption. They found that only approximately 3% of regular marijuana users would be arrested in a given year.<sup>44</sup>

In sum, we pour billions of dollars into marijuana prohibition every year. Beginning in the 1990s, we ramped up marijuana enforcement by significantly increasing the number of people arrested for marijuana each year. Marijuana arrestees are subject to a range of negative consequences that can interfere with their participation in the labor force, from the loss of a driver’s license to incarceration. And yet, for all of those costs, we have seen little in the way of benefits.

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40. INT’L CTR. FOR SCI. IN DRUG POLICY, TOOLS FOR DEBATE: U.S. FEDERAL GOVERNMENT DATA ON CANNABIS PROHIBITION 5 (2010).

41. *Id.* at 11.

42. Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report.

43. BEAU KILMER ET AL., ALTERED STATE? ASSESSING HOW MARIJUANA LEGALIZATION IN CALIFORNIA COULD INFLUENCE MARIJUANA CONSUMPTION AND PUBLIC BUDGETS 7 (2010).

44. *Id.* at 8-9.

### E. RACE AND MARIJUANA PROHIBITION

One of the most biting criticisms of drug prohibition generally and marijuana prohibition in particular is the relationship between race and enforcement.<sup>45</sup> Race has been closely linked to drug prohibition long before the modern war on drugs. Indeed, many early drug laws were passed expressly for the purpose of discriminating against minority populations. An 1886 court opinion considering the constitutionality of a ban on opium dens, for example, observed that the law “proceeds more from a desire to vex and annoy the ‘Heathen Chinese’ ... than to protect the people from the evil habit.”<sup>46</sup> Ethnic bias also played a role in the adoption of alcohol prohibition, with anti-German sentiment in connection with World War I helping the dry cause.

For marijuana, “racial prejudice against both African Americans and Mexicans merged to prompt states to outlaw usage.”<sup>47</sup> At the time early marijuana-prohibition laws were passed, “not only did few middle-class Americans know about marijuana and its use, but what little ‘information’ was available provided an automatic association of the drug with Mexican immigration, crime and the deviant life style in the Black ghettos. Naturally, the impending drug legislation ... became entangled with society’s views of these minority groups.”<sup>48</sup>

The legislative history of early marijuana-prohibition statutes is full of disturbing examples of racism. For example, a 1929 hearing at the Montana Legislature on marijuana prohibition featured testimony from a doctor who joked:

[w]hen some beet field peon takes a few [puffs] of this stuff ... [h]e thinks he has just been elected president of Mexico so he starts out to execute all his political enemies. I understand that over in Butte

45. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012). For discussions of the impact of race on criminal justice, see, for example, Jeffrey Fagan, “Race and the New Policing,” in Volume 2 of the present Report; Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; L. Song Richardson, “Police Use of Force,” in Volume 2 of the present Report; Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

46. *Ex parte Yung Jon*, 28 F. 308 (D. Or. 1886).

47. Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690 (2016).

48. Bonnie & Whitebread, *supra* note 3, at 1037.



where the Mexicans often go for the winter they stage imaginary bullfights in the “Bower of Roses” or put on tournaments for the favor of “Spanish Rose” after a couple of whiffs of Marijuana.<sup>49</sup>

More recently, there is evidence to suggest President Richard Nixon’s decision to reject a national commission’s recommendation that marijuana be decriminalized was at least partially motivated by race. Nixon’s Oval Office tapes “make clear that [he] wanted to link marijuana use and its negative effects to two groups who he held in contempt: African Americans and hippies.”<sup>50</sup>

This sort of overt racism is mostly, though not entirely, absent from the debate about drug laws today.<sup>51</sup> But the disproportionate impact of drug enforcement on people of color is in many ways just as troubling. About 12.6% of the U.S. population are African-American, and blacks use drugs at about the same rate as whites. Although we do not have much data on the racial composition of drug dealers, the evidence that does exist “suggests a racial breakdown among sellers similar to that among users.”<sup>52</sup> And yet, 30.4% of drug arrestees in 2013 were black.<sup>53</sup> The disparity grows even more when it comes to incarceration. As of 2012, 37.7% of state drug prisoners were black.<sup>54</sup>

A 2013 report by the American Civil Liberties Union (ACLU) examining disparities in arrests for marijuana found that a black person is 3.73 times as likely to be arrested for possession of marijuana as a white person, and that the disparity had increased 32.7% between 2001 and 2010.<sup>55</sup> Indeed, the ACLU found that during this period, the white arrest rate for marijuana possession had “remained constant at around 192 per 100,000, whereas the Black arrest rate has

49. *Id.* at 1014.

50. John Hudak, *How Racism and Bias Criminalized Marijuana*, WASH. POST (Apr. 28, 2016), [https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana/?utm\\_term=.f4f5537000b0](https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana/?utm_term=.f4f5537000b0).

51. David A. Graham, *Paul LePage’s Racist Fearmongering on Drugs*, THE ATLANTIC (Jan. 8, 2016), <http://www.theatlantic.com/politics/archive/2016/01/racial-dogwhistling-with-paul-lepage-still-americas-most-outlandish-governor/423246/> (reporting that the governor of Maine described heroin sellers as “guys by the name D-Money, Smoothie, Shifty” who “come from Connecticut and New York” to sell heroin and “half the time they impregnate a young, white girl before they leave”).

52. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 268 (2009).

53. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2013, tbl.43 (2014), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43>; see also Fellner, *supra* note 52, at 272-73 (reviewing drug arrest rates by race from 1980 to 2007).

54. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013, at 16 tbl.14 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

55. ACLU, *supra* note 16, at 9.

risen from 537 per 100,000 in 2001 ... to 716 per 100,000 in 2010.”<sup>56</sup> In other words, the increase in marijuana-possession arrests between 2001 and 2010 was almost entirely due to an increase in arrests of African-Americans for marijuana.

## II. STATE MARIJUANA POLICY RECOMMENDATIONS

After decades of waging war on marijuana, voters in many states have come to see marijuana prohibition as a failure and believe that legalization is a better option. The Pew Research Center has been polling attitudes about marijuana legalization since 1969, when just 12% of Americans believed marijuana should be made legal. Its most recent survey, released in October 2016, found that 57% of U.S. adults favor legalizing marijuana while just 37% favor prohibition.<sup>57</sup> The numbers were nearly reversed just a decade ago, with only 32% in favor of legalization and 60% opposed in 2006.<sup>58</sup>

In this Section, I make the case that state policymakers would be wise to follow the public on this issue and work to enact marijuana-legalization laws in their states. First, I provide a brief history of state marijuana reforms. Second, I review the evidence so far from states that have legalized marijuana. These studies show that, by and large, legalization has been a success and a much better option than prohibition. Finally, I highlight some of the considerations and choices facing policymakers when enacting marijuana legalization.

### A. A BRIEF HISTORY OF STATE MARIJUANA REFORMS

The story of state marijuana legalization dates back to 1996, when California passed the first statewide medical-marijuana legalization law. The federal government did all that it could to try to stop the law in its tracks, raiding medical-marijuana dispensaries and prosecuting some of the operators.<sup>59</sup> Despite its best efforts, however, the federal government was not able to stop the trend. Throughout the 2000s, more and more states passed medical-marijuana laws, and marijuana stores started opening faster than the federal government could shut them down. The problem came down to resources. The federal government has the legal authority to prosecute any marijuana offense, from

56. *Id.* at 20.

57. Abigail Geiger, *Support for Legalization Continues to Rise*, PEW RESEARCH CTR. (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

58. *Id.*

59. AM. FOR SAFE ACCESS, *WHAT’S THE COST: THE FEDERAL WAR ON PATIENTS* 27 (2013), <https://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf> (“Over the past 17 years, the Justice Department has carried out over 500 aggressive SWAT-style raids on medical cannabis patients and providers, arrested nearly 400 people, and prosecuted more than 160 cases.”).

a marijuana kingpin to a user in possession of a single joint. But it only has the manpower to go after a small fraction of marijuana offenders—almost all marijuana enforcement is carried out by state and local police.<sup>60</sup> As a result, the federal government did not succeed in shutting down state medical-marijuana laws. Instead, federal enforcement served mostly to make it more difficult for states to implement effective regulations.<sup>61</sup>

By the time Colorado and Washington passed the first laws legalizing marijuana for all adult use in 2012, it was clear to most observers that the federal government was fighting a losing battle. Perhaps in recognition of this dynamic, the DOJ announced a cease-fire in its war on state-legal marijuana in late 2013, in the form of a memorandum advising federal law-enforcement officials not to use scarce resources to go after people in compliance with state marijuana laws.<sup>62</sup> The election of Donald Trump and his selection of Jeff Sessions to be attorney general have raised questions about whether the federal government's hands-off approach will continue. Even if the federal government reverses course, however, the experience with medical-marijuana laws suggests it will be unable to block state legalization laws entirely.

Since Colorado and Washington voters legalized marijuana, six more states have followed suit. In 2014, Oregon and Alaska passed marijuana-legalization ballot measures. And, in 2016, California, Maine, Massachusetts, and Nevada joined the club. Since 2012, voters in only two states have rejected marijuana-legalization proposals. In 2015, Ohioans decisively rejected a controversial ballot measure that would have legalized marijuana by giving the initiative's backers a monopoly on marijuana production. In 2016, an Arizona legalization ballot measure was narrowly defeated, with 51.32% against and 48.68% in favor.<sup>63</sup>

60. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463-67 (2009) (arguing that the federal government did not succeed in blocking state medical marijuana laws because of its limited law enforcement resources).

61. Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 569-75 (2010).

62. Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The Department of Justice had issued memos related to marijuana enforcement in 2009 and 2011, which curtailed federal enforcement in some medical marijuana states, although in other states enforcement continued more or less as it had before. For a discussion of these memos, see, for example, Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 McGEORGE L. REV. 109, 115-18 (2012).

63. *Ballot Measure Races*, ARIZ. SEC'Y OF STATE (Nov. 21, 2016), <http://results.arizona.vote/2016/General/n1591/Results-State.html#ballots>.

### B. LEGALIZATION: THE RESULTS SO FAR

A few organizations have released reports assessing state marijuana-legalization laws. Because marijuana-legalization laws are so new—in Colorado and Washington, the provisions permitting marijuana businesses did not take effect until 2014—the findings are necessarily preliminary. Based on the early results, however, marijuana-legalization laws appear to be succeeding at reducing law enforcement expenditures and generating tax revenue, without significantly impacting rates of marijuana use.

The Cato Institute has released the most comprehensive analysis of state marijuana-legalization laws to date, with its September 2016 report *Dose of Reality: The Effect of State Marijuana Legalizations*.<sup>64</sup> The report examines the legalization laws in Colorado, Washington, Oregon, and Alaska, and it considers data on marijuana use, marijuana pricing, health indicators, crime rates, and road safety. Overall, the report concludes “that state marijuana legalizations have had a minimal effect on marijuana use and related outcomes.”<sup>65</sup> Specifically, the data shows that “state-level marijuana legalizations to date have been associated with, at most, modest changes in marijuana use and related outcomes.”<sup>66</sup> Meanwhile, tax revenue following marijuana legalization has generally met or exceeded expectations. In Colorado, the state “collects well over \$10 million per month from recreational marijuana alone” and in Washington “recreational marijuana generated approximately \$70 million in tax revenue in the first year of sales—double the original forecast.”<sup>67</sup>

A 2016 report by the Drug Policy Alliance (DPA) reaches a similar conclusion.<sup>68</sup> The DPA report looked at data on youth marijuana use, marijuana arrests, road safety, and tax revenue. It found that while “[i]t is too early to draw any line-in-the-sand conclusion about the effects of marijuana legalization,” the preliminary data “suggest that the effects of legalization have been either positive or negligible.”<sup>69</sup> Thus far, legalization appears to have had “little to no impact on the overall rate of youth marijuana use.”<sup>70</sup> The data also indicates

64. ANGELA DILLS ET AL., *DOSE OF REALITY: THE EFFECT OF STATE MARIJUANA LEGALIZATIONS* (Cato Inst. Pol’y Analysis No. 799, 2016), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa799.pdf>.

65. *Id.* at 1.

66. *Id.* at 2.

67. *Id.* at 25.

68. DRUG POLICY ALLIANCE, *SO FAR, SO GOOD: WHAT WE KNOW ABOUT MARIJUANA LEGALIZATION IN COLORADO, WASHINGTON, ALASKA, OREGON, AND WASHINGTON, D.C.* (2016), [https://www.drugpolicy.org/sites/default/files/Marijuana\\_Legalization\\_Status\\_Report\\_101316.pdf](https://www.drugpolicy.org/sites/default/files/Marijuana_Legalization_Status_Report_101316.pdf).

69. *Id.* at 2.

70. *Id.* at 3.

that “[l]egalization has not led to more dangerous road conditions,” with “the post-legalization fatality rate” remaining consistent with pre-legalization levels in Colorado and Washington and early data from Oregon and Alaska showing the same.<sup>71</sup> DPA found that states are realizing substantial cost savings and tax revenue. Arrests for marijuana have (not surprisingly) “plummeted since voters legalized the adult use of marijuana, saving those jurisdictions millions of dollars and preventing the criminalization of thousands of people.”<sup>72</sup> Tax revenue exceeded expectations in both Colorado and Washington in 2015,<sup>73</sup> and early data from Oregon show the state collecting about \$4 million a month in marijuana taxes.<sup>74</sup> (Alaska did not issue its first retail marijuana license until September 8, 2016.)<sup>75</sup>

This is not to say that marijuana-legalization laws are costless or that they do not carry public health risks. Hospital admissions and poison-control calls related to marijuana have jumped in legalization states. In both Colorado and Washington, poison-center calls involving marijuana roughly doubled following legalization, although in absolute terms the numbers are still quite low. In Washington, calls increased from 156 in 2012 to 280 in 2016.<sup>76</sup> In Colorado, there were 110 calls in 2012 and 224 in 2016.<sup>77</sup> This is a small fraction of marijuana users and much lower than poison-center calls for many common household goods (for example, 2014 saw just under 200,000 poison-control calls nationwide for cosmetics and personal-care products).<sup>78</sup> Nevertheless, policymakers should certainly pay close attention to this trend, particularly as it concerns the regulation of edible marijuana products.<sup>79</sup>

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71. *Id.* at 6.

72. *Id.* at 4.

73. *Id.* at 7.

74. *Id.* at 8.

75. *Id.* at 9.

76. *2016 Annual Cannabis Report*, WASH. POISON CTR., <http://www.wapc.org/toxic-trends/marijuana-and-you/2016-annual-cannabis-report/> (last visited Apr. 8, 2017).

77. ROCKY MOUNTAIN POISON & DRUG CTR., *HUMAN MARIJUANA EXPOSURES* (2016), <http://rmpdc.org/Portals/23/docs/Colorado%202016%20Marijuana%20statistics.pdf?ver=2017-02-12-140328-797>.

78. James B. Mowry et al., *2014 Annual Report of the American Association of Poison Control Centers' National Poison Data System (NPDS): 32nd Annual Report*, 53 *CLINICAL TOXICOLOGY* 962, 987 tbl.17A (2015), <http://dx.doi.org/10.3109/15563650.2015.1102927>.

79. For a discussion of the challenges involved in regulating edible marijuana products, see DANIEL G. BARRUS ET AL., *TASTY THC: PROMISES AND CHALLENGES OF CANNABIS EDIBLES* (RTI Press Publication No. OP-0035-1611, 2016), [https://www.rti.org/sites/default/files/resources/12512064\\_Tasty\\_THC\\_Promises\\_and\\_Challenges\\_of\\_Cannabis\\_Edibles.pdf](https://www.rti.org/sites/default/files/resources/12512064_Tasty_THC_Promises_and_Challenges_of_Cannabis_Edibles.pdf).

In addition, it appears adult marijuana use has increased slightly following state marijuana legalization. Legalization opponents, such as Smart Approaches to Marijuana (SAM), argue that this is cause for alarm.<sup>80</sup> But the data so far show at most a small increase in use, and nothing close to “the sometimes dire predictions made by legalization opponents.”<sup>81</sup> Past-month use in Colorado rose from 14.93% of the population in 2013-2014 to 16.57% in 2014-2015.<sup>82</sup> Past-month use in Washington actually *decreased* slightly during that same period, from 12.79% to 11.22%,<sup>83</sup> although use rates in Washington had been rising in the years leading up to 2014-2015.<sup>84</sup> Still, basic economic theory would suggest that as marijuana becomes less expensive and easier for adults to purchase, adult use will increase, at least somewhat.

Of course, policymakers should be mindful that early data may not necessarily reflect the impact of marijuana legalization over the long term. As the RAND Corporation’s Beau Kilmer recently wrote in the *New England Journal of Medicine*, “we should be skeptical of people who claim to know what the net effect of cannabis legalization on public health will be.”<sup>85</sup> Marijuana prices in legalization states are still higher than they are likely to be as the industry matures. Already, prices have begun to drop in Colorado and Washington.<sup>86</sup> With this in mind, future rates of marijuana use may depend a great deal on details like the extent to which legalization states deploy taxes and other regulatory measures to prevent prices from dropping too far. It is

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80. See SMART APPROACHES TO MARIJUANA, LESSONS LEARNED AFTER 4 YEARS OF MARIJUANA LEGALIZATION (2016), <https://learnaboutsam.org/wp-content/uploads/2016/11/SAM-report-on-CO-and-WA-issued-31-Oct-2016.pdf>.

81. DILLS ET AL., *supra* note 64, at 1.

82. *National Survey on Drug Use and Health: Comparison of 2013-2014 and 2014-2015 Population Percentages* tbl.2, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/data/sites/default/files/NSDUHsaeShortTermCHG2015/NSDUHsaeShortTermCHG2015.htm> (last visited Apr. 8, 2017). *But see* COLO. DEP’T OF PUB. HEALTH & ENV’T, MONITORING HEALTH CONCERNS RELATED TO MARIJUANA IN COLORADO: 2016, at 5 (2017), <https://drive.google.com/file/d/0B0tmPQ67k3NVRHpUOEFYN0ZHQ0E/view> (finding that “[f]or adults and adolescents, past-month marijuana use has not changed since legalization either in terms of the number of people using or the frequency of use among users”).

83. *National Survey on Drug Use and Health*, *supra* note 82.

84. SMART APPROACHES TO MARIJUANA, *supra* note 80, at 4.

85. Beau Kilmer, *Recreational Cannabis—Minimizing the Health Risks from Legalization*, 378 NEW ENG. J. MED. 705, 707 (2017).

86. Debra Borchardt, *Marijuana Prices Fall in 2016 as Growers Flood the Market with Pot*, FORBES (Jan. 31, 2017), <https://www.forbes.com/sites/debraborchardt/2017/01/31/marijuana-prices-fall-in-2016-as-growers-flood-the-market-with-pot/#4a2444092f7f>.

also worth noting that the data we have on use is limited—rates of past-year or past-month use do not account for other important measures like the amount of marijuana people are consuming or its potency.

Still, while no one can predict the future, the experience of marijuana-legalization states so far is, on the whole, encouraging. States that have legalized marijuana have raised tax revenue in excess of pre-legalization estimates while redirecting law-enforcement and judicial resources that were previously spent on enforcing marijuana prohibition. Youth marijuana use does not appear to have increased as a result of legalization, adult marijuana use has risen at most modestly, and the overall impact of legalization on public health and safety has been small.

### RECOMMENDATIONS

To date, all eight states to legalize marijuana have done so via popular vote. It might be tempting for legislators to see that as an argument in favor of leaving the issue alone, at least in states that have an initiative process. But entrusting marijuana legalization to the ballot-measure process means advocates and businesses will be the ones to draft the law. The details of legalization—tax rates,<sup>87</sup> rules to protect children, and so forth—matter a great deal. As marijuana legalization becomes more and more popular with voters, ballot-measure boosters may not feel as constrained by considerations like public health. As a result, it is important that legislatures not cede control of marijuana policy. Instead, state lawmakers should seize the opportunity to shape *how* marijuana legalization is implemented.

States that pursue marijuana legalization will be faced with many important policy choices. With so many moving parts, drafting legislation can seem daunting at first. Policymakers do not need to decide every detail of legalization in advance, however. Thus far, marijuana-legalization ballot measures have been written in relatively broad strokes, leaving it to regulatory agencies to draft more-precise rules through the administrative process. The discussion below highlights just a few of the key questions policymakers will want to study when considering marijuana legalization. For a detailed look

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87. For an evaluation of state laws regarding marijuana taxation, see Pat Oglesby, *Marijuana Taxes—Present and Future Traps*, 83 STATE TAX NOTES 391 (2017).



at state marijuana regulations now in effect, the National Alliance for Model State Drug Laws maintains a document with a point-by-point comparison of marijuana-legalization laws.<sup>88</sup>

1. **Manufacture and distribution.** Perhaps the most important element of any state legalization law concerns marijuana manufacture and distribution. To date, state legalization laws have adopted an alcohol-style commercial model, but with much stricter oversight of the supply chain. States have gone to great lengths to track marijuana in order to avoid diversion to the black market in prohibition states and to minors in their own states. Diversion is an especially important concern, in part because under the Department of Justice’s 2013 non-enforcement guidelines, “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states” is one of the things that states must do to avoid federal interference.<sup>89</sup>

To guard against diversion of marijuana, the four states that have already implemented marijuana legalization—Alaska, Colorado, Oregon, and Washington—all require “seed-to-sale” tracking of the product.<sup>90</sup> (The legalization laws in California, Maine, Massachusetts, and Nevada, which were passed by voters in 2016, have not yet been implemented with respect to marijuana manufacture and retail sale.) These tracking systems “offer[] the state the ability to track product in ways that far surpass product tracking in most other commodity markets in the U.S.”<sup>91</sup>

88. NAT’L ALLIANCE FOR MODEL STATE DRUG LAWS, MARIJUANA: COMPARISON OF STATE LAWS LEGALIZING PERSONAL, NON-MEDICAL USE (2016), <http://www.namsdl.org/library/33FD7B09-D862-91A9-48FFEF87F5D4611/>. The RAND Corporation, in a 2013 report for the Vermont state legislature, has produced the most thorough examination of the options for policymakers when it comes to marijuana reform. The RAND report analyzes a wide range of policy options, including many that have not yet been implemented in any state. See CAULKINS ET AL., *supra* note 23.

89. Memorandum from James M. Cole, *supra* note 62.

90. Margaret Cohn, *Tracemarks: A Proposed Information Intervention*, 53 HOUS. L. REV. 421, 451-52 (2015) (discussing the seed-to-sale tracking system in Washington); Ken Helm & Logan Leichtman, *Implementation of Oregon’s Measure 91 in the State Legislature*, 52 WILLAMETTE L. REV. 1, 26-27 (2015) (discussing Oregon’s seed-to-sale tracking system); John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 649, 678 (2015) (discussing Colorado’s tracking system); Laurel Andrews, *Alaska Signs 5-year Contract With Marijuana Seed-to-Sale Tracking Company*, ALASKA DISPATCH NEWS (Mar. 11, 2016), <https://www.adn.com/cannabis-north/article/alaska-signs-5-year-contract-marijuana-seed-sale-tracking-system-company/2016/03/11/>.

91. Hudak, *supra* note 90, at 679.



Other considerations for regulating manufacturers and producers include whether to permit licensees to manufacture and distribute unlimited amounts of marijuana, which may contribute to driving the price down. Or, whether to place limits on the amount of marijuana a licensee can produce. California’s marijuana-legalization law, for example, establishes 19 different license types, including 13 different cultivation license types and a “microbusiness” license.<sup>92</sup> Each cultivation license type is based on the size of the grow operation and its location (indoors, outdoors, etc.). Notably, the law places a moratorium on the three “large” cultivation license types—which would allow a licensee to grow up to one acre of marijuana outdoors or 22,000 square feet indoors. The state may not issue these licenses until after January 1, 2023.<sup>93</sup>

Of course, it is also possible to legalize marijuana without allowing commercial manufacture and distribution.<sup>94</sup> Leaving all or part of the supply chain in the hands of the state is an attractive option for legalization supporters who are concerned that commercialization could result in increased use. Uruguay is in the process of implementing a marijuana-legalization law under which production is controlled by state-commissioned companies.<sup>95</sup> This model is not entirely unfamiliar to the United States: In a number of states, liquor is sold at state-run stores. Unfortunately, state-run marijuana stores are unlikely to be a legally viable option so long as federal prohibition remains on the books. This is because, unlike a state marijuana law that merely permits private actors to grow and sell marijuana, a system in which the state itself is violating federal marijuana law would almost surely be struck down under the Constitution’s Supremacy Clause.<sup>96</sup>

Similarly, some argue states should consider making it legal to possess and grow small amounts of marijuana while continuing to prohibit commercial sales as a middle ground between legalization and prohibition.<sup>97</sup> A Washington, D.C., law takes this approach. In May 2017, the Vermont Legislature passed a proposal along these lines but the governor vetoed

92. CAL. BUS. & PROF. CODE § 26050.

93. *Id.* § 26061(d).

94. See CAULKINS ET AL., *supra* note 23 at 49-74 (comparing different marijuana supply models).

95. Alex Marshall, *Uruguay to Test World’s First State-Commissioned Recreational Cannabis*, THE GUARDIAN (Apr. 18, 2016), [https://www.theguardian.com/society/2016/apr/18/uruguay-first-state-commissioned-recreational-cannibis-marijuana?CMP=edit\\_2221](https://www.theguardian.com/society/2016/apr/18/uruguay-first-state-commissioned-recreational-cannibis-marijuana?CMP=edit_2221).

96. Mikos, *supra* note 60, at 1457-59.

97. CAULKINS ET AL., *supra* note 23, at 57-59 (discussing allowing adults to grow their own marijuana as a middle ground option between legalization and prohibition).

it. The Vermont bill “would [have] legalize[d] the possession of 1 ounce or less of marijuana and the cultivation of several plants by people who are at least 21 years old” but commercial manufacture and sale would have remained prohibited.<sup>98</sup> This approach has drawbacks in comparison to broader legalization laws. By leaving most marijuana distribution unregulated, the state cannot collect taxes and the black market will continue to thrive. In addition, as discussed below, laws that allow small-scale home cultivation may be open to abuse by illegal commercial growers using them as cover. Nevertheless, legalizing personal possession and cultivation only is an effective way to address the criminalization of marijuana users. This approach should not be confused with laws that merely reduce marijuana possession to a misdemeanor or an infraction—sometimes referred to as decriminalization laws—which can raise a number of problems of their own.<sup>99</sup>

2. **Possession limits.** Marijuana legalization proponents often use the tagline of taxing and regulating marijuana “like alcohol.” Unlike alcohol, however, marijuana-legalization laws strictly limit the amount a person can purchase and possess. As with seed-to-sale tracking, this feature is designed to help prevent against diversion. If consumers were allowed to buy unlimited amounts of marijuana, smuggling legally produced marijuana into other states for sale would be easy and cost-effective. These limits might also have public health benefits by preventing stores from offering bulk discounts to consumers and keeping prices high.<sup>100</sup>

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98. April McCullum, *VT House Delays Vote on Legalizing Marijuana*, BURLINGTON FREE PRESS (March 28, 2017), <http://www.burlingtonfreepress.com/story/news/politics/2017/03/28/vermont-house-delays-vote-marijuana-legalization/99597878/>.

99. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (analyzing the impact of “misdemeanor decriminalization” laws, including marijuana decriminalization laws, throughout the criminal justice system); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24 CORNELL J.L. & PUB. POL’Y 319, 351 (2014) (analyzing the impact of marijuana decriminalization laws on policing and pretextual stops and concluding that “[i]t could be that nothing short of legalization is required for a true wind down to take place”); see also Alexandra Natapoff, “Misdemeanors,” in the present Volume.

100. CAULKINS ET AL., *supra* note 23, at 118 (noting that “vendors of both legal and illegal marijuana offer quantity discounts for bulk purchases” with the price per unit weight per pound approximately 38% below the price per unit weight per ounce).

With the exception of Maine, legalization states limit the amount of marijuana a person can buy to one ounce.<sup>101</sup> In Maine, the limit is substantially higher, at 2.5 ounces.<sup>102</sup> At least as long as most states retain prohibition, legalization laws should probably include a limit on the amount of marijuana a person can purchase and possess. Although one ounce is a nice, round number, states could probably adopt a lower limit. Studies suggest daily marijuana users consume between 1.3 and 1.9 grams of marijuana per day,<sup>103</sup> so half an ounce would last a very heavy user a little more than a week. A half-ounce limit would further reduce the risk of diversion and help to keep prices relatively high (a goal of many public health advocates). On the other hand, a lower limit on personal possession could expose more users to arrest for having more marijuana than the law allows.

3. **Cultivation for personal use.** Cultivation for personal use, or “homegrows,”<sup>104</sup> warrants special attention from policymakers. Most state legalization laws allow individuals to grow small amounts of marijuana for personal use. In Colorado, for example, adults can legally grow up to six marijuana plants for personal use.<sup>105</sup> Although there is a requirement that the marijuana be secured “in an enclosed, locked space,”<sup>106</sup> homegrows are essentially unregulated.<sup>107</sup> No license is needed to legally grow six marijuana plants or fewer for personal use in Colorado. Similarly, under Oregon’s legalization law, adults may grow up to four plants per residence.<sup>108</sup> By contrast, Washington did not legalize home cultivation—there, the only way to legally grow marijuana for recreational use is if you have a commercial license to do so.<sup>109</sup>

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101. See NAT’L ALLIANCE FOR MODEL STATE DRUG LAWS, *supra* note 88, at 3 (reporting that in Alaska adults 21 and older “may purchase, possess, or transport up to one ounce of marijuana”); *id.* at 9 (28.5 gram limit in California, which is approximately one ounce); *id.* at 17 (one ounce limit in Colorado); *id.* at 32 (one ounce limit in Massachusetts); *id.* at 37 (one ounce limit in Nevada); *id.* at 41 (one ounce limit in Oregon with a higher limit of eight ounces within a residence); *id.* at 46 (one ounce limit in Washington state).

102. *Id.* at 26 (2 ½ ounce limit in Maine).

103. CAULKINS ET AL., *supra* note 23, at 17.

104. See Hudak, *supra*, note 90, at 669.

105. See COLO. CONST. art. XVII, § 16(3)(b).

106. *Id.*

107. Hudak, *supra*, note 90, at 670 (“[T]he state has done little to regulate homegrows, in large part because the amendment’s language is clear.”).

108. NAT’L ALLIANCE FOR MODEL STATE DRUG LAWS, *supra* note 88, at 42.

109. *Id.* at 46.

If marijuana were legal nationwide, letting people grow small amounts of marijuana in their homes probably would not present many challenges. Growing marijuana “is much more difficult than most people understand,”<sup>110</sup> not to mention resource intensive: “[t]he investment—in hydroponics, proper lighting, and humidity controls—can be substantial.”<sup>111</sup> It would seem, then, that home marijuana cultivation would be left mostly to hobbyists, much like home brewing by beer enthusiasts.

There is little evidence that small marijuana homegrows that comply with state laws have become a problem in the states that permit them. There is, however, reason to “worry that homegrowers may grow *more* marijuana than they are allowed and present an opportunity to divert product to illegal markets” in other states.<sup>112</sup> Anecdotal evidence suggests that this may be happening in Colorado, where law enforcement officials report that illegal growers are attempting to use Colorado’s homegrow law as a cover.<sup>113</sup> The illegal growers take advantage of the fact that it is hard for police to distinguish the legal and illegal homegrows without gaining access to a home. But, without some evidence that a homegrower is operating outside the law, the police will not be able to get a search warrant.

States that include home cultivation in their legalization laws may want to consider adopting measures that would make it harder for illegal growers to take advantage. One option would be to require homegrowers to register with the state. States might also explore the possibility of requiring registered homegrowers to consent to warrantless state inspections based on reasonable suspicion, although such a policy could be open to a legal challenge on Fourth Amendment grounds.

## CONCLUSION

This chapter outlines the case for marijuana legalization, along with a few of the key questions policymakers will want to study when considering marijuana legalization. Barring a dramatic reversal of public opinion, marijuana legalization is more a question of when than if for policymakers. And, in light of the generally positive results of state marijuana-legalization laws so far, it is exceedingly unlikely public opinion will turn. In the coming years then,

110. David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Lessons Learned*, 8 HARV. L. & POL’Y REV. 359, 377 (2014).

111. *Id.*

112. Hudak, *supra*, note 90, at 670.

113. See POLICE FOUND., COLORADO’S LEGALIZATION OF MARIJUANA AND THE IMPACT ON PUBLIC SAFETY: A PRACTICAL GUIDE FOR LAW ENFORCEMENT (2015), [http://www.nccpsafety.org/assets/files/library/Legalized\\_Marijuana\\_Practical\\_Guide\\_for\\_Law\\_Enforcement.pdf](http://www.nccpsafety.org/assets/files/library/Legalized_Marijuana_Practical_Guide_for_Law_Enforcement.pdf).

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we can expect to see more states adopt marijuana-legalization laws. While the prospects for marijuana reform at the federal level may be dim under the current administration, it is hard to imagine that a decade from now federal law will not have changed to accommodate state marijuana-legalization laws in some form or fashion.

In this environment, state policymakers would be wise to take this issue up sooner than later. Marijuana prohibition has been a costly failure, requiring states to invest a significant amount of money on enforcement while losing out on potential tax revenue, all with little to show for it. Marijuana legalization may not be as perfect as some advocates make it out to be. But if implemented well, it is far better than the status quo. By leaving marijuana legalization to the ballot-measure process, however, state legislatures have so far ceded many of the policy details to legalization advocates and marijuana businesses. It is time for state legislators to take the lead on this important criminal justice reform issue.



# Sexual Offenses

Robert Weisberg\*

*While American penal codes punish a wide variety of sexual offenses, reform efforts and their controversies have focused on the core crime of rape, and in particular on the principle of consent. Over many decades, definitions of rape have moved from egregiously pro-defendant rules requiring strong resistance from complainants to somewhat more nuanced notions of force and ultimately, in many states, to a deceptively simple-looking rule defining rape as sex without consent. Lawmakers and commentators have argued for pushing the line farther along to requiring “affirmative consent”—a standard now at work in just a few states but widely adopted in the parallel world of college disciplinary rules. As illustrated in recent American Law Institute debates over the Model Penal Code, that last step is a difficult one because of proof and mens rea problems. As a result, at least in the near term and at least outside the college context, the equilibrium might well—and arguably should—settle at the nonconsent point in the continuum, until the law finds a better way of apprehending the great psychological complexities of sexual communication and conduct.*

## INTRODUCTION

The subject of “sexual offenses” covers a wide range of conduct. While most would associate it with the crime of rape, the term can also encompass such diverse matters as prostitution, child pornography, and human trafficking. The goal of this paper is to identify areas of criminal law<sup>1</sup> widely perceived in need of reform, and the various subcategories of sexual offense law vary widely in terms of fitting that criterion. While there may be disputes about the scope and implementation of prostitution laws,<sup>2</sup> they have not been salient in

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1. The category of sexual harassment generally applies to noncriminal misconduct subject to tort law or institutional disciplinary rules.

2. Indeed, as matter of categorizations prostitution is often placed under the rubric of “vice crimes.” See FRANKLIN ZIMRING & BERNARD HARCOURT, CRIMINAL LAW AND THE REGULATION OF VICE (2nd ed., 2014).

public discourse of late, except in the form of human trafficking. And for that latter tragic subject, since there is obviously a moral consensus about its evils, the major discussions are about finding better resources and international mechanisms to fight it, not about how we conceive it legally.<sup>3</sup> Child pornography is certainly an area subject to some contention, but mainly about whether federal sentences are excessive.<sup>4</sup> The related area of Internet stings by police to find those who prey on children is subject to some disagreement about police conduct, with arguments addressing the boundaries of attempt law or the entrapment defense.<sup>5</sup> Finally, there is plenty of dispute about the wider variety of sex-offender registration laws, with constitutional discussion about when a registration requirement might count as illegal punishment, and policy debates about its overbreadth.<sup>6</sup> But if we are to concentrate our attention on an area most in contention and most in need of general legal resolution, the subject is indeed rape.

In that regard, we can readily identify the most contested specific subject within the realm of rape law. As will be elaborated on below, American rape law is at a pivot point about the role of *consent* in penal definitions of rape or sexual assault. Laws defining rape and sexual assault<sup>7</sup> have undergone remarkable transformation in the last half-century, and equally remarkable is that the changes reflect a fairly strong moral and political consensus—at least up to a (very recent) point. For one thing, certain procedural rules long denounced as retrograde have largely disappeared. But in regard to our focus here on substantive criminal law, while state laws still vary widely, we can trace a fairly steady movement in the doctrine. It runs from the now-infamous “utmost resistance” test, to the “reasonable resistance” test, to a criterion of “force,” to a criterion of nonconsent, and ultimately (perhaps) to a requirement

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3. See Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006).

4. See Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 *STAN. L. & POL’Y REV.* 545 (2011).

5. See, e.g., *People v. Thousand*, 631 N.W.2d 694 (Mich. 2001) (finding that police sting remains within legal boundary of attempt law).

6. See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (lifetime sex offender registration requirement not unconstitutional). See generally Wayne A. Logan, “Sex Offender Registration and Notification,” in Volume 4 of the present Report.

7. A caveat about vocabulary: “Rape” laws do not necessarily use the term “rape.” Some speak of “sexual assault,” and in most jurisdictions even if “rape” is a crime, there will be other very serious offenses under the rubric of sexual assault. Moreover, laws vary as to whether they are limited to acts of penetration or otherwise are gender-specific. This chapter will finesse those difficult questions by using the term “rape” to signal the act of penetration for sure, but also other serious violations of bodily integrity and sexual autonomy that a legislature would deem equally harmful.



of affirmative consent. The key choice for legislatures now is whether to make nonconsent or the absence of affirmative expression of consent the chief element of the crime of rape.<sup>8</sup> That apparently subtle distinction has become hugely controversial. To be sure, there are related components of rape law that are still subject to debate and legislative revision, such as defining categorical incapacity to consent (in terms of youth, mental disability, unconsciousness, and intoxication, or subordination in a professional relationship),<sup>9</sup> or rape by fraud or extortion, or the issue of marital immunity. But the focus of public debate has been what we might call situational consent, and the wisdom or feasibility of an affirmative-consent rule.

That issue has presented a unique challenge for settling even the most basic elements of the crime, and it requires us to face old and fundamental questions about how to define the act element of crime (*actus reus*), and how to choose from the conventional menu of mental-state standards (*mens rea*)—and indeed whether conduct element definitions end up obviating any need for mens rea terms. And thus we see a great paradox: An area of human conduct uniquely fraught with moral, social, and political dispute and empirical uncertainty has also been an arena for substantive criminal law doctrinal analysis of the most old-fashioned and abstract kind. A subject that some criminal law professors approach with anxiety or avoid altogether because of its controversy and sensitivity is also a useful topic to teach legal doctrine to first-year law students. Indeed, the new doctrinal debate focuses on the state of the Model Penal Code, a body of law written over a half-century ago that remains well-regarded for its rational and progressive rebuilding of penal law—except for its notoriously obsolete and culturally unenlightened provisions on rape. And as shown below, there are related paradoxes. For one thing, appellate judges used to deciding relatively abstract questions of law now take seriously claims of insufficient evidence that require them to parse the highly delicate and sensitive factual details of complex sexual communications between nonstrangers. For another, much of the debate over the best legal standard is being carried out by a kind of legal proxy, the non-criminal disciplinary rules governing the conduct of a distinct subset of people—undergraduate students on college campuses.

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8. For a long historical view of the evolution of rape law, see GUYORA BINDER, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW* 261-84 (2016).

9. These issues receive some attention below regarding the mens rea doctrine.

## I. A CENTURY OF EVOLUTION OF RAPE LAW DOCTRINE

Here is a brief review of how the line distinguishing rape from innocent conduct has moved over the last century of American law. We start with the “utmost resistance” test. In *Brown v. State*,<sup>10</sup> where the legal definition of rape was simply to “carnally know” another “by force and against her will,” it was insufficient for the state to prove that the sexual act occurred “in the entire absence of mental consent or assent.” Rather, the complainant must have undertaken “the most vehement exercise of every physical ... power to resist”<sup>11</sup> until the very act of consummation. It is telling that in these old cases the alleged victim (complainant) was called the “prosecutrix,” because the terminology underscores that the prosecutor must align with the complainant to prove required action by her and not by the defendant. Put differently, to reframe the crime into elements about the defendant’s conduct or state of mind, the prosecution must prove that the defendant’s effort at consummation is accompanied by a virtual assault with intent to kill, since the complainant must have responded with the force virtually necessary to survive a fatal attack—a demonstrable effort at the equivalent of self-defense to homicide.

By mid-century, that utmost-resistance test came to be viewed as an unjustifiable obstacle to conviction, rooted in misogynist prejudice. The next step on the continuum is captured by the New York case of *People v. Dorsey*.<sup>12</sup> While state law made “forcible compulsion” the actus reus of the crime, the court required proof that the complainant undertook the “earnest resistance ... reasonably to be expected from a person who genuinely refuses to participate in sexual intercourse.”<sup>13</sup> This test obviously eases the prosecutor’s burden, and indeed—as construed by the court—even no resistance at all could be sufficient (most obviously in stranger cases, where the complainant could reasonably infer that any resistance was futile). But still the focus was on the complainant’s conduct, and still the state bore not just the burden of proof beyond reasonable doubt at trial but a considerable burden to fend off an insufficiency of evidence claim on appeal.

A next important stage on the continuum is reflected in the famous California case of *People v. Barnes*,<sup>14</sup> which establishes that the actus reus of the crime really must in fact be framed in terms of the action of the defendant. Rejecting any formal requirement of resistance by the complainant, the California law

10. *Brown v. State*, 127 Wis. 193 (1906).

11. *Id.* at 199.

12. *People v. Dorsey*, 429 N.Y.S.2d 828 (N.Y. Sup. Ct. 1980).

13. *Id.* at 832.

14. *People v. Barnes*, 42 Cal. 3d 284 (1986).

defined rape (and still does) as a sexual act “accomplished against a person’s will by means of force or fear of immediate and unlawful bodily injury on the person or another.”<sup>15</sup> The state Supreme Court issued a stern rebuke to a lower appellate court that had continued to require some proof of resistance (and also cited social science evidence of not just the futility but the positive harm of resistance in certain circumstances). In technical legal terms, the court was also admonishing the lower appellate courts to grant more respect to jury verdicts and hence to look with more skepticism on claims of insufficient evidence.

But the *Barnes* standard is still only a midpoint on the continuum. For one thing, the force requirement still speaks of a threat of injury that presumably goes beyond the experience of unwanted sex per se. For another, in the factually nuanced cases and often disputed narratives in nonstranger cases (like that in *Barnes* itself), where the defendant has not expressly threatened a physical battery independent of the nonconsensual sexual act, the inference of force will remain very much a matter of interpretation. Thus, even while resistance is not formally necessary, it is often vital as part of the evidence for a prosecutor trying to prove force. Further, *Barnes* implicitly raises questions of mental state as well as act, matters buried in the utmost-resistance standard and only indirectly raised in *Dorsey* in the context of the complainant’s reasonableness in perceiving whether resistance was feasible. Indeed, *Barnes* implicitly raises questions of mental state with respect to both parties. Did the complainant reasonably perceive the defendant’s arguably ambiguous actions as threats? And if a reasonable perception that his action contained a threat can establish force, does that mean that the mens rea of rape is less than full intent? That is, while of course the state must prove the defendant’s intent to have intercourse, is it sufficient to prove that he was merely reckless or negligent with respect to whether his actions will be reasonably perceived as a threat? Finally, and despite the court’s admonitions, with all these new subtleties in the definition of rape, the *Barnes* standard could hardly preclude appeals based on insufficiency of evidence, nor could it spare judges the discomfort of close scrutiny of sensitive and entangled human interactions and speculations about governing social mores.<sup>16</sup>

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15. *Id.* at 292.

16. To get a sense of the awkward delicacies appellate judges face in finely parsing the evidence in nonstranger rape cases, see Jeannie Suk’s narration of how judges at different tiers of a state court system contentiously analyzed the facts of a famous case in “*The Look in His Eyes*”: *The Story of Rusk and Rape Reform*, in *CRIMINAL LAW STORIES* 171–211 (Donna Coker & Robert Weisberg eds., 2013).

The previous standards may have sometimes applied in the context of a statute or doctrine that also mentioned absence of consent, but the inevitable next step on the continuum was to focus solely on the criterion of nonconsent, without any requirement of force, and certainly not a threat of extrinsic assaultive force, much less resistance. And notably, while American law generally does not formally distinguish between stranger and nonstranger cases, legislative and judicial debates in this next historical step have mainly focused on cases involving acquaintances. Thus many of the most controversial adjudications have involved people who have had at least a casual social or romantic relationship for a while, or who are new dating partners.

Exemplary is *State v. Smith*,<sup>17</sup> which involves a spontaneous and initially consensual social encounter. The *Smith* decision makes absence of consent the very essence of the crime. But in moving the line even farther along than did *Barnes*, the *Smith* court unavoidably encountered questions of state of mind. Whether the complainant has indeed consented or not might seem to be a question about an observable event, but in the court's language, "whether a complainant should be found to have consented depends upon how her behavior would have been viewed by a reasonable person under the surrounding circumstances."<sup>18</sup> In turn, "whether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed."<sup>19</sup> Thus, the court conceded that the mental state of the defendant is not really separate from the presence or absence of the act of consent, and that the mental state need not be "an actual awareness on the part of the defendant that the complainant had not consented or a reckless disregard of her nonconsenting status."<sup>20</sup> Even negligence with respect to whether the complainant has manifested consent might be sufficient for rape, and so the subjective and objective components of the crime are analytically entangled.

But rape law reformers were still not satisfied by the easing of the prosecutor's burden offered by the *Smith* standard. As the *Smith* court said, "[c]onsent is not made an affirmative defense," but its absence must be proved beyond a reasonable doubt as an element of the crime.<sup>21</sup> And if that question turns on how a reasonable person would interpret the possibly ambiguous or vague "manifestations" by the complainant, juries might err too far on the side of the defendant, and appellate courts might yet again find insufficient evidence—

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17. *State v. Smith*, 554 A.2d 713 (Conn. 1989).

18. *Id.* at 717.

19. *Id.*

20. *Id.*

21. *Id.*

even under this standard. So the proposed solution brings us to the choice point at which American rape law now stands: To induce a person who seeks intercourse with another to avoid any unreasonable risk of wrongly construing the other person's behavior as indicating consent, the new standard requires as the key element of the crime that the manifestation amount to affirmative expression. In the language of the important case of *In re M.T.S.*,<sup>22</sup> "any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault."<sup>23</sup> As a result, the only "force" needed is "any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration."<sup>24</sup>

Although I will discuss the implications of this new standard in more detail below, here is the gist of the issue in the words of the *M.T.S.* court itself:

Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act. ... Although it is possible to imagine a set of rules in which persons must demonstrate affirmatively that sexual contact is unwanted or not permitted, such a regime would be inconsistent with modern principles of personal autonomy.<sup>25</sup>

The court is conceding that while "affirmative consent" purports to be an objective event that helps us avoid the interpretive difficulties of the *Smith* standard, unless we truly literally mean that only "yes" means "yes," the problem of interpretation never goes away. Thus, a defendant can argue that nonverbal conduct by the complainant could be reasonably construed as affirmative consent, and then, in turn, the plausibility of such a claim might well depend on some empirically based understanding of the norms of sexual communication.

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22. *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992).

23. *Id.* at 1277.

24. *Id.*

25. *Id.*

The application of conventional principles of mens rea to rape law has always been vexing, and the reason should now be evident. But let us make a key distinction. In one area of sexual assault law which is not the main subject here, those conventional principles and doctrinal choices still apply. This is the area of incapacity in its various forms. When the incapacity is due to age, under the rules of statutory rape there is a straightforward question of the required mens rea for the underage element, and we can safely say that many if not most jurisdictions make this a strict liability element—and do so fairly uncontroversially.<sup>26</sup> Somewhat more complicated is incapacity in the form of mental deficiencies because of less certainty about the objective indications—but negligence is the norm.<sup>27</sup> Still somewhat more complicated is situational unconsciousness, where negligence is the usual standard, but the role of intoxication (by either or both parties) has led to policy disputes.<sup>28</sup>

But when it is a matter of actual consent, not incapacity to consent, American law has been unclear about whether or how mens rea should enter the equation. The implication of the *Smith* and *M.T.S.* standards and possibly the *Barnes* and even *Dorsey* standards, is that a defendant is guilty if he is reckless—or possibly negligent—with respect to whether his actions could be reasonably construed as threatening the relevant degree of force, or whether the complainant's conduct manifests consent. Some defendants have framed their arguments that they were not reckless or negligent in these situations by claiming a “mistake of fact” defense, which, but for a possible shift of burden of proof, amounts to saying that they lacked the required mens rea. Where the defendant argues that his mistake was reasonable, he is implicitly construing the required mens rea as at least negligence. In many jurisdictions, the mistake-of-fact defense is rejected and mens rea does not explicitly become any part of the legal dispute. Thus in *Commonwealth v. Fischer*,<sup>29</sup> where the relevant standard was whether the defendant engaged in “forcible compulsion ... by use of physical, intellectual, moral, emotional or psychological force, either express or implied,”<sup>30</sup> the court construed state law as forbidding any mistake-of-fact defense. On the other hand, even under that standard, especially because of the latter phrases, the jury might well have considered the reasonableness of the defendant's understanding of his own behavior in light of the complainant's apparent responses.

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26. BINDER, *supra* note 8, at 280. A few states have moved toward a negligence standard. See, e.g., *People v. Hernandez*, 61 Cal. 2d 529 (1964).

27. E.g., *White v. Commonwealth*, 478 S.E.2d 713 (Va. Ct. App. 1996) (negligence sufficient in case of retarded victim).

28. BINDER, *supra* note 8, at 279-81.

29. *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. Ct. 1998).

30. *Id.* at 1116.

But Professor David Bryden expresses skepticism whether a focus on the defendant's mens rea or mistake would make any difference in jurisdictions that retain the force-resistance rule, because juries are unlikely to believe that a defendant, who used force on a resisting victim, honestly believed she consented.<sup>31</sup> Bryden suggests that litigation over mistake will be rare in any event, because in addition to ambiguous cases of consent being screened out before trial, few rape defendants will find it in their interest to argue mistake: "[A] defendant who claims that the woman consented may still get the benefit of jurors' speculation that he made an understandable mistake and so should not be punished. Unless he is unusually honest, or the facts are unusually clear, he has no reason to concede that she did not consent, and therefore no reason to assert a mistake defense."<sup>32</sup>

## II. THE CURRENT STATE OF THE LAW

One can find a number of sources surveying the current array of state law, both statutory and judicial, defining the elements of rape. These surveys are trying to hit a moving target, because in some states the law remains somewhat undefined or is in active flux. They also face a great obstacle in comparing state laws, because these laws vary so much in the number and complexity of their forms and severity levels of rape and sexual assault. Nevertheless, a review of well-researched and reasonably up-to-date sources<sup>33</sup> shows a consensus on some key general points: A majority of states still have some version of an explicit "force" requirement.<sup>34</sup> Some have what might be called a soft version of affirmative consent by using the term "unwillingness" in their statutes.<sup>35</sup> Perhaps 15 could be said to be affirmative-consent states, but in several jurisdictions the notion is implicit and tied to force (as in California under *Barnes*), with some requiring express or implied acquiescence. Only three could be said to be "pure" affirmative-consent states: Wisconsin, Vermont, and New Jersey.<sup>36</sup>

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31. David Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 341-43 (2000).

32. *Id.* at 414-15.

33. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 442 (2016); John F. Decker & Peter G. Baroni, *No Still Means Yes: The Failure of the Non-Consent Reform movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1084-86 (2011). Patricia J. Falk, *Not Logic But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape by Fraud*, 123 YALE L.J. ONLINE 353, 357 (2013).

34. Tuerkheimer, *supra* note 33, at 447.

35. *Id.* at 445-48.

36. *Id.* at 451.

One recent source, the American Law Institute, helps give us an impressionistic picture—which may be the best we can hope for in this inquiry.<sup>37</sup> It tells us that five states define consent as “positive cooperation.” Two states define consent in terms of “express or implied acquiescence,” which might be viewed as a subspecies of affirmative consent. Three more states do not have a clear definition, seeming to lean toward a positive cooperation conception by using the term “without ... consent,” but without any statutory definition of consent. Six states define nonconsent with language that can be roughly paraphrased as some expression of unwillingness or resistance, although several of these states continue to use some language of “force.” One state defines consent as “actual words or conduct indicating freely given agreement” but then also requires that “lack of consent was clearly expressed by the victim’s words or conduct.” Another state penalizes sexual intercourse when the defendant knows it is without consent, but case law suggests that the complainant must communicate unwillingness.

Adding to that uncertainty is that even in the so-called “pure” affirmative-consent states, the interpretive case law has so far told us very little. Professor Deborah Tuerkheimer has shown that in those states, the facts in the appellate cases upholding rape convictions under the affirmative-consent standard show enough indications of force or manifest nonconsent that they could readily come out the same way under the earlier standards.<sup>38</sup> As she finds, the cases tend to fall into fact patterns where the complainant was asleep or intoxicated, or exhibited fear. In the first two, the facts of the cases clearly establish liability without affirmative consent being an issue. Only the third contains cases where the complainant is passive, such that an argument could be made that the missing element was affirmative consent, but those cases tend to involve such otherwise decisive factors as past physical abuse, incest, or “surprise attack.”<sup>39</sup> And perhaps most notably, virtually none of the cases turns on a plausible argument of miscommunication between the parties, where plausible interpretations could be found on either side.<sup>40</sup>

Because state laws vary so much, especially where their divergent vocabularies and gradations make comparisons difficult, and because state courts often fail to resolve statutory ambiguities, generalizing about the average or modal point on the historical continuum is difficult. But one might venture that the heart

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37. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Preliminary Draft No. 5, Sept. 8, 2015) [hereinafter Preliminary Draft No. 5].

38. Tuerkheimer, *supra* note 33, at 451-57.

39. *Id.* at 459.

40. *Id.* at 468.



of American law now is something like the *Smith* consent standard, a standard that stops short of affirmative consent. This standard arguably holds sway even in many states that officially still have “force” language on the books but have allowed judges to finesse their way around it. And as I suggest later, this is the point where American rape law likely will be—and probably should be—for some time.

An alternative, or complement, to a survey of current law is an analytic map of the possible combinations of act and mens rea available to the states in defining rape law. Useful here is a chart by David Bryden:<sup>41</sup>

Mens Rea		Act	
1.	Intentional		Penetration, plus
2.	At Least Recklessly	1.	Force and nonconsent
3.	At Least Grossly Negligent	2.	Nonconsent (Subjective)
4.	At Least Negligent	3.	Nonconsent Manifested by Either Verbal or Physical Resistance
5.	Strict Liability	4.	Lack of Affirmative Expression of Consent

As Bryden observes:

By combining one of the mental states from the left column with one of the acts from the right column, we can create a definition of rape to suit nearly anyone. Of all the possible combinations of a mens rea and an act, the most advantageous to the prosecution would be strict liability combined with subjective nonconsent. The most favorable to the defense would be intent (to have nonconsensual intercourse) combined with force and nonconsent.<sup>42</sup>

We can add to Bryden’s taxonomy a fifth act standard, penetration plus force, employed by Model Penal Code (MPC), to which I now turn.

### III. THE MODEL PENAL CODE AS IT HAS BEEN

Overall, the MPC, in both its “General Part” (dealing with such broad concepts as mens rea, complicity, and attempt) and in its specific statutes for specific crimes, has won considerable favor over the decades and has broadly influenced the codes of many states. It has also remained very stable, except for some proposed changes in its sentencing provisions,<sup>43</sup> with little public attention to, or calls for, amendments. Then we get to the paradox of its rape

41. Bryden, *supra* note 31, at 422–23.

42. *Id.* at 423.

43. In the first major change in the original MPC, the ALI has now approved MODEL PENAL CODE: SENTENCING (Proposed Final Draft, approved May 24, 2017), which calls for such innovations as sentencing guidelines and sentencing commissions.

provisions: While some states have incorporated or imitated those provisions, the provisions have also been criticized as embarrassing cultural anachronisms. Yet now those very rape provisions are undergoing a process of revision that has brought unprecedented public attention to the American Law Institute (ALI) mission of model law writing. So on the subject of rape law, the MPC is trying to leap 50-plus years forward over the many incremental changes that evolved in the states.

Below is a key part of the “current” MPC law, excluding provisions dealing with incapacity:

### **Section 213.1. Rape and Related Offenses**

(1) *Rape*. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; ...

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted sexual liberties, in which cases the offense is a felony of the first degree.

(2) *Gross Sexual Imposition*. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; ....<sup>44</sup>

A number of features stand out. First, the MPC provides for three different felony levels of rape, and a lesser included offense of “gross imposition.” In that sense, the MPC somewhat fairly reflects the state of the law today. Many jurisdictions have at least two levels of rape, with different combinations of elements. In one sense it is obvious that any prosecutor can call on lesser offenses below the highest rape charges and use them as a risk-averse offering to a possibly lenient jury or to a defendant considering a guilty plea.<sup>45</sup> Putting

44. MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962).

45. According to Professor Deborah Denno, the MPC drafters believed that severe punishments in cases not involving strangers or severe bodily harm had two perverse effects: a perception that these penalties were too severe led to underenforcement and false acquittals; and severe punishments exacerbated the problem of racially motivated prosecutions of black men accused of raping white women. Deborah Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 208 (2003).

aside the complex menu of statutory crimes in the case of predation on children (i.e., “contributing to the delinquency of a minor”), there is always some form of non-sexual generic assault available. But the MPC offers a lower felony charge similar to what some states do, and what many progressive commentators recommend: a lesser, compromise sexual offense which, to put it simply, could be viewed as further along our historical continuum than the higher offense. Thus a state can have a force requirement for the higher crime and a nonconsent standard for the lower.

The MPC does something like this, but notice its language. It uses the term “by force,” but it has no term for nonconsent, and while never defining “force,” it distinguishes force from “threat of imminent death, serious bodily injury, extreme pain or kidnapping.” For the “gross sexual imposition” crime, it speaks of compelling the woman to submit to intercourse “by any threat that would prevent resistance by a woman of ordinary resolution.” It might thereby imply that “force” under section (1)(a) means threat of physical harm to distinguish it from compulsion to submit under section (2)(a). In her article calling for revision of the MPC rule, Professor Deborah Denno suggests we give the 1962 drafters at least partial credit for enlightenment.<sup>46</sup> The absence of a term for consent was part of its effort to avoid the “put the victim on trial” effect that results from focusing on the complainant’s state of mind or actions.<sup>47</sup> Objective act elements were to do the work. But still, the 1962 law is widely derided now for an overly defendant-friendly rule even for the lower offense, and also for its choice to distinguish the two highest felony levels on the basis of whether the complainant is a “voluntary social companion.” That partial diminution of the suffering of nonstrangers now looks terribly ill-informed. But in some ways the MPC was being realistic, given that many decades later the nonstranger cases are the hardest for prosecutors to win. Moreover many reformers call for a lesser offense of sex without consent which, while not formally designated as applying to nonstrangers, is clearly designed to enable convictions in those cases.<sup>48</sup>

But the drafters’ failure to address the matter of nonconsent in acquaintance rapes is reflected in their inadvertently telling assertion that rape law must draw “a line between forcible rape on the one hand and reluctant submission

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46. *Id.* at 207–08 (also noting that the post-1962 Commentaries on art. 213 recognized and called for reform in some of the contestable 1962 provisions).

47. STEPHEN SCHULHOFER, UNWANTED SEX 20-24 (rev. ed. 2000).

48. See the proposal by Professor Donald Dripps for an intermediate standard of “sexual expropriation.” Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992).

on the other.”<sup>49</sup> These substantive provisions, along with outdated evidentiary rules like the prompt complaint and corroboration rules, as well as its gender-specificity and marital immunity rule, no longer reflect the state of American rape law. But as Professor Denno argues, the 1962 law is still widely cited and remains important—hence the new move to revise it, to which we turn below.<sup>50</sup> But first we must look at another major new vector in the American debate about rape law: the college disciplinary system.

#### IV. THE COLLEGE CONTEXT

The move toward an affirmative-consent standard has been happening along a front parallel to the criminal law—our institutions of higher education. A huge number of universities have now adopted some version of affirmative consent as part of their internal disciplinary standards.<sup>51</sup> It is very hard to generalize among universities, because the standards are so much in flux and because they are difficult to compare to each other—even more so than the state criminal laws discussed above.<sup>52</sup> Some have a single category called sexual assault. Others have distinct enumerations of forms of sexual misconduct with different names, different act (and mental state) elements, and different penalties. Further, whereas in criminal law we can hold constant the procedural side of things—i.e., the due process and related rights of criminal defendant are roughly uniform regardless of the state’s penal code definitions—universities vary widely in terms of who the adjudicator is (administrator, faculty panel, or student jury), who the “prosecutor” is, what the rules of evidence and discovery are, whether professional counsel play a role, and so on. But, as discussed below, a fair generalization is that universities have moved in the direction of an affirmative-consent standard.

But while we may think of these university disciplinary systems as “private law” (even when it is a public university) designed independently of state criminal law, governmental law directly interacts with college disciplinary systems in at least three ways.

49. MODEL PENAL CODE § 213.1 commentary at 279-80 (Official Draft and Revised Comments 1980).

50. See Denno, *supra* 43.

51. Tuerkheimer, *supra* note 33, at 442 (number is as high as 1400).

52. See HEATHER M. KARJANE, BONNIE S. FISHER & FRANCIS T. CULLEN, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 3, 6, 11 (2005), <http://perma.cc/H7EE-9CZN>.

First, since college campuses tend to be the most visible arena in the public media for the controversies about defining and punishing sexual assault, especially for nonstranger or “date rape” cases, the intellectual and public energy operating in that arena greatly influences discussion of governmental law.

Second, and more concretely, there is a movement in the state legislatures to impose the affirmative-consent standard on both public and private colleges and universities as a condition of state funding.<sup>53</sup> California now requires institutions receiving state funding (effectively all of them) to forbid any sexual activity on campus without affirmative consent as defined in the California Education Code:

affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.<sup>54</sup>

This law is entirely separate from the state’s criminal law, and it doesn’t even tell the university how to define sexual assault or how much to punish it.

The third mode of government-college interaction is a still more pervasive *federal* intervention that has energized and polarized public debate about affirmative consent: the U.S. Department of Education’s effort to control colleges’ internal university disciplinary rules and processes. This has been a very remarkable phenomenon, with complex roots. The statutory basis for this incursion is Title IX,<sup>55</sup> a law originally motivated by a concern with sexual discrimination in colleges, and one area in particular—funding for college athletics. But the wide-ranging notion of discrimination has come to embrace sexual harassment and ultimately sexual assault. The Department of Education now issues a variety of messages—some through formal regulations, some through exhortations, some through passive-aggressive “guidance”

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53. Tuerkheimer, *supra* note 33, at 442-43.

54. CAL. EDUC. CODE §67386(a)(1); *see also* N.Y. EDUC. LAW § 6441.

55. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-99.

documents<sup>56</sup>—that colleges must take greater steps to ensure student safety, and that of female students in particular, by strengthening their rules against sexual assault. Ironically, while an original goal or effect of this new administrative effort was to hold the colleges themselves accountable and thus to allow injured students’ actions against the college, a later effect has been that the colleges respond to Title IX with arguably harsh quasi-criminal law systems to punish students. In turn, where the system is criticized by accused students for lack of due process, the aggrieved accused students sometimes sue the college and the federal government for complicity in this deprivation.

Professors Jeannie Suk and Jacob Gerson have narrated this incursion in scathing terms.<sup>57</sup> As they portray it, the complicated world of romance, dating, and sexuality of 20-year-olds has become the subject of the federal administrative state and its rather abstracted principles of technocratic and procedural rationality.<sup>58</sup> Unbounded by any penal code or by the constitutional constraints on actual criminal adjudication, the government has been forcing colleges to prosecute a variety of forms of behavior not otherwise illegal under any criminal law or even any independent civil regulation.<sup>59</sup> It has also complicated or confounded the adjudication of sexual offenses with public health discourse about “risk.” The goal of the public health may be to bring “nonjudgmental” remedies to the harms students suffer, but, as Suk and Gerson show, this approach has some worrisome consequences. First, while the government tries to finesse the ascription of blame by purporting to treat both parties to a sexual encounter as being “at risk,” it has produced demographic data on “risk” that ends up reinforcing prejudicial stereotypes about certain minority-group males as the likeliest perpetrators of harm.<sup>60</sup> Second, the government’s “encouragement” of better sexual health education ends up with colleges virtually writing scripts for sexual communication among students, with declarations that consent should not just be affirmative

56. The most famous of these is the so-called “Dear Colleague Letter.” Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/DB7V-5UBD>]. Opining on how colleges might better define and fight sexual violence, the letter offered interpretations of Title IX by the Education Department’s Office for Civil Rights, including that colleges use the preponderance of the evidence standard in adjudications, but the letter was evasive on its source of authority.

57. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016).

58. *Id.* at 885.

59. *Id.* at 892. Under the Clery Act, 20 U.S.C. § 1092(f), which requires crime reports from colleges, the government has a much broader set of definitions of offenses than would obtain in the relevant state penal code or in the college’s own rules.

60. Suk & Gerson, *supra* note 57, at 912–16.

but even “enthusiastic” and going into bizarre detail about what qualifies as “good” sexual activity.<sup>61</sup>

While these messages come to students in a variety of ways short of express prohibitory rules, Suk and Gerson argue that the effect is to induce among students the sense that these new norms do indeed represent the “rules.” Further, the actual sanctioning effect of Title IX’s messages in terms of formal constraints on the colleges remains unclear, because colleges, terrified of the loss of federal money, respond to the nonbinding messages from the government with agreements to significantly change their disciplinary definitions and processes in implicit or negotiated settlements that dodge the actual legal issues. As a result, the college has become the laboratory where we are testing the various hypotheses about how a full-fledged affirmative-consent doctrine would operate in state criminal law—with outcomes that are at least very confusing or at worst very distressing.

While these governmental actions and legal and campus advocacy have fueled the push toward an affirmative-consent standard, there has also been robust scholarly commentary on the wisdom of that standard—and it has inclined toward the skeptical. From the perspective of political philosophy, Professor Aya Gruber has suggested that the legal uncertainty and controversy over the standard is inescapable because the very concept of “consent” is fundamentally contestable:

[T]here are a variety of views about what constitutes a consensual mental state, ranging from enthusiastic to grudging, from hedonistic to instrumental, from sober to quite inebriated. Others argue that focusing on internal willingness puts victims on trial; thus, sexual consent should be about what the parties say and do. Even here, there is considerable variability on what constitutes performative consent. Some hold that engaging in sexual activity without protest, or with weak protest, communicates consent. Others insist that consent be “affirmatively” or “positively” expressed. To complicate matters, affirmative consent, depending on who you ask, runs the gamut from nonverbal foreplay to “an enthusiastic yes.”<sup>62</sup>

Gruber offers a striking insight into an implicit but highly troublesome analogy between consent and contract. The notion of consent, she observes, evokes the liberal principles that animate the law of contract, and at a high level

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61. *Id.* at 924-31.

62. Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 417 (2016).

of generality the contractual vision of freely undertaken and well-informed assent might seem temptingly suitable as a standard to guide the law governing sexual relations. But under scrutiny, that conception is an odd fit for the crime of rape and related offenses:

The contractual framework is both over- and under-inclusive. It could dictate that sexual agreement procured through deception, tainted by intoxication, or failing to meet formalities is invalid, leading to overbroad laws. At the same time, contract principles might permit defendants to procure sexual consent through capitalizing on fear, insecurity, or lack of bargaining power, so long as such behavior does not amount to the duress that vitiates a contract.<sup>63</sup>

For such reasons, Gruber concludes, the meaning of consent in sexual relations is necessarily distinct from that in contractual relations. While feminist reformers promoted a shift to the consent standard in their effort to *broaden* liability, many of those reformers were then disappointed when decisionmakers botched this standard and thus failed to proscribe unwanted sex. “Activists urged affirmative consent standards to compel legal actors to arrive at the ‘right’ conclusion about what constitutes rape,” all the while glossing over “the various presumptions and normative commitments underlying reformers’ ideas about what *is* the right conclusion.”<sup>64</sup>

On another academic front, social scientists have used highly sophisticated survey instruments to examine how young people communicate about sex. A clear consensus emerges from this research, but alas it is not one that offers any very clear guidance to lawmakers. Communication between potential sexual partners occurs mainly through physical language, not verbal,<sup>65</sup> or through very subtle and indirect negotiation on to which legal standards of affirmative or manifest consent do not readily map.<sup>66</sup> Survey instruments reveal that these communications do not fall into sufficiently regular patterns, much less “scripts,” to allow for a later third party to judge whether a claim of consent

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63. *Id.*

64. *Id.* at 419.

65. Terry P. Humphreys & Melanie M. Brousseau, *The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity*, 47 J. SEX RES. 420, 421 (2010).

66. Various studies include: Lucia F. O’Sullivan & E. Sandra Byers, *College Students’ Incorporation of Initiator and Restrictor Roles in Sexual Dating Interactions*, 29 J. SEX RES. 435 (1992); Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 FAM. J. 496 (2005); Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 PURE INSIGHTS (2015), <http://digitalcommons.wou.edu/cgi/viewcontent.cgi?article=1050&context=pure>.



meets some general legal standard.<sup>67</sup> And notably, the research reveals that on the whole students do not give specific permission for individual sequential sexual actions, so that much of the behavior proceeds without specific permission to continue. This unstated permission probably comes from the permission to begin the encounter in the first place, predicated on the interactive conduct that precedes the beginning of the sexual encounter, and it reflects a mind-set that assumes yes unless a no is heard. As researcher David Hall concludes, this finding is consistent with the assumption that a wanted sexual activity, once begun, is a consensual process unless a no is spoken or indicated.<sup>68</sup> He does observe that for the more intimate activities, such as oral sex and intercourse, both vaginal and anal, verbal permission occurs more often than it does for other activities, but much of this activity goes on with nonverbal or no specific permission.<sup>69</sup> A more cautious conclusion comes from Professors Annika Johnson and Stephanie Hoover, who acknowledge the rough consensus above but argue that the research is far too thin and premature to generate clear conclusions.<sup>70</sup> If so, and if some burden must be placed on the proponents of affirmative consent, then perhaps a shift to an affirmative-consent standard should be put on hold.

## V. THE DRAMA AT THE AMERICAN LAW INSTITUTE

### A. THE MOVE TO A NEW CONTEXTUAL CONSENT STANDARD

To return to the MPC, in recent years, the ALI has tackled the job of updating the anachronistic provisions of MPC article 213 with a new focus on consent as the basis of rape and sexual assault. But that effort has become a roiling controversy among this elite group of lawyers. Over the last four years, the redrafting effort, headed by Professors Stephen Schulhofer and Erin Murphy, has redefined the elements of sexual-assault crimes and added a new doctrine of consent, and has taken those new features through many iterations, each an effort to overcome objections to the last.

While the proposed new article 213 has many moving parts not relevant here, in structural terms the key change is to eliminate the “gross imposition” section from the 1962 version and to replace it with a felony called “Sexual

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67. David S. Hall, *Consent for Sexual Behavior in a College Student Population*, 1 ELECTRONIC J. HUM. SEXUALITY (Aug. 10, 1998), <http://www.ejhs.org/volume1/consent1.htm>.

68. *Id.*

69. *Id.*

70. Johnson & Hoover, *supra* note 66.

Penetration Without Consent.”<sup>71</sup> Putting aside any possible disagreement about limiting this crime to acts of penetration,<sup>72</sup> the innovation here is a felony rape charge without any reference to force. The felony is of a lower grade than the forcible rape felonies detailed in a previous section.<sup>73</sup> Moreover, the new provision is linked to a new definition of “consent”<sup>74</sup>—and from this derives the lawyerly drama.

Early on, unsurprisingly, there was a strong push to build affirmative consent into the definition section. The proffered rationale was that “sexual injury occurs not only through physical domination but also through the failure to respect personal autonomy, the individual’s right to control the boundaries of his or her sexual experience.”<sup>75</sup> But the affirmative consent standard was also designed to account for the “practical dynamics of sexual aggression,” specifically “the dangers of permitting a sexually assertive party to assume willingness until the other person clearly protests.”<sup>76</sup>

In a series of subsequent ALI discussions, however, the proposals to add and define a component of consent shifted from an explicit requirement of affirmative consent to others that use different phrasings and may or may not have similar legal effect. The proposals also shifted among versions varying in terms of whether the affirmative standard applies to non-penetration as well as penetration offenses and also between felony and misdemeanor status. Clearly the movement toward affirmative consent had gotten stuck. The following is a slice of this legal history-in-the-making.

At one point in the debates, a proposed definition required that consent be “positive, freely given,”<sup>77</sup> and then the drafters dropped that term in favor of

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71. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.2 (Tentative Draft No. 2, Apr. 15, 2016) [hereinafter Tentative Draft No. 2].

72. See *infra* note 87 and accompanying text (discussing criticisms of the definition of “penetration” and noting that the most recent draft provision has renamed the relevant offense “Sexual Penetration or Oral Sex Without Consent”).

73. Tentative Draft No. 2, *supra* note 71, § 213.1.

74. *Id.* § 213.0(3).

75. Preliminary Draft No. 5, *supra* note 37, at 61.

76. *Id.*

77. Preliminary Draft No. 5, *supra* note 37, § 213.0(3)(a).

a simple “agreement” and eventually just “willingness.”<sup>78</sup> It is telling that the bland, if redundant, sentiment in the original phrase could nonetheless become controversial. But, of course, lawyers—even lawyers in broad concurrence on the key principles at issue—are all too expert at uncovering problems at the molecular level of language. Some thought “positive, freely given” was too vague, and some thought it too prescriptive. Others thought that the phrase was simply a gloss on the notion of “agreement,” while still others thought that the very notion of “agreement” in the context of consent to sex raised difficulties. Reflecting the contract analogy raised by Professor Gruber,<sup>79</sup> some members wrote:

If the social ill we seek to prevent is sex with an unwilling person, we need to recognize that “agreement” is not synonymous with “willing.” An “agreement” is something different and is generally recognized as a subset describing a particular form of “willingness.” Unlike the usual understanding of “willingness,” the term “agreement” is generally understood more restrictively and carries with it the baggage of its meaning throughout the law of contracts where “agreement” typically includes such further requirements as consideration and intent to be bound, all of which are inappropriate for intimate relations outside of prostitution.<sup>80</sup>

At another point, a proposed version of “Sexual Penetration Without Consent” provided that an actor was guilty of a misdemeanor if he “knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act has not given consent to such act.”<sup>81</sup> As then recounted by critics during the debate, the provision was heavily rewritten on three occasions, resulting in a proposal making it a fourth-degree felony if an actor “engages in an act of sexual penetration and knows, or consciously disregards a substantial risk, that the other person has not given consent to that act.”<sup>82</sup> A few days after

78. See Memorandum of Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Council Draft No. 3 Revisions to Sexual Assault Provisions of the Model Penal Code, at 2-4 (Jan. 19, 2016) [hereinafter Jan. 19, 2016 Memo]; Memorandum from Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Preliminary Draft No. 6 Revisions to Sexual Assault Provisions of Model Penal Code, at 3 (Apr. 4, 2016) [hereafter Apr. 4, 2016 Memo]. The critics’ memoranda discussed in this section are available at <http://www.prosecutorintegrity.org/sa/ali/>.

79. See Gruber, *supra* note 62.

80. Jan. 19, 2016 Memo, *supra* note 78, at 2.

81. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.2 (Discussion Draft No. 2, Apr. 28, 2015).

82. Tentative Draft No. 2, *supra* note 71, § 213.2.

debating this version, the provision was rewritten yet again, so that an actor would be guilty of a fourth-degree felony if he “engages in an act of sexual penetration without the consent of the other person, and the actor knows that, or is reckless with respect to whether, the act was without consent.”<sup>83</sup>

Thus, after five rewritings, and after the drafters acknowledged some members’ worry over overcriminalization, the crime of “Sexual Penetration Without Consent” returned close to its original version, but with one notable change: conduct that had been deemed a misdemeanor was re-graded as a felony. As Professor Kevin Cole wryly observed, “ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole.”<sup>84</sup> In addition, there was debate over the requirement for consent to each “specific act”<sup>85</sup> of sexual penetration or contact, leading to the possibility of hyper-parsed judicial or jury inquiry into the timing and frequency of consent in the nuances of a sexual encounter. For some critics, “[t]he microscopic analysis of each ‘specific act’ invites troubling comparison to video replay of a contested call at a sporting event. If the Accused stepped ‘out of bounds’ in any individual freeze frame image from the video replay, the Accused is a felon, not merely a participant in a sporting play whistled to a halt.”<sup>86</sup>

By the end of 2016, the ALI had rejected any explicit reference to affirmative consent but approved the following definition of consent:

- (a) “Consent” ... means a person’s willingness to engage in a specific act of sexual penetration or sexual contact.
- (b) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.
- (c) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.

...

83. This “friendly amendment” is quoted in Memorandum from Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Tentative Draft No. 2 Revisions to Sexual Assault Provisions of Model Penal Code, at 2-3 (May 12, 2016) [hereinafter May 12, 2016 Memo].

84. Kevin Cole, Like Snow to the Eskimos and Trump to the Republican Party: The ALI’s Many Words for and Shifting Pronouncements About “Affirmative Consent,” at 5 (Mar. 23, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2753718](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753718) [<https://perma.cc/4WCM-K3BA>].

85. Tentative Draft No. 2, *supra* note 71, § 213.0(3)(a).

86. May 12, 2016 Memo, *supra* note 83, at 3.

(e) Consent may be revoked or withdrawn any time before or during the act of sexual penetration or sexual contact. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent.<sup>87</sup>

This definition, often referred to as “contextual consent,” is important for several reasons. For one thing, it seems to represent a fairly stable equilibrium or consensus among members of the ALI, even though it obviously has dissenters, and even though the drafters’ seemingly endless efforts are not over yet. For another, it seems to avoid the aspects of affirmative consent that have so troubled critics of that standard and that seemed most incongruent with the empirical research about sexual communication<sup>88</sup>—although the rough compromise of making it a felony, not a misdemeanor, and having it sit below a higher force-based felony may prove contestable. Of course, the MPC is just a “model” law; states that admire this model can adapt it however they wish into their own structures. But the compromise might satisfy those who are troubled enough even by a consent (not affirmative consent) standard that they want “forceful rape” to be punished more, as well as those who would think it would be an insulting dilution of the harm of sexual assault to make it a misdemeanor.

As for how it will operate, the detail of its language will be an issue. The language is useful as a *description* of the way many people, including judges, would identify the key features of a nonconsensual encounter. Some may think it too verbose to give to a jury. Others may prefer just simple language of “nonconsent” or “without consent” in a statute, and then leave it to judges to fashion case-specific jury instructions by borrowing some of the MPC’s language. Either way, prosecutors will have to make judgments about when a case meets these criteria; juries will unavoidably face close decisions on the facts but may not be any worse off, and may well be better off, by not hearing the term “affirmative” from the judge; and appellate judges may trust that juries are well enough guided by this standard that they can treat insufficient claims with as much skepticism as they do in criminal law generally.

### B. BUT THE DRAMA GOES ON

Meanwhile, even as we consider the uncertainties about how a new MPC standard will operate, the debates continue to simmer within the ALI. In

87. Updated “Consent” Definition, AM. L. INST. (Dec. 21, 2016), <https://www.ali.org/news/articles/updated-consent-definition/> (emphasis added)

88. See *supra* notes 65-70 and accompanying text.

retrospect, dissatisfaction with each draft, conveyed in strong and sometimes scathing memoranda, seems to have led to tweaks that then provoke criticism for being insufficient or for worsening things.

One contested issue is technically separate from consent, but unavoidably intertwined with it: The new contextual consent standard governs the act of “penetration,” but a long list of critics had complained that one proposed definition was not really limited to penetration at all, because the term had been defined to include “direct contact between the mouth or tongue of one person and the anus, penis, or vulva of another person.”<sup>89</sup> Members have also lamented that, instead of grading conduct by severity, the ALI’s approach allows for treating the least severe conduct as harshly as the most severe.<sup>90</sup> Recognizing this concern but responding in a rather feckless way, the most recent draft reminds us that a provision in the MPC’s General Part tells courts to dismiss prosecutions where “it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.”<sup>91</sup> Critics view this as an insufficient protection against overbreadth, especially because numerous states have not even adopted this type of savings clause.<sup>92</sup>

89. Tentative Draft No. 2, *supra* note 71, § 213.0(7)(b); *see, e.g.*, May 12, 2016 Memo, *supra* note 83, at 4; Memorandum from Undersigned ALI Members and Advisers, to ALI Director, Deputy Director, Project Reporters, Council and Members, about Tentative Draft No. 3 Revisions to Sexual Assault Provisions of Model Penal Code, at 1 (May 18, 2017) [hereafter May 18, 2017 Memo]. It should be noted that the most recent draft sought to resolve this problem by creating a separate definition of “oral sex” for non-penetrative contact. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(2) (Tentative Draft No. 3, Apr. 6, 2017) [hereinafter Tentative Draft No. 3]. In turn, this draft has renamed (and renumbered) the substantive crime as “Sexual Penetration or Oral Sex Without Consent.” *Id.* § 213.4.

90. *See, e.g.*, May 18, 2017 Memo, *supra* note 89, at 2; May 12, 2016 Memo, *supra* note 83, at 4-5.

91. Tentative Draft No. 3, *supra* note 89, § 213.0 comment at 4-5 & n.8 (discussing and quoting MODEL PENAL CODE § 2.12(3)).

92. May 18, 2017 Memo, *supra* note 89, at 2-3. This memo also argues that Tentative Draft No. 3 has botched the issue of mens rea, either by confusion or conscious overbreadth. In particular, consider the new section on forcible rape, which states in relevant part:

An actor is guilty of Forcible Rape if he or she causes another person to engage in an act of sexual penetration or oral sex by *knowingly or recklessly*:

(a) using physical force or restraint, or making an express or implied threat of bodily injury or physical force or restraint; or he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; ...

(b) making an express or implied threat to inflict bodily injury on someone else.

Tentative Draft No. 3, *supra* note 89, § 213.1(1) (emphasis added). The placement of the mens rea terms (i.e., “knowingly or recklessly”) makes a charge possible where the defendant was knowing or reckless with respect the use of force or restraint but not respect to whether that act caused the act of sexual penetration. The memo urges consideration of moving the mens rea adverbs to precede “causes.” May 18, 2017 Memo, *supra* note 89, at 4-5.

Finally, the critics have complained that the ALI has diverged from its very own tradition of law reform. They characterize that tradition as one of building upon and, to a reasonable extent, incorporating established law in proposing reforms, and they argue that one of the conventional formulations for the nonconsent principle, the “against the will” standard, could well be the basis for a modified standard in the MPC. But critics allege that the drafters have essentially rebranded “affirmative consent” by bringing in the phrase “communicates willingness.”

If the standard is “communicates willingness,” the starting presumption is that sex is a crime. The prosecutor need only say, “Ladies and Gentlemen of the Jury, under the State’s definition, it does not matter whether the complainant actually was willing. It is undisputed that the sex act occurred and there is no evidence in the record that the complainant *communicated* willingness. There is no consent if the complainant has not *communicated* willingness. You must convict if you find that the defendant recklessly disregarded that absence of consent.”<sup>93</sup>

The critics lament that this language might effect a de facto shift of the legal burden to the defendant—at least as to the burden of producing evidence, if not the burden of persuading the jury.

To the critics, the ALI has gratuitously taken a clean-sweep approach, contrary to the explicit statements in the ALI’s own guidebook, which claims that its projects “built upon, rationalized, and synthesized previous legislation” and “sought to clarify established and widely accepted” policy.<sup>94</sup> By contrast, say the critics, the ALI is effectively proposing “novel social legislation” through its sexual assault provisions, which create “an operative phrase that is not known to exist in any state” while failing “even to acknowledge the existence of the most widely used standard in the States.”<sup>95</sup>

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93. Apr. 4, 2016 Memo, *supra* note 78, at 3–4 (emphasis in original).

94. AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 11 (rev. ed. 2015), [https://www.ali.org/media/filer\\_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf](https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf).

95. Apr. 4, 2016 Memo, *supra* note 78, at 4–5. This memo also objected to the deletion of language stating that the “lack of physical or verbal resistance may be considered” in determining whether someone has given consent. “Possibly a good defense attorney will argue past the [resulting] unbalanced definition,” the memo noted, but it raises “doubt about whether lack of resistance will be evaluated within the totality of the circumstances.” *Id.* at 5.

In all, the definition of consent has moved toward greater imbalance. Each elaboration within the definition describes circumstances that negate or revoke consent (“verbal or physical resistance,” “circumstances preventing or constraining resistance,” “behavior communicating unwillingness,” “a verbal expression of unwillingness,” “force, fear, restraint, threat, coercion, or exploitation”), while nothing supports consent or explains under what circumstances a person is safe from criminal accusation.<sup>96</sup>

As thus depicted by the critics, the latest ALI proposal is a well-meaning but muddled and ambivalent—and even ambiguous—effort to respect the sentiment behind the affirmative consent concept, while finessing it as an explicit rule for American law.

### CONCLUSION

The difficulty of achieving conciseness on these fundamental questions, even among elite lawyers who probably agree on general principles of progressive reform, is remarkable—but informative. The discomfort and disagreement that ALI members have been enduring may be worth the cost and might now be optimistically viewed as a robust and productive debate. A cautious speculation would be that American criminal rape law is likely to settle in around a consent standard without the complications of the “affirmative” term. The affirmative consent rule will continue to operate widely in the disciplinary regimes on college campuses, and lessons from that arena may inform our criminal system. But the realms will likely remain separate, and wisely so. While colleges have considerable power over students and expulsion can be life-jarring, the state’s power to criminally punish remains distinctively awesome. Meanwhile, the ALI’s current proposal for a “contextual consent” standard is a sincere but flawed way of accommodating the differing sides in the affirmative-consent debate. Its model language is unlikely to win great consensus among the states. On the other hand, that language may prove useful as a menu of terms that wise trial judges can incorporate into their jury instructions as the fact patterns of particular cases might call for. If so, renewed efforts at a reformed consensus standard might well draw on observations of these instructional practices. For now, the nonconsent standard has proved successful enough in curing some of the ills of the “force” standard and has worked well enough in many states as to be the best candidate for a consensus statutory rule. And while the nonconsent standard stops short of the stage of the continuum that many would prefer, from a century-old perspective it represents considerable moral progress.

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96. *Id.* at 5.



## RECOMMENDATIONS

While legislative experimentation and variation among the states in defining rape may be beneficial in our legal system, it might well serve American criminal law and American society to seek some consensus on that standard. But the design of an ideal standard meets challenges from social controversy about the proper norms for sexual communication, as highlighted by the very mixed social science research on that subject. For these reasons, I offer the following suggestions:

1. **Maintain the prevailing standard in American criminal codes (at least for now).** The standard defining rape as sex without consent is both an enlightened and workable one that deserves pride of place in our contemporary criminal law. As illustrated by the surprisingly divisive debates in the American Law Institute over a new Model Penal Code standard, the very appealing idea of an affirmative-consent standard may, at this point, be too controversial and too uncertain in its application to achieve or merit consensus.
2. **Short of immediate code reform, consider ways to draw upon the ALI's work product.** While the "contextual consent" standard proposed by the ALI has proved very divisive, it may be appropriate for proceedings outside of the criminal justice system, such as college disciplinary hearings. Moreover, the ALI's efforts have supplied ideas and vocabularies that trial judges may usefully draw on in their jury instructions, and experience with those instructions might usefully inform future legislative reform.



# Firearms and Violence

*Franklin E. Zimring\**

*Questions about firearms ownership and use are significant elements of crime policy and constitutional law in the United States. Two important recent issues involving guns are the distinction between prevalence and incidence effects of gun ownership and the important contrast between private gun rights in households and in public spaces. This chapter attempts to summarize the issues and known facts about firearms and violence, as well as the government strategies toward gun ownership and use in light of the Supreme Court's recent jurisprudence on the Second Amendment.*

## INTRODUCTION

Policy discussions about crime and about firearms control overlap in the United States more substantially, and are debated more passionately, than in any other nation. At either extreme in the debate about guns in the United States one hears confident assertions that gun policy is intimately connected to the volume of crime in the United States and its costs. Those who support efforts to restrict the access to firearms blame the proliferation of firearms for the high rates of death and injury associated with crime in the United States, while those who oppose restrictions on gun ownership and use go further than questioning the link between guns and crime rates, and instead argue that the many millions of firearms owned, carried and fired by American citizens are a major force for crime prevention on American soil. Whatever one's sentiments about this dispute, it is an important part of discussions of crime control policy only in America.

This chapter is my attempt to summarize the issues and known facts about firearms and violence in three installments. The first section presents my own view of current knowledge about three issues that concern the relationship between guns and violence in the United States, the relationship between gun use and the death rate from crime, the involvement of guns in accidental and suicidal acts, and the use of guns to prevent crime and defend against attackers. The second section concerns the broader patterns of how many firearms are owned by Americans and how they are used. The third section concerns strategies of governmental policy toward gun ownership and use. It outlines

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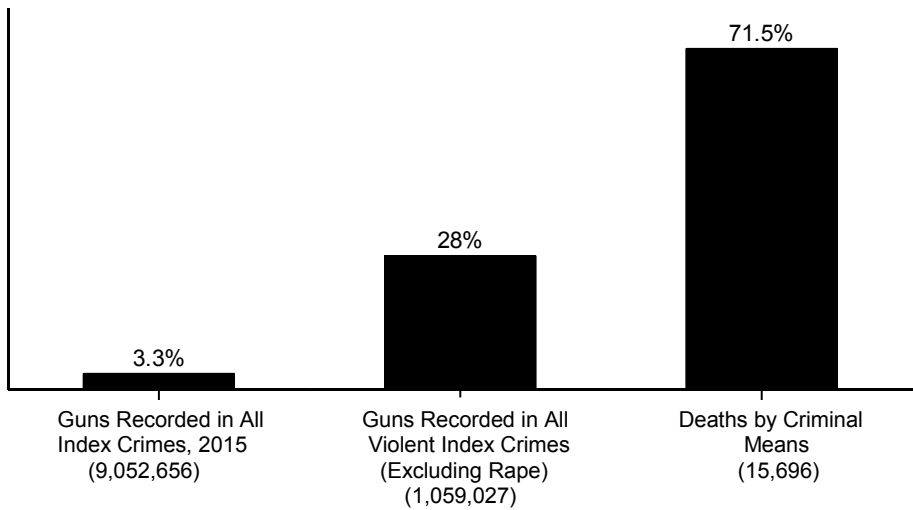
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traditional methods of limiting access to guns, attempts to restrict how and where guns may be used, and it then considers how these approaches may be affected by the emerging personal constitutional right to bear arms created in the United States Supreme Court.

**I. DOES THE WEAPON MATTER?**

The overlap between firearms and crime in the United States is incomplete in ways which clearly identify why and where firearms influence the cost of crime in the United States. There are many millions of guns in the United States and the odds that a particular gun will be used in a crime are very small. Even more striking, the overwhelming majority of all offenses, including even offenses of violence, do not involve the use of a firearm. Figure 1 tells the story of known gun involvement in three classes of reported crime in the United States profiled in the Uniform Crime Reports of the FBI for 2015, total index crime other than arson (seven major offenses: homicide, rape, robbery, aggravated assault, burglary, auto theft, larceny), total index crimes of violence other than rape (homicide, robbery, and aggravated assault) and murder and non-negligent manslaughter.

**Figure 1. The Role of Firearms Use in Crime –  
Uniform Crime Reports 2015**



Source: Federal Bureau of Investigation.

Guns are reported as being used in fewer than 4% of all reported index crimes in the United States, and there is no method even of reporting use of a gun for almost 90% of all index crimes such as larceny and burglary where the victim and offender do not interact. For the million or so crimes involving personal violence, gun use is reported in 28% of all index offenses. But for criminal homicide, no fewer than 71.5% of homicides were committed with firearms. The contrast as one reads across the bar chart in Figure 1 is striking. Guns are used in a small number of total crime, in a significant minority of all violent index felonies but in more than 7 out of 10 criminal homicides.

The comparison across crime categories provides an important indication of why firearms dominate deaths from crime so much more completely than they are found in non-fatal crimes of violence. A generation of studies suggest that gun use increases the death rate when used in attacks because guns are much more likely to cause deaths, particularly when an attacker is not determined to cause a death. These “instrumentality effects” elevate the death rates both from assaults and in robbery.<sup>1</sup>

The extensive use of firearms in American violent crime is not so much associated with higher rates of all kinds of crime but rather with higher rates of death associated with violent crime. Two decades ago, Gordon Hawkins and I reflected this pattern in the title of a book we published, *Crime Is Not the Problem: Lethal Violence in America*.<sup>2</sup> In the changed circumstances of 2017, the title of that book remains an accurate portrait of the American condition. Crime rates of all types have declined in the United States but even our diminished crime rate kills citizens at a rate substantially higher than other developed nations. We do not have more crime or more criminals, but the dangerous instruments so often used in American violence generate a higher death rate from crime that is a more specific but still substantial problem.

And the lethality of privately-owned firearms in the United States of 2017 is a major cause of violent deaths in some social settings where guns have not been an important issue in the public discussion. There were more than 1,000 killings of citizens by police in the United States in 2015, vastly more than the killings by police officers in other developed nations. The estimated 2.93

1. See PHILIP COOK & KRISTIN GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* (2014); Franklin E. Zimring & James Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1 (1986); Philip J. Cook, *The Technology of Personal Violence*, 14 CRIME & JUSTICE 1 (1991); Franklin E. Zimring, *The Medium Is the Message: Firearm Caliber as a Determinant of Death from Assault*, 1 J. LEGAL STUD. 97 (1972); Franklin E. Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721 (1968).

2. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

killings by police per million citizens were about 42 times the death rate from police in Germany and more than 100 times the shooting death rate by police in England and Wales.<sup>3</sup> Why these huge differences in shootings by police officers? One major cause of the high American rate of killings by police is the much more substantial rate at which American police are killed by civilians. For the five-year periods we collected data for in a recent study, police officers in the United States were about 35 times more likely per capita to die from assaults on duty as were police in Germany and 17 times more likely to die per capita than in the United Kingdom. Why is police duty so much more hazardous in the United States? The FBI estimates that over 90% of all deaths from felonious killings of police are caused by guns and that turns out to be an *understatement* of the dominant role of guns in fatal attacks against police. When 17 motor-vehicle crashes are eliminated from the attack statistics over a six-year period, 268 of 275 police deaths from assault (97.5%) are caused by firearms. Civilian ownership and use of guns in the United States is thus the major cause of why police officers are at risk in the United States and also an important reason why police kill so many civilians. The same instrumentality effects that police fear are frequent reasons why they use lethal force and why three citizens a day die at the hands of police.

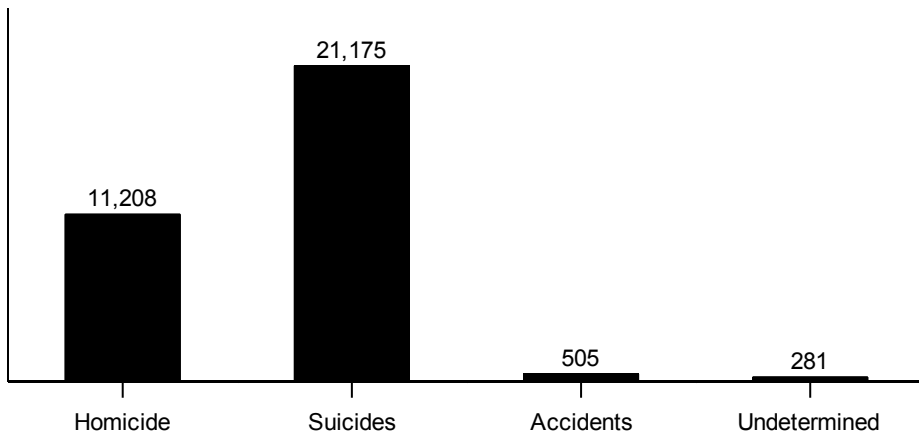
#### A. SUICIDE AND ACCIDENTS WITH FIREARMS

The use of firearms in interpersonal crime is only one of several types of firearms events that produce killings and woundings. A complete accounting of the death toll from firearms activity involves two other behavioral categories—accidents and suicides—as well as a number of deaths where health authorities cannot decide on whether the death was intentional or accidental. Figure 2 profiles the volume of all forms of gun deaths by type for 2013, using data from the Centers for Disease Control and Prevention.

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3. FRANKLIN E. ZIMRING, WHEN POLICE KILL 76 fig.4.2 (2017).

**Figure 2. Volume of Deaths Caused by Firearms,  
Four Classifications, United States 2013**



*Source: Centers for Disease Control and Prevention.*

The volume of firearms suicides in the United States at 21,175 is almost twice the number of gun homicides and 30 times the volume of accidental and undetermined deaths, but the number of fatalities by gun is not by itself an accurate measure of the extent to which firearms use increases the death rate and the number of years reduced from the lifespan because a firearm killed. For homicides, the death rate per 100 gun assaults is five times as high for guns as for knives, the next most dangerous frequently used weapon in assaults,<sup>4</sup> so gun use instead of less deadly alternatives increases the death rate substantially. For suicides, the story is more complicated and not well studied. Firearms use in suicide attempts has a much higher death rate than the most frequently used methods of attempts such as drug overdoses and cuttings. So if those frequently used methods were selected instead of guns, the death rate would be much lower. There are, however, other methods of suicide attempt that do have high mortality rates—jumping from high buildings or bridges and possibly drowning, so that any good estimates of the instrumentality effects associated with gun use in attempts depend on determining what if any non-gun methods of attempt would be chosen if guns weren't available. More research is needed. A generation ago, observers concluded "[t]he relationship between firearms use and suicide is an important story waiting to be told."<sup>5</sup> We are still waiting.

4. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 13–27 (1987).

5. *Id.* at 63.

The volume of gun accidents is quite low but two factors made their 500 to 800 accidental deaths from firearms discharge more problematic than the low volume would suggest. First, because no harm was intended in accidents, the net cost of life from gun accidents is pretty close to 100% of the death rate. Second, many of the victims of gun accidents are quite young; indeed, for handgun accidents the highest death rate is for persons too young to legally own handguns.

There is one other important distinction between the firearms used in accidents and in suicides and those that are used in homicides—their geography. Most accidents and suicide attempts happen within the home environment of the gun-owning household. But homicidal attacks are not concentrated in the household that owns the gun. The geography of death risk may be important both politically and legally. Because guns used in robbery and assault are usually carried outside the offender's home, citizens are concerned that their exposure to risk is not within their control. Even if I choose not to have a gun, the risk of my being assaulted or robbed with your gun is a risk beyond my control. If I don't have a gun in my home, by contrast, I can reduce the risk of either suicide or accident.

There may also be a geographical dimension to the evolving Second Amendment rights to own and use guns. Both the *Heller* and *McDonald* precedents have restricted the ability of municipalities to prohibit ownership of handguns for household self-defense.<sup>6</sup> So the regulatory options available for household firearms may be much narrower in scope than for firearms that are carried or used in public spaces. I will return to this issue when discussing the Second Amendment issues that have emerged since 2008.

### B. SELF-DEFENSE AND CRIME PREVENTION

Not all violent acts and potential exercises of violence result in high or even net social cost. For this reason, the criminal law provides a defense of justification in the use of force generally, and more restricted justifications for the use of force likely to cause death or great bodily harm. The discourse on firearms use contains two different controversies involving gun ownership and use and its effect on crime rates in the United States. The first dispute is on the number and quality of self-defense episodes by armed citizens. The main methodology on this question is survey research in which persons are asked if they defended themselves from attack with a firearm. Only crimes of personal confrontation will be possible to investigate in this fashion—assault

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6. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).



and robbery—and there are two major methodological problems. One is that only a small fraction of survey respondents will provide positive answers, and estimating volume and eliminating statistical noise and misunderstanding is difficult. The second problem is that the respondent to the poll asserts he or she was a victim of a crime but there is no method to verify this without checking against police records. Some poll data has been said to create very large numerical estimates,<sup>7</sup> but estimates based on the national crime victimization surveys are much smaller.<sup>8</sup> There are no reported statistics on civilians shooting firearms or non-fatally wounding persons in self-defense, but the FBI Supplemental Homicide Reports (“SHR”) has collected data from police departments on justifiable killings by both police and by citizens since 1976. If one uses this data as a measure of the relative importance of police versus civilian self-defense firearms volume, the numbers are dramatically different. In 2013, the volume of “felons killed by police” was reported at 393 in the SHR, and the volume of justifiable killings by other citizens was reported at 260. Since there are only about 600,000 police officers in the United States, the rate per 100,000 officers was more than 600 times the rate for adult civilians. The trends over time in justifiable killings by civilians are downward. The five-year average volume per year from 2001–2005 was 222, a 37% reduction from the volume in 1976–1980, despite substantial increases in the general population. So the only available data on trends is inconsistent with substantial growth in guns being fired in self-defense by civilians.

An even more astonishing statistical food fight concerns the impact of loosening restrictions on carrying concealed weapons on crime rates in states and counties in the United States. During the 1970s and 1980s, a substantial number of states that had previously allowed local law enforcement officials to require that citizens show a special need to carry concealed weapons changed their laws to allow any citizen who qualified to own handguns to also qualify to obtain a permit to carry concealed weapons in public. The previous laws often meant that very few permits to carry concealed weapons were granted. These new so-called “shall issue” laws were passed in a number of jurisdictions that had strong gun owner influence on the state legislature—Southern, Western and Midwestern states generally with low big-city populations. An econometrician, John R. Lott, published statistical evidence that the states that passed such laws had lower crime rates after they did so, and this set of statistics became

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7. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).

8. COOK & GOSS, *supra* note 1.

his book *More Guns, Less Crime*.<sup>9</sup> The method here is not to directly measure either incidents of self-defense with guns or crime-prevention uses of firearms, but rather to compare places that pass the legal change to “shall issue” with jurisdictions that didn’t change their laws, attempting to statistically control for all of the other differences between places that might influence crime. Dr. Lott argues that passing “shall issue” laws reduced crime, since the jurisdictions that did so experienced lower crime trends thereafter than states that did not. He maintains his data analysis has already accounted for other factors that could have explained the different trends.

These claims were contested by a number of scholars, most prominently by John Donohue of Stanford Law School.<sup>10</sup> One interesting pattern that made me doubt the power of multiple regression as social science in this case is the contrast between the 1980s (when the states with “shall issue” had better crime trends) and the 1990s (when states that *had not* made this change did better). One simple explanation for this is that many states with big cities that suffered during the crack cocaine epidemic faced more crime problems in the 1980s but also experienced more substantial recoveries during the 1990s, when the crack influence abated. A failure of statistical “controls” to fully account for this influence might have been more important than concealed weapons permit laws during this peculiar two decades.

## II. FIREARMS OWNERSHIP AND USE

There are two methods of estimating the number of firearms owned in the United States, but each method carries a significant margin of error. One method is to count official records of guns manufactured and imported in the United States over the period that records are available and use that figure as a maximum population of currently owned and serviceable firearms. The first estimates of these totals were produced in 1968 (90 million),<sup>11</sup> and the 2016 update of total production since 1899 would be about 300 million guns, more firearms than adult citizens. This is a vast overestimate, of course, because it does not account for guns that became inoperable or are destroyed. The number of weapons produced in this aggregation is around 300 million, but firearms brought back as war souvenirs would push that total even higher.

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9. JOHN R. LOTT, *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (3d ed. 2010).

10. See Ian Ayers & John Donohue III, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 STAN. L. REV. 1193 (2003).

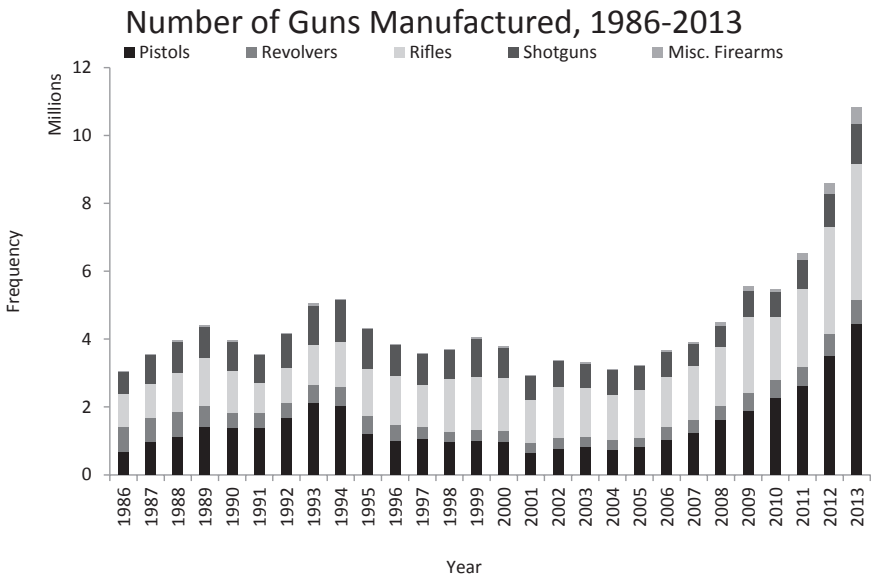
11. GEORGE NEWTON & FRANKLIN ZIMRING, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* (1968).

The second method of estimating gun ownership is by survey research, in essence asking a cross-section of the population whether they own firearms, as well as how many guns and what kinds of guns they own. There are two problems other than accurate sampling that threaten the validity of survey-based estimates of ownership—the willingness of respondents to report gun ownership, and the accuracy of an individual respondent's reports of his or her personally-owned guns, as well as guns owned by others in the household. Unwillingness to report would underestimate ownership, and inaccurate estimates of the number of weapons owned by others in the household could produce both underestimates and overestimates, particularly when a household might own many guns. The most recent poll-based estimate of guns owned is 265 million.

#### A. PREVALENCE VERSUS INCIDENCE— THE CONTRAST IN RECENT TRENDS

The pattern of gun-ownership trends that comes from statistics since 1980 is an apparent puzzle. The introduction of new guns into the civilian market has increased dramatically in the past decade, more than doubling since 2004, as shown in Figure 3.

**Figure 3.**

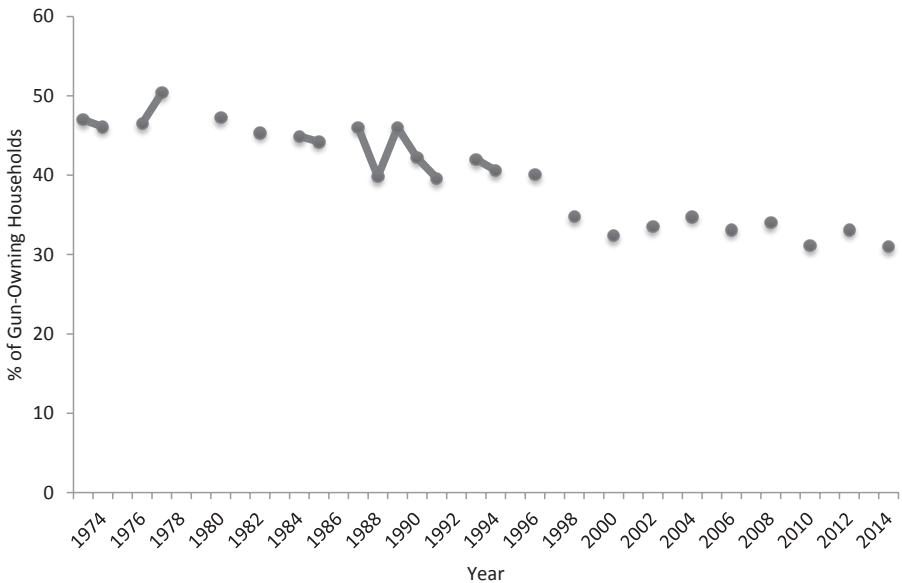


Source: Bureau of Alcohol, Tobacco, Firearms & Explosives, *Firearms Commerce in the United States: Annual Statistical Update* (2015).

But the rate of individual and household ownership reported in surveys has declined in most surveys. Figure 4 shows the trend in reported gun ownership in the National Opinion Research Center general social survey over four decades.

Figure 4.

% of Households with Guns, 1973-2014



Source: National Opinion Research Center, University of Chicago, *General Social Survey Final Report: Trends in Gun Ownership in the United States, 1972-2014* (2015).

The long-term decline in household firearms ownership is substantial across the decades and there is no recent upturn to match the large increase in new guns. How can this be?

There may be no contradiction between an expanding population of guns but consistency or decline in personal and household gun ownership. The distinction between the *incidence* of gun ownership and the *prevalence* of gun ownership could explain the divergent trends. The incidence of gun ownership is the rate of guns owned divided by the population, and that has almost certainly been increasing over recent years with the introduction of so many new guns. But the prevalence of gun ownership is the proportion of the population that owns guns, and what Figure 4 reported is that the proportion of households owning guns has declined. These two trends could coexist if most of the new guns introduced into the civilian market are purchased by persons

who already own guns. Multiple gun ownership is a major element in the U.S. population and one recent story asserted that 3% of the U.S. population owns 50% of guns.<sup>12</sup>

The increase in the number of guns (incidence) would have a substantial impact on the volume of guns at risk for theft or secondary transfer (what has been called the “hand-to-hand” market) but would not directly influence the proportion of guns readily available for suicide attempts, domestic conflicts or other violent acts. By contrast, an increased prevalence of household guns would directly increase the number of settings in which a gun is available for use in violence. It is whether or not a gun is available where people live (prevalence) not the number of guns in that house that are close at hand which should have the most direct impact on use in personal violence. For this reason, if the increase in guns hasn’t been accompanied by an increase in rates of personal or household ownership, it should not be expected to produce a major increase in the proportion of violence that involves gun use.

The major types of firearms in the United States are handguns and long guns. The major types of long guns are shotguns (which fire shells with multiple pellets) and rifles (which have long barrels and fire bullets). Handguns are short-barreled firearms that can be carried and easily concealed. Because they can be transported for use through public venues and in public, they are far more often used in criminal acts than long guns. Handguns are about 40% of the estimated population of guns owned in the United States but are more than 90% of the firearms used in crime.<sup>13</sup> Both rifles and shotguns can be semiautomatic (requiring only a repetition of pulling the trigger to fire second and subsequent bullets) or single shot.

A variety of semiautomatic weapons have been classified as “assault weapons” in state laws as well as a federal law (passed in 1994 but not renewed in 2004). The number of such weapons in circulation depends on how the prohibited weapon is defined, and the definitions vary.

### III. STRATEGIES OF FIREARMS CONTROL

Two basic strategies of firearms control are (1) limiting gun acquisition and ownership and (2) attempting to limit the times, places, and manners in which firearms can be used. The attempts to limit gun acquisition and ownership usually prohibit persons classified as high risk from owning any guns or forbid or restrict the ownership by any persons of guns that are regarded as particularly risky.

12. See Lois Beckett, *Gun Inequality: US Study Charts Rise of Hardcore Super Owners*, THE GUARDIAN (Sept. 19, 2016).

13. COOK & GOSS, *supra* note 1, at 13.

### A. OWNERSHIP RESTRICTIONS

Restriction of high-risk weapons was the focus of the first major federal gun-control law, the National Firearms Act (NFA) of 1934. Two classes of weapons were subject to special restrictions in that law: automatic guns, which could fire repeatedly with a single pull of a trigger, and long-barreled guns that had been modified by sawing off the barrels to make rifles and shotguns easier to conceal. The Thompson submachine gun was notorious as a destructive automatic weapon associated with organized crime, and sawed-off shotguns and rifles were also regarded as both dangerous and not suitable for legitimate uses. The NFA attempted to ban such weapons but used a high tax (\$200 in 1934) as the device to eliminate the weapons.

A second strategy of ownership prohibition restricted the acquisition or ownership of any guns by particular classes of persons regarded as high-risk users. The Federal Firearms Act of 1938 was the first federal law to isolate high-risk users. The two major categories of person prohibited in the 1938 act were adults with records of felony convictions and youths under age 18. These federal categories were altered in subsequent legislation in 1968 and 1985, and all 50 states also have laws restricting ownership by defined high-risk groups.

One major effort to enforce restrictions on the acquisition of guns by identified high-risk users is to require persons to prove they are not prohibited from ownership as a precondition of being able to acquire guns. Many states require persons to submit to a screening and acquire a license that confirms their age and absence of a disqualifying criminal record. This system, which can be called “permissive licensing” because it allows most adults to acquire guns, operates in several states. The federal government has, since 1994, required dealers licensed by the federal government to submit the names and identification that prospective customers provide to enable the government to check for a criminal record. This is an attempt to screen out unfit purchasers.

Some state laws go much further to restrict those permitted to purchase handguns to those specially licensed, usually by local police. This insistence on special needs or qualifications is called restrictive licensing.

A second basic strategy of firearms control attempts to limit high-risk uses and locations of firearms. The regulation of high-risk uses and gun possession in particular places was the traditional province of state and local law. The almost universal traditional regulation of the use of concealed weapons was state and local laws that required persons to have a special license to carry a concealed weapon in public. All but a very few U.S. states require special permits to carry concealed weapons, but there is a major distinction between

states that will grant licenses to all persons who prove they are eligible to own handguns (these are called “shall-issue” systems) and states that allow local law enforcement agencies to restrict licenses to carry concealable guns to persons who establish a special need to use such weapons in public places (these can be called “may-issue” systems).

An outright ban on owning or producing high-risk weapons does not require extensive additional governmental screening of persons. As we shall soon see, attempts to keep guns from high-risk persons do require and often involve governmental systems to screen individuals who wish to acquire guns in order to assume they are not in a prohibited group.

### *B. HIGH-RISK USERS*

While the first federal gun-control effort was directed at high-risk guns, the second law, the Federal Firearms Act of 1938, attempted to forbid particular persons regarded as problematic from acquiring firearms. But the federal act only licensed dealers, and it attempted to restrict sales to felons or fugitives by prohibiting dealers from selling to them. But only the “knowing” transfer by a dealer to a prohibited person was forbidden. The amendments to the 1938 act passed by Congress in 1968 extended the groups of persons prohibited from ownership to persons under 18 for long guns and 21 for handguns, as well as persons who have been adjudicated mentally defective or committed to any mental institution. And the 1968 act also continued the 1938 law’s prohibition of transfer of guns to persons who were not permitted to possess them under the law of the state in which they resided. The 1968 act also required notice to local law enforcement agencies of the buyer by a federally licensed dealer.

Many states also attempted to prohibit high-risk persons from owning or acquiring guns and frequently attempted to enforce these restrictions by requiring individuals to apply for a license to purchase a weapon. The governmental agency could then verify the lack of a criminal record. These screening systems have been called “permissive licensing” because all but modest classes of prohibited persons can acquire and own guns.

A few states reversed the presumption used in federal and most state laws and instituted licensing systems for handgun ownership that restricted ownership to persons who could establish a special need to own a handgun. The application process in these regimes is more complex and there is no presumption that a law-abiding citizen should qualify for ownership. These systems have been called “restrictive licensing” because their aim is to reduce the weapons in circulation. This is as much a control effort based on the notion

that the gun is dangerous rather than assuming that only the wrong kind of gun owner is the primary problem.

### *C. TIME, PLACE, AND MANNER RESTRICTIONS*

Most states and many municipal governments attempt to restrict the places that firearms can be taken and the ways they can be used even when lawfully acquired and owned. The broadest prohibition found in most state laws makes it unlawful to carry a concealed weapon (including a firearm) in a public place without a special license. Almost all American states have laws requiring special licenses to carry concealed weapons. Some states require local authorities to grant such licenses when requested if the applicant meets the legal requirements to own the weapon (these are called “shall issue” laws), while other state laws allow local law enforcement officials who review applications to require demonstration of special needs to obtain CCW (Carrying Concealed Weapons) licenses. These “may issue” jurisdictions often only authorize a very few persons to carry. A prominent political movement to expand eligibility in the “shall issue” paradigm has been a feature of state-level legislative activity in states with powerful gun-owning groups. Other time, place, and manner restrictions forbid firearms in places where they might be a special hazard (bars and saloons) or inappropriate (churches and schools). Of all the time, place, and manner restrictions, the class of laws that produce the vast majority of arrests and criminal prosecutions are for carrying concealed weapons without a license.<sup>14</sup>

### *D. THE EMERGENT SECOND AMENDMENT AS A RESTRICTION ON GOVERNMENTAL FIREARMS CONTROL*

While governmental restrictions on gun ownership and use have a long American history, there was little effort or impetus to use the language and concepts of the Second Amendment as a limit on governmental power to regulate firearms ownership and use until recent years. Claims to Second Amendment values as a symbol of “firearms liberty” carried an important emotional resonance for some gun-owning groups, but there had been no strong recognition of federal courts or the legal establishment of the Second Amendment as a source of personal rights to guns.

The Supreme Court law to the contrary prior to 2008 was neither extensive nor thickly principled. A series of challenges to state gun-control laws were rejected in the 19th century on the grounds that the Bill of Rights

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14. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2015, tbl. 29 (2016).



only restricted congressional action.<sup>15</sup> When Congress finally did pass gun restrictions in the Federal Firearms Act of 1934, in a challenge to a criminal conviction for shipping a shotgun with a barrel length of less than 18 inches, the Supreme Court relied on the “obvious purpose” of the Second Amendment of assuring the effectiveness of the militia; the Court continued, “in the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>16</sup> The issue and the decision in *Miller* were not regarded as important at the time of the decision or for some time thereafter.

There were isolated efforts in the legal academy to breathe some life into a personal Second Amendment. Don B. Kates’ 1983 *Michigan Law Review* article, “Handgun Prohibition and the Original Meaning of the Second Amendment,”<sup>17</sup> and Sanford Levinson’s “The Embarrassing Second Amendment” in 1999,<sup>18</sup> were followed by a series of historical and doctrinal arguments for personal rights under the amendment that could limit governmental restrictions.

The case that effectively reversed *United States v. Miller* and announced a personal Second Amendment right for citizens was *District of Columbia v. Heller*, decided in 2008.<sup>19</sup> The law challenged in *Heller* was a 1975 ordinance in the District which prohibited civilian ownership and possession of handguns. The D.C. Circuit Court of Appeals held this prohibition of handguns violated a personal Second Amendment right. Writing for the appellate panel, Judge Silberman engaged the *Miller* Court’s argument about short-barreled shotguns not being militia weapons by finding references to a 1794 ordinance which included bulky ancestors of modern handguns as militia ordinance.<sup>20</sup> Justice Scalia in *Heller* rejected such arguments and instead found that citizens’ desires to use handguns as household self-defense created a right under the Second Amendment. The opinion in *Heller* had to address handguns specifically because the District of Columbia ban was only on handguns. But the *Heller* case, and the extension of *Heller* rights against the states in *McDonald*,<sup>21</sup> struck down absolute prohibitions on handgun ownership, including within

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15. See NEWTON & ZIMRING, *supra* note 11, at 254.

16. *United States v. Miller*, 307 U.S. 174, 178 (1939).

17. Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

18. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

19. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

20. See *Parker v. District of Columbia v. Heller*, 478 F.3d 370, 386-88 (D.C. Cir. 2007).

21. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

the home, a rare breed of government regulation different in form from even restrictive licensing of handguns and restrictions on carrying weapons or concealed weapons in public. Justice Scalia's opinion for the Court in *Heller* endorses both the notion of limits on its version of the Second Amendment right and provides approving citations to a number of restrictions with long histories, such as restrictions on carrying concealed weapons. The opinion also isolates the District of Columbia statute from more common attempts to restrictively license handguns: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."<sup>22</sup> And the Chicago ordinance that the Court disapproved in *McDonald* was also a flat ban on handgun ownership.

So the doctrinal ingredients for establishing how this newly announced right interacts with state and local gun-control efforts are (1) a very broad personal right, (2) a long history of gun controls the *Heller* Court suggested were legitimate, and (3) a balancing process between state and personal interests where we have little indication of what level of interest must be found and who has the burden of proof.

Some very broad questions can be answered in 2017. While the only gun ordinances that the Court has struck down have been outright prohibitions on handgun ownership and use in the house, important claims for personal self-defense can be made in both public and private places. And many persons disqualified from handgun licenses because they haven't demonstrated special needs for ownership will feel just as disadvantaged as did the plaintiff in *Heller*. Even permissive systems that bar young persons or those with nonviolent criminal records raise real interests in the balance. What about those with criminal records and armed enemies?

The historical credentials of substantial restrictions on carrying concealed weapons are impeccable but the risk of much criminal victimization for citizens is also higher on the street. Two elements that haven't yet made powerful impressions on courts considering challenges to bans on carrying concealed weapons might make a difference. The first is that carrying a loaded gun in public affects the safety and feelings of security of others in public who might prefer limiting concealed firearms in streets. There are externalities to carrying guns outside one's house in a shared public space that don't apply with equal force in the household setting of the *Heller* decision.

The second problem is the violence threat of concealed guns in public to police on patrol. For instance, 97.5% of all attacks that kill police are with guns,

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22. *Heller*, 554 U.S. at 629.

and the concealed guns an armed police officer cannot see are a particular hazard.<sup>23</sup> Further, anything that increases the risk of gun attacks to police also increases their tendency to shoot first. Over a thousand civilians a year are now killed by police in the United States. Increasing concealed handguns on the street by constitutional fiat won't help matters for cops or citizens.

The current state of Second Amendment doctrine in 2017 is the American legal realist's ultimate theory on all law—the U.S. Supreme Court can decide anything it wants to decide about challenges to state licensing requirements and public carrying of concealed weapons. To date, circuit courts have been prone to defend all but absolute prohibition from Second Amendment claims. But there are no clear principles emerging.

The *Heller* doctrine could be a minor restriction if highly restrictive handgun licensing is allowed in the tradition of New York's Sullivan law of 1911. Or it could become a personal right stronger than claims for the primacy of the police power in public spaces.

At the far extreme would be a conflict between property rights and personal rights to bear arms when owners of public accommodations use technology to screen for and prohibit guns in their facilities. Is that discrimination equivalent to the racial discrimination that provoked the Civil Rights Act of 1964? Or is it instead a property owner's right to self-defense against other people with guns? Stay tuned.

## CONCLUSION

The major contingency that will influence the course of firearms controls in the American future is the degree to which the Supreme Court's holdings on the Second Amendment will allow legislative regulation of firearms ownership and use by the federal government as well as states and localities. If long-standing forms of restriction on carrying concealed firearms continue to be allowed, substantial differences in patterns of firearms regulation will exist in urban vs. rural states and in regions with different sentiments about gun policy. A more aggressive architecture of the evolving Second Amendment's personal rights will mandate less diverse and more uniformly deregulatory policies.

The most important contingency in federal legislation will be whether background checks will be extended to all or most person-to-person transfers. This is an important detail in the regulatory approach to a country with more than 300 million citizens and almost that many firearms. But it is only

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23. ZIMRING, WHEN POLICE KILL, *supra* note 3, at 96.

a regulatory detail rather than a change in the importance of guns in the 21st century. The singular status of the United States as a gun-owning and gun-using nation is assured.

### RECOMMENDATIONS

Given the foregoing, I would emphasize two points:

1. **Recognize that the Constitution allows firearms regulations.** As mentioned above and acknowledged by the Supreme Court, governmental restrictions on gun ownership and use have a long history in the United States. The *Heller* opinion does not, and could not, ignore the pedigree of firearms regulations: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>24</sup> *Heller* also recognized the tradition of bans on carrying “dangerous and unusual weapons,” like short-barreled shotguns.<sup>25</sup> The traditional powers of the states to restrict carrying concealed weapons in public should be recognized as categorically different from regulating household ownership, and the vulnerability of police and other citizens to concealed weapons in public places should be integrated into a coherent jurisprudence of the Second Amendment.
2. **Focus on specific strategies and contexts.** The question of whether gun control can work is subject to a highly qualified answer of “yes, but.” If and to the extent that regulation reduces the use of loaded guns in crimes it will save American lives. But reducing the share of violence with guns is not an easy task to achieve in urban environments with large inventories of available handguns. Most gun control efforts do not make measurable impacts on gun use, particularly low budget symbolic legislation. If Congress when creating what it called a “gun-free school zone” by legislation did reduce firearms violence, the result would be on a par with that of the miracle of loaves and the fishes. But New York City’s effort to tightly enforce one of the nation’s most restrictive handgun laws did apparently have a substantial payoff in reduced shootings that saved many lives.<sup>26</sup> What I would emphasize here is the fallacy of categorical generalizations. We have no business asking

24. District of Columbia v. *Heller*, 554 U.S. 570, 626-27 (2008).

25. *Id.* at 625, 627.

26. See Jeffrey Fagan, Franklin E. Zimring & June Kim, *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277 (1998).

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whether broad classes of laws—criminal prohibitions, anti-theft statutes or gun control strategies—work or don't. That is an aggregation error as long as guns are a contributing cause to the death rate from violent crime in the United States. The serious work is in identifying the specific strategies and contexts in which regulation can reduce the use of firearms in violent assault and attempting to achieve these results at tolerable public and personal cost.



# Gangs

Scott H. Decker\*

*Interest in gangs by law enforcement, policymakers and the public has grown over the past three decades. Among the most critical challenges in responding to gangs is arriving at an operational definition that can be implemented and used reliably. Responding to gangs is especially important because of their propensity for violence. Gangs also engage in high levels of drug sales, and possession and use of firearms. As most gang members are in their teens, street gangs are seldom highly organized or disciplined. Structural, group processes and risk-factor explanations hold promise for understanding the causes of gangs and thereby crafting more-effective responses. Gangs are important in prisons as well, exerting control of inmates and the distribution of illegal goods and services. Solid evaluation evidence indicates that coordinated responses to gangs that include both law enforcement and the provision of employment opportunities and training have an impact on reducing gang membership.*

## INTRODUCTION

Gangs and violence have become interchangeable terms. When the term “gangs” is mentioned in the media or among public audiences, the context typically includes violence. Although gangs are disproportionately involved in violent crime, there is more to gang life than violence. This chapter reviews key points of what is known about gangs, crime, and responses to gangs.

## I. DEFINING GANGS

Without the ability to distinguish between gangs and other groups of offenders, it is not possible to gauge the magnitude of the problem, nor to build effective responses to gangs. As with many topics in criminology, gang definitions are complicated. A key methodological issue in the study of gangs has been whether the unit of analysis is the gang, the gang member, or the act (crime) committed by the gang member or members. There is also no consensus on what the definition of a gang crime is or should be. At the federal level, the FBI once offered a sweeping definition of a gang that focused heavily on the

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organizational features<sup>1</sup> and was at odds with how most local law enforcement agencies and researchers understand gangs.

The definitions used by local law enforcement agencies fall into two groups. The first defines a gang crime based on the participation of a gang member in an act (typically a crime), either as a victim or an offender. This is the definition used by Los Angeles and many other cities in California. It is an inclusive definition that depends only on the ability of an officer or investigator to determine whether a victim or offender is a documented gang member. A number of other cities, most prominently Chicago, use a much more restrictive definition, relying instead on the motive for an offense. From this view, an offense that involves a gang member, as either victim or offender, may be classified as gang-related only if the motive furthers the interests of the gang. The offenses may include battles over gang turf, retaliation against rival gangs or gang members, or crimes committed to generate economic gain for the gang. The use of a motive-based definition requires considerably more information and investigation than the use of a member-based definition of gang crime.

The choice of definition greatly influences how many gang members and gang crimes are counted in a jurisdiction.<sup>2</sup> A comparison of the Los Angeles and Chicago definitions reveals that a member-based definition yields nearly twice as many gang-related homicides as the narrower gang-motive definition.<sup>3</sup> Despite this difference in magnitude, the demographic characteristics of the individuals involved (race, age, and gender) and the situational characteristics of homicides (guns, location, and victim-offender relationship) for the two different definitions were the same.

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1. See Scott H. Decker, *Youth Gangs and Violent Behavior*, in *THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION* (Daniel J. Flannery et al. eds., 2007) (quoting FBI definition of gang as “a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence and any other criminal activity to sustain the enterprise”).

2. Malcolm W. Klein, Cheryl L. Maxson & Lea C. Cunningham, “Crack,” *Street Gangs, and Violence*, 29 *CRIMINOLOGY* 623 (1991); Cheryl L. Maxson & Malcolm W. Klein, *Street Gang Violence: Twice as Great, or Half as Great*, in *GANGS IN AMERICA* 71 (C. Ronald Huff ed., 1990); Cheryl L. Maxson, & Malcolm W. Klein, *Defining Gang Homicide: An Updated Look at Member and Motive Approaches*, in *GANGS IN AMERICA* (C. Ronald Huff ed., 2nd ed. 1996).

3. Maxson & Klein, *Defining Gang Homicide*, *supra* note 2.



In terms of measuring gang membership, self-nomination has proven to be a robust measure that is capable of differentiating gang and non-gang youth.<sup>4</sup> My colleagues and I have also determined that self-nomination is valid when measuring an individual's disengagement from the gang.<sup>5</sup>

## II. GANG HOMICIDE

Homicides involving gangs and gang members attract the most media and law enforcement attention. Because there is no comprehensive national source of gang-crime reporting, the picture regarding gang crime and violence must be constructed by compiling a variety of sources, often based on the work of researchers who use different definitions and whose samples vary. Two law enforcement sources of national gang-crime data (including homicide) are the National Incident Based Reporting System (NIBRS) and the Supplemental Homicide Reports (part of the current Uniform Crime Reports). NIBRS is meant to be the next generation of crime data after the UCR, though participation is voluntary.

The most consistent source of gang homicide data has come from the National Youth Gang Center (NYGC), funded by the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Several conclusions can be drawn this data. First, the trend in gang homicide mirrors that for youth homicide in the United States, with dramatic increases in the early 1990s that leveled off by the end of the 1990s. Despite this pattern, the overall level of gang homicide is considerably higher than for other subcategories of homicide, including domestic homicides and robbery, reinforcing the consistent finding that gang membership is a significant risk factor for involvement in violence, both as a perpetrator and a victim.<sup>6</sup> Juveniles are also more likely to carry and fire guns than older offenders, and their gun possession and use is strongly related to membership in a gang.<sup>7</sup>

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4. Finn-Aage Esbensen et al., *Youth Gangs and Definitional Issues: When is a Gang a Gang, and Why Does it Matter?*, 47 CRIME & DELINQUENCY 105 (2001); Scott H. Decker et al., *Validating Self-Nomination in Gang Research: Assessing Differences in Gang Embeddedness Across Non, Current, and Former Gang Members*, 30 J. QUANTITATIVE CRIMINOLOGY 577 (2014).

5. Scott H. Decker, David C. Pyrooz & Richard K. Moule, *Disengagement from Gangs as Role Transitions*, 24 J. RES. ON ADOLESCENCE 268 (2014).

6. SCOTT H. DECKER & BARRIK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS AND VIOLENCE* (1996); TERENCE P. THORNBERRY ET AL., *GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE* (2002).

7. Adam M. Watkins, Beth M. Huebner & Scott H. Decker, *Patterns of Gun Acquisition, Carrying, and Use Among Juvenile and Adult Arrestees: Evidence from a High-Crime City*, 25 JUST. Q. 674 (2008).

And for both victims and perpetrators, gang homicides are exceedingly likely to involve males, racial minorities, and guns. They are also more likely than other homicides to occur outside and include multiple participants.

The NYGC survey data on gang homicide begin with the year 1996, when 1,330 gang homicides were reported by cities with populations over 100,000.<sup>8</sup> Gang homicides increased in the early part of the new century, an increase that was notable against the backdrop of falling homicide rates for the nation. Historically, Chicago and Los Angeles have stood out for their exceptionally high levels of gang violence, particularly gang homicide. To a large extent, changes in gang-homicide figures for cities over 100,000 population are driven by changes in gang homicide in Chicago and Los Angeles. In 2009, one-half of the homicides in Los Angeles and one-third of the homicides in Chicago were gang-related.<sup>9</sup> Gangs in Los Angeles and Chicago have been present perhaps for as long as a century. Because of the entrenched nature of gangs in those two cities, they are not good examples for other cities to emulate when they construct law enforcement, prevention, or intervention policies. Many cities over 100,000 population, however, report roughly one-quarter of their homicides were gang-related.<sup>10</sup>

It is important to underscore that gang members are overrepresented both as offenders and victims in homicides. Gang members in large U.S. cities have homicide rates nearly 100 times as high as the national average.<sup>11</sup> It is also worth noting that communities with the highest concentration of gang members have the highest rates of gun assault.<sup>12</sup> Gang membership has been identified as a risk factor for violent victimization, a fact that in turn leads to a large volume of retaliatory violence. Indeed, an ethnographic study of gang members in St. Louis<sup>13</sup> found that nearly one-quarter of the 99 members of the initial sample had been murdered within a three-year period following the conclusion of the study. These results underscore the fact that gang violence, particularly homicide, has a distinctive character.

8. G. David Curry, Arlen E. Egley & James C. Howell, *Young Gang Homicide Trends in the National Youth Gang Survey* (2004) (paper presented at the American Society of Criminology Meetings, Nashville, TN).

9. James C. Howell et al., *U.S. Gang Problem Trends and Seriousness, 1996–2009*, NAT'L GANG CTR. BULL. (May 2011), <https://www.nationalgangcenter.gov/Content/Documents/Bulletin-6.pdf>.

10. *Id.*

11. Scott H. Decker & David C. Pyrooz, *On the Validity and Reliability of Gang Homicide: A Comparison of Disparate Sources*, 14 HOMICIDE STUD. 359 (2010).

12. Beth M. Huebner et al., *Dangerous Places: Gang Members and Neighborhood Levels of Gun Assault*, 33 JUST. Q. 836 (2014). For a discussion of gun violence, see Franklin E. Zimring, "Firearms and Violence," in the present Volume.

13. DECKER & VAN WINKLE, *supra* note 6.

### III. INSTRUMENTALITIES

There are a number of correlates that distinguish gang crime, particularly violence, from other crime. These include a prior relationship between the victim and the offender, the occurrence of the event outdoors, the involvement of multiple suspects, and the presence of firearms and drugs. Here, I will discuss two of these correlates: firearms and drugs.

#### A. FIREARMS

The access to and use of firearms in gang violence is well documented in police data and research findings. In an 11-city study of arrestees, Pennell, Caldwell, and I found that self-reported gang members were more likely than other subgroups to report wanting, owning, using, and being victimized by firearms.<sup>14</sup> Similarly, studies by Bjerregaard and Lizotte and by Lizotte and colleagues report that gun ownership remains one of the strongest correlates of gang membership and gang violence.<sup>15</sup> Lizotte et al. report that youths who carry guns for protection are five times as likely to be in a gang as youths who own guns for sporting purposes.<sup>16</sup> The accumulation of firearms can often lead to “arms races” between rival gangs.<sup>17</sup> Firearms are the weapon of choice among gang members, a preference for ownership that has increased over the course of the past four decades.<sup>18</sup> This fact is strongly related to the high levels of violent death in gang-involved populations in ethnographic research.<sup>19</sup> Clearly, an effective response to gangs will need to address the issue of firearms possession and availability.

An ethnography of St. Louis gang members characterizes their lives as under a constant state of threat from rival gangs, one’s own gang, and the police.<sup>20</sup> In St. Louis, gang youths are six times as likely to get shot as their non-gang youth counterparts.<sup>21</sup> Neighborhoods with high concentrations of gang members

14. Scott H. Decker, Susan Pennell & Ami Caldwell, *Illegal Firearms: Access and Use by Arrestees*, NAT’L INST. OF JUSTICE RESEARCH IN BRIEF (Jan. 1997), <https://www.ncjrs.gov/pdffiles/163496.pdf>.

15. Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership*, 86 J. CRIM. L. & CRIMINOLOGY 37 (1995); Alan J. Lizotte et al., *Patterns of Adolescent Firearms Ownership and Use*, 11 JUST. Q. 51 (1994).

16. Lizotte et al., *supra* note 15.

17. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995); Watkins, Huebner & Decker, *supra* note 7.

18. James C. Howell, *Youth Gangs: An Overview*, JUVENILE JUST. BULL. (Aug. 1998), <https://www.ojjdp.gov/jjbulletin/9808/contents.html>.

19. DECKER & VAN WINKLE, *supra* note 6; Decker & Pyrooz, *supra* note 11.

20. DECKER & VAN WINKLE, *supra* note 6.

21. G. David Curry, Scott H. Decker & Arlen Egley Jr., *Gang Involvement and Delinquency in a Middle School Population*, 19 JUST. Q. 275 (2002).

create a potentially volatile situation where members frequently interact with rival gang members, thus increasing the likelihood of gun violence.<sup>22</sup>

### B. DRUGS

The level of gang participation in the sale of illegal drugs coincided with the widespread availability of crack cocaine in the late 1980s. Howell and I documented the considerable overlap between involvement in drug markets and the use of violence.<sup>23</sup> Neighborhoods were carved into territories “held down” by gangs competing for drug markets.<sup>24</sup> Disputes over drug turf were at the heart of a considerable amount of gang violence in the 1990s. Drug use among gang members has also been reported in a host of studies.<sup>25</sup>

There are two competing views about the role of gangs and gang members in street drug sales. One is that street gangs are well-organized and effective mechanisms for the distribution of illegal drugs and invest drug-sale profits into their gang. A second explanation holds that drug sales by gangs are seldom well-organized, with gang members often selling independently of their gangs. Some research has described gangs as formal-rational organizations with a leadership structure, roles, rules, common goals, and control over members. Others, however, describe gangs as loosely confederated groups that lack internal cohesion or many of the formal characteristics of organization.

Most gang members sell drugs, though the level at which they sell may not be increased by gang membership alone. It is clear that involvement in drug trafficking is a risk factor for becoming a victim or perpetrator of violence. Conflict between gangs is motivated by retaliation far more than involvement in the illegal drug trade. In his work in Indianapolis, Lauger noted that local gangs used violence as

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22. Huebner et al., *supra* note 12; Andrew V. Papachristos, David M. Hureau & Anthony A. Braga, *The Corner and the Crew: The Influence of Geography and Social Networks on Gang Violence*, 78 AM. SOC. REV. 417 (2013).

23. James C. Howell & Scott H. Decker, *The Youth Gangs, Drugs, and Violence Connection*, JUVENILE JUST. BULL. (Jan. 1999), <https://www.ncjrs.gov/pdffiles1/93920.pdf>.

24. DECKER & VAN WINKLE, *supra* note 6; Papachristos et al., *supra* note 22.

25. Scott H. Decker & Barrik Van Winkle, *Slingin' Dope: The Role of Gangs and Gang Members in Drug Sales*, 11 JUST. Q. 583 (1994); JOHN M. HAGEDORN, *PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY* (1989); Howell & Decker, *supra* note 23.

a source of gaining legitimacy within the gang as well as responding to violence with greater violence to improve their status amongst other gangs.<sup>26</sup> Involvement in drug sales is also a primary way that gang members develop a criminal record, something that can hurt their chances for employment.<sup>27</sup>

#### IV. WHAT DO GANG MEMBERS LOOK LIKE?

The average age of a gang member in the United States is 17. This means that a large number of gang members are adolescents and their behavior reflects that of typical adolescents.<sup>28</sup> They form associations and social relationships with limited information about the consequences of such associations and terminate those relationships as quickly as they form them. In addition, adolescents are not the best money managers or planners. Adolescence is also a time when friends assume greater importance than parents. Most gangs have a strong affiliation with the neighborhood where they live and often take the name of the neighborhood or a prominent street in the name of the gang. Like most adolescents, adolescent gang members engage in a considerable amount of braggadocio and myth-making. Formal roles and responsibilities are not characteristic of the typical adolescent, and that is also true of gangs. The typical “term” in a gang is about two years. Disengagement from a gang is seldom the result of a program or social intervention, rather it seems to come from natural social processes related to maturation. While most gang members are male, females constitute an important component of gangs, perhaps as much as 25% of all gang members.

Older gang members are capable of higher levels of organization. In many cases, that can be attributed to spending time in prison, which enforces discipline. The discipline gang members learn in prison is generally not due to the efforts of the correctional officers and rules; it is a consequence of discipline enforced by prison gangs. Going to prison often enhances the credibility and reputation of a gang member and places them in a position of leadership once they return from incarceration. In many instances, gang membership is entrenched with cultural values, particularly among Hispanic gangs.

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26. TIMOTHY R. LAUGER, *REAL GANGSTAS: LEGITIMACY, REPUTATION, AND VIOLENCE IN THE INTEGRATING ENVIRONMENT* (2012).

27. See generally Gabriel J. Chin, “Collateral Consequences of Criminal Conviction,” in Volume 4 of the present Report.

28. For a discussion of juvenile offenders, see Barry C. Feld, “Juvenile Justice,” in the present Volume.

## V. WHAT ARE THE CAUSES OF GANGS?

Understanding the causes and correlates of gangs should lend insights into appropriate responses to the gang problem. Three predominant explanations for the presence of gangs exist. These focus on (1) community-level explanations, (2) the role of social processes, or (3) risk factors. Community-level explanations underscore the role of neighborhood structure and other social variables, including measures of community social control, in the generation of patterns and trends in homicide. Such explanations typically include measures of racial composition, concentrated poverty, gun availability, and the presence of drug markets and drug use in the neighborhood or city as the unit of analysis.<sup>29</sup> Such approaches often use spatial analysis.<sup>30</sup> Explanations that emphasize collective behavior point to the role of social processes, such as contagion and retaliation, and depend more often on ethnographic or case study materials. The former approach emphasizes the spatial distribution of individual and neighborhood characteristics, whereas the latter highlights dynamic social processes and often uses the group as its level of analysis. Risk-factor approaches, on the other hand, focus on individuals and pay attention to the challenges they have or negative life experiences.

### A. STRUCTURAL EXPLANATIONS

A study in Chicago found that gang homicides have a significantly different ecological pattern than do non-gang homicides and conform to classic models of social disorganization and poverty.<sup>31</sup> They argue that analyzing gang groups as a function of mobility patterns is a productive conceptual means of understanding gang homicides.<sup>32</sup> Social disorganization was found in neighborhoods undergoing shifts in population composition, overall mobility, and economic change. This disorganization was subsequently linked to gang homicide and other forms of gang crime, particularly violence. This conclusion was reached by examining a host of structural variables, including race/ethnicity and poverty. Social disorganization is problematic because it interrupts the natural socializing processes of family, employment, school and adult supervision.

29. Richard Rosenfeld, Timothy M. Bray & Arlen Egley, *Facilitating Violence: A Comparison of Gang-Motivated, Gang-Affiliated, and Nongang Youth Homicides*, 15 J. QUANTITATIVE CRIMINOLOGY 495 (1999); Huebner et al., *supra* note 12.

30. Alfred Blumstein et al., *Diffusion Processes in Homicide* (Nat'l Crim. Just. Ref. Serv. July 17, 1999), <https://www.ncjrs.gov/pdffiles1/nij/grants/193425.pdf>; Jacqueline Cohen & George Tita, *Diffusion in Homicide: Exploring a General Method for Detecting Spatial Diffusion Processes*, 15 J. QUANTITATIVE CRIMINOLOGY 451 (1999).

31. G. David Curry & Irving A. Spergel, *Gang Homicide, Delinquency, and Community*, 26 CRIMINOLOGY 381 (1988).

32. *Id.*

Neighborhoods with high levels of gangs display strong spatial concentrations of crime, particularly in neighborhoods with high levels of poverty and social change.<sup>33</sup> Spatial concentrations of gang members also create higher levels of gun violence.<sup>34</sup> Neighborhoods with high concentrations of gang membership are characterized by high levels of gun violence and social disorganization.

### B. SOCIAL PROCESSES AND GANG VIOLENCE

Studies of the social processes involved in the generation of gang violence focus on group processes.<sup>35</sup> The dynamics of interactions that lead to both initial and retaliatory acts of gang violence are key to such analysis. Such analyses underscore the role of group process and social-psychological variables in the understanding of gangs and gang activities. In 1996, I observed spikes in gang violence over time that were often quite dramatic in magnitude.<sup>36</sup> My study underscored the role of “threat” in the explanation of gang violence, particularly retaliatory violence. An assault could initiate a sequence of retaliatory violence that moves beyond an individual neighborhood and its original participants.<sup>37</sup>

This approach emphasizes the dynamic social processes of collective behavior that lead to retaliatory violence among gangs. It is important to note in this context the role that offending plays in victimization, particularly for gang members<sup>38</sup> where offending and victimization are linked in a series of inter-relationships. In this context, Klein and Maxson identified the role of social processes in the escalation of violence.<sup>39</sup> Pizzaro and McGloin provided

33. Carolyn Rebecca Block & Richard Block, *Street Gang Crime in Chicago*, NAT'L INST. OF JUSTICE RESEARCH IN BRIEF (Dec. 1993); David Kennedy, Anthony Braga & Anne Piehl, *The (Un)Known Universe: Mapping Gangs and Gang Violence in Boston*, in CRIME MAPPING AND CRIME PREVENTION 219 (David L. Weisburd & J. Thomas McEwen eds., 1997); Rosenfeld, Bray & Egley, *supra* note 29.

34. Huebner et al., *supra* note 12.

35. Colin Loftin, *Assaultive Violence as a Contagious Social Process*, 62 BULL. N.Y. ACAD. MED. 550 (1984).

36. Scott H. Decker, *Collective and Normative Features of Gang Violence*, 13 JUST. Q. 243 (1996).

37. Andrew V. Papachristos, *Murder by Structure: Dominance Relations and the Social Structure of Gang Homicide*, 115 AM. J. SOC. 74 (2009); Cohen & Tita, *supra* note 30; Decker, *supra* note 36.

38. David C. Pyrooz, Scott H. Decker & Richard K. Moule, *The Contribution of Gang Membership to the Victim-Offender Overlap*, 51 J. RES. CRIME & DELINQ. 315 (2014).

39. Malcolm W. Klein & Cheryl L. Maxson, *Street Gang Violence*, in VIOLENT CRIME, VIOLENT CRIMINALS 189, 219 (Neil A. Weiner & Marvin E. Wolfgang eds., 1989); Cheryl L. Maxson, *Gang Homicide: A Review and Extension of the Literature*, in HOMICIDE: A SOURCEBOOK OF SOCIAL RESEARCH 239 (M. Dwayne Smith & Margaret A. Zahn eds., 1999).



additional support for this approach with data from Newark.<sup>40</sup> Such approaches typically point to the lack of structural control in gangs,<sup>41</sup> particularly the weak control that gangs have over their members, and the role that rivalries can play in leading to violence within and between gangs. These studies reinforce the notion that gangs lack the ability to control the behavior of their members. This process is enhanced by the widespread availability of social media. As the “digital divide”<sup>42</sup> has shrunk and gang members more frequently engage in the use of social media to fan the flames of violence,<sup>43</sup> there is a new medium for keeping conflicts alive. Social media also helps to spread violence to new groups and potentially involve new victims. Addressing the group processes in gangs will require inserting conventional relationships and activities in the lives of gang members.

### C. RISK FACTORS

A third approach to explanations of gang membership and behavior is found in approaches that emphasize risk factors. This work largely comes from school-based panel studies of youth that identify gang members and isolate characteristics that distinguish them from non-gang members. Five domains have been examined in this context: (1) individual, (2) family, (3) school, (4) peer group, and (5) community. Risks in these domains are associated with an increased probability of affiliating with a gang. Maxson identified five specific risk factors that received the most empirical support.<sup>44</sup> These include: (1) experiencing a critical life event such as loss of a parent or divorce, (2) showing a propensity for risk-taking and impulsivity, (3) having pro-delinquent attitudes, (4) having low levels of parental supervision, and (5) associating with delinquent peers. Research also shows that involvement in gangs increases when those factors are more intense, begin earlier, are greater in number, and span longer periods of time. There is, however, a caveat to add: These are the same risk factors for delinquent involvement. As a consequence, it is not easy to differentiate gang risk factors from delinquent risk factors. A strength of

40. Jesenia M. Pizarroa & Jean Marie McGloin, *Explaining Gang Homicides in Newark, New Jersey: Collective Behavior or Social Disorganization?*, 34 J. CRIM. JUST. 195 (2006).

41. Scott H. Decker & G. David Curry, *Gangs, Gang Homicide and Gang Loyalty: Organized Crimes or Disorganized Criminals?*, 30 J. CRIM. JUST. 343 (2002).

42. David C. Pyrooz, Richard K. Moule & Scott H. Decker, *Criminal and Routine Activities in Online Settings: Gangs, Offenders, and the Internet*, 32 JUST. Q. 471 (2015).

43. Pyrooz, Decker & Moule, *supra* note 38; Desmond Upton Patton, Robert D. Eschmann & Dirk A. Butler, *Internet Banging: New Trends in Social Media, Gang Violence, Masculinity and Hip Hop*, 29 COMPUTERS IN HUM. BEHAV. A54 (2014).

44. Cheryl Maxon, *Street Gangs*, in CRIME AND PUBLIC POLICY 158 (James Q. Wilson & Joan Petersilia eds., 2011).



the risk-factor approach is that it allows for interventions to target the social deficits created by the presence of a risk factor. Another strength is that there is strong convergence between the risk factors for gang membership and those for involvement in delinquency. This strongly suggests that general delinquency interventions should be appropriate for dealing with gang members. Several of the Colorado Blueprint programs (Functional Family Therapy and Multi-Systemic Therapy in particular) that are demonstrated as effective in dealing with delinquency may be applied to gang involvement.

## VI. PRISON GANGS

Because of their heavy involvement in crime, a large number of gang members are imprisoned. One group estimated that up to 40% of juveniles in secure confinement claim gang membership.<sup>45</sup> Adult gang members also constitute a sizable part of the prison population,<sup>46</sup> which has increased dramatically since the 1990s. Gang members can be found in all forms of incarceration in the United States, including prisons, jails, detention centers, and pre-release centers. It is estimated that gang members comprise roughly 13% of jail populations,<sup>47</sup> 12% to 17% of state prison populations,<sup>48</sup> and 9% of the federal prison population.<sup>49</sup>

Prison gangs are more structured than street gangs and have much more effective control over their members.<sup>50</sup> The rank-and-file membership often has several distinct levels of membership. In this sense, prison gangs resemble organized-crime groups, because of their level of organization and emphasis on profits. Prison gangs are heavily involved in prison violence and rule infractions. By some estimates, as much as half of all violence in prison is

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45. DALE PARENT ET AL., U.S. DEP'T OF JUSTICE, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES (1994).

46. GEORGE M. CAMP & CAMILLE GRAHAM CAMP, U.S. DEP'T OF JUSTICE, PRISON GANGS: THEIR EXTENT, NATURE, AND IMPACT ON PRISONS (1985); Paige H. Ralph & James W. Marquart, *Gang Violence in Texas Prisons*, 71 PRISON J. 38 (1991).

47. Rick Ruddell, Scott H. Decker & Arlen Egley, *Gang Interventions in Jails: A National Analysis*, 31 CRIM. JUST. REV. 33 (2006).

48. Marie L. Griffin & J. R. Hepburn, *The Effect of Gang Affiliation on Violent Misconduct Among Inmates During the Early Years of Confinement*, 33 CRIM. JUST. & BEHAV. 419 (2006); Jessie L. Kreinert & Mark S. Fleisher, *Gang Membership as a Proxy for Social Deficiencies: A Study of Nebraska Inmates*, 3 CORRECTIONS MGMT. Q. 47 (2001).

49. Gerald G. Gaes et al., *The Influence of Prison Gang Affiliation on Violence and Other Prison Misconduct*, 82 PRISON J. 359 (2002).

50. David Pyrooz, Scott H. Decker & M. Fleisher, *From the Street to the Prison, from the Prison to the Street: Understanding and Responding to Prison Gangs*, 3 J. AGGRESSION CONFLICT & PEACE RES. 12 (2001).

attributable to prison gangs.<sup>51</sup> Prison gangs exert strong control over drug sales, gambling, and prostitution in institutions.<sup>52</sup> Prison also provides an impetus to join a gang for many individuals who seek protection. Incarceration plays a role in maintaining the inmate code, which values illegal activities that create profits.<sup>53</sup> Moreover, going to prison provides gang members with additional status when they return to the street. Little is known about how gang members fare when they are released from prison and whether their re-entry is more difficult than that of other inmates.

## VII. RESPONDING TO GANGS

Many high-profile, high-cost interventions targeting gangs have not been adequately evaluated. We do not have a good sense of whether police crackdowns on gangs produce reductions in crime, nor do we fully understand the impact of gang truces on violence and gang recruitment. Civil Gang Injunctions have been used extensively in California. Despite their popularity and expense, we don't know enough about their short- and long-term impact. The programming and research literature on prison gangs and re-entry efforts among prison gang members also has large gaps. Given the high cost of responding to gangs wrapped up in policing and prisons, this is not an acceptable situation. Clearly it is imperative that careful evaluations be conducted.

Good evaluations must begin with clear definitions of problems and interventions. Some efforts to curb gangs are targeted at individual gang members while others target gangs themselves. The evidence supports targeting individuals rather than the gang itself.<sup>54</sup> Interventions that target the gang itself often give recognition and resources that strengthen their organizational structure as well as their position in the community. Another key element in gang interventions is the match between the level of criminal involvement and the scope of an intervention. It is important to distinguish individuals who are at broad risk for gang involvement from those who are actively engaged in serious gang crime. Clearly, a different response is needed for active offenders. The gang programming and evaluation literature identifies primary prevention

51. Barton L. Ingraham & Charles F. Wellford, *The Totality of Conditions Test in Eighth-Amendment Litigation, in AMERICA'S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY* (Stephen D. Gottfredson & Sean McConville eds., 1987); CAMP & CAMP, *supra* note 46.

52. MARK S. FLEISHER, *WAREHOUSING VIOLENCE* (1989).

53. Meghan M. Mitchell et al., *Criminal Crews, Codes, and Contexts: Differences and Similarities Across the Code of the Street, Convict Code, Street Gangs, and Prison Gangs*, *DEVIAN'T BEHAV.* 1 (2016).

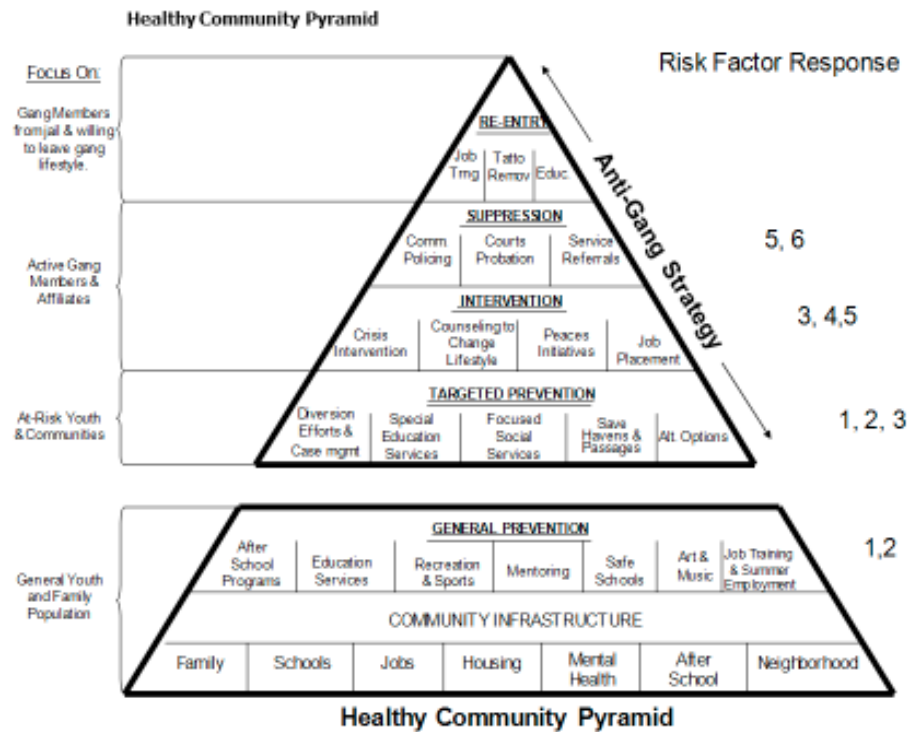
54. MALCOLM W. KLEIN & CHERYL L. MAXSON, *STREET GANG PATTERNS AND POLICIES* (2006); DAVID G. CURRY, SCOTT H. DECKER & DAVID C. PYROOZ, *CONFRONTING GANGS: CRIME AND COMMUNITY* (2014).

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as an appropriate response to the general population of youths and families who live in areas of high risk for gang involvement. Primary prevention is a less expensive and less invasive “dose” than targeted (also known as secondary) prevention. As such, primary prevention seeks to address the needs of individuals at risk for involvement in gang or delinquent activities. School-based prevention programs are a good example of primary prevention. For example, the Gang Resistance Education and Training (GREAT) program has been identified as an effective primary-prevention program. Expanding the use of this prevention strategy would be a good start at gang prevention. On the other hand, targeted prevention is designed to provide a higher level of “dose” to children and adolescents at high risk for gang involvement, perhaps because of the neighborhood they live in or the involvement of other family members in gang activity. Interventions such as job training or counseling are best used with individuals who are gang members but not yet at high levels of involvement. This is a more intrusive intervention, with higher costs than either form of prevention. Suppression—arrest, prosecution, imprisonment—is reserved for those most involved in crime, particularly long-term gang members or individuals who serve as leaders of gangs.

A key to this model, referred to as the Gang Response Pyramid, is the match between level of criminal involvement and response. Finding the right match can be enhanced by assessing individuals for the risk factors associated with gang membership.

Diagram 1



A growing body of research has examined the process of disengaging from gangs.<sup>55</sup> Most importantly, this research finds that the majority of gang members leave their gangs, often without negative consequences. The exit process is helped along most often by family and maturational reform. It is important for agencies, police, and friends and relatives to recognize and abet, not impede, the exit process from gangs. When opportunities for desistance present themselves (pregnancy, injury, employment, marriage), their effects should be encouraged and enhanced.

55. Scott H. Decker, David C. Pyrooz & Richard Moule Jr., *Disengagement from Gangs as Role Transitions*, 24 J. RES. ADOLESCENCE 268 (2014); Dena C. Carson, Dana Peterson & Finn-Aage Esbensen, *Youth Gang Desistance: An Examination of Different Operational Definitions of Desistance on the Motivations, Methods, and Consequences Associated with Leaving the Gang*, 38 CRIM. JUST. REV. 510 (2014).

Some of the more notable gang interventions include the Comprehensive Gang Strategy, Boston Ceasefire, and the Los Angeles Gang Reduction and Youth Development (GRYD) strategy. The Comprehensive Gang Strategy involves a wide variety of interventions such as the Community Wide Approach to Gang Reduction (Mesa, Riverside, San Antonio, Bloomington-Normal and Tucson),<sup>56</sup> Safe Futures (St. Louis, Imperial Valley, Boston, Seattle, Fort Belknap and Contra Costa),<sup>57</sup> and the Little Village Project. All of these interventions are united by their adherence to the Comprehensive Gang Strategy developed by Dr. Irving Spergel. These efforts combined prevention, intervention and suppression. The results of external evaluations demonstrate that the model is extremely difficult to implement, but that when implemented fully, some reductions in gang crime are produced. Boston Ceasefire was a response to youth violence and homicide in Boston.<sup>58</sup> It was a “smart” intervention in the sense that the operational staff (law enforcement, probation, outreach workers, ministers and youth workers) was guided by the research team. The research team (David Kennedy and Anthony Braga) used mapping, network analysis, and other social-science analytical tools to identify patterns, places and motivations for violence (including gang violence). Significant reductions in youth homicide were observed, though there is ongoing debate about the long-term effectiveness of the intervention. The lasting takeaway for gang intervention, however, is that Boston Ceasefire demonstrated that it is possible to form a coalition of law-enforcement, social-service, clergy, and probation efforts to address a problem. Chicago Ceasefire was a related program that was built on public-health principles of violence prevention and depended heavily on outreach workers to act as “violence interrupters.” Finally, GRYD is notable because it represented a political triumph over territoriality on the part of politicians and social-service agencies. GRYD emerged from the reform efforts of the Los Angeles mayor and City Council to combine all of the existing funding for gang prevention and intervention programs into a single initiative. GRYD used research (mapping, police data, school data, and youth surveys) to identify risk areas, risk factors, and concentrations of gang crime. The evaluation showed some reductions, but not consistently across the city.

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56. JAMES C. HOWELL, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, U.S. DEP'T. OF JUSTICE, YOUTH GANG PROGRAMS AND STRATEGIES 34-37 (2000), <https://www.ncjrs.gov/pdffiles1/ojjdp/171154.pdf>.

57. ELAINE MORLEY ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, U.S. DEP'T. OF JUSTICE, COMPREHENSIVE RESPONSES TO YOUTH AT RISK: INTERIM FINDINGS FROM THE SAFE FUTURES INITIATIVE (2000), <https://www.ncjrs.gov/pdffiles1/ojjdp/183841.pdf>.

58. *Program Profile: Operation Ceasefire (Boston, Mass.)*, NAT'L INST. OF JUSTICE, [https://www.crimesolutions.gov/ProgramDetails.aspx?ID=207\\_](https://www.crimesolutions.gov/ProgramDetails.aspx?ID=207_)

The state of research and practice in responding to gangs has not advanced to the point where it is possible to identify “best” practices, something akin to what is available in outlets such as the University of Colorado Blueprints for Healthy Youth Development. There are many resources available, including a guidebook on prevention by the Centers for Disease Control and the National Institute of Justice as well as a *Strategies to Prevent Gang Crime* published by the Office of Community Oriented Policing.<sup>59</sup> That said, the state of knowledge does support the following generalizations. First, no single response to gangs is likely to be successful, because the problem of gangs, gang members and gang behavior is complex and requires multiple responses. Second, the dose must match the magnitude of the problem. That is to say, where the gang problem is deeply entrenched (for example, cities like Chicago and Los Angeles), multifaceted, long-term strategies must be initiated. In other cities, where the gang problem is emergent, a lower level of intervention may be necessary. Third, the response must be tailored to the individual level of gang involvement. Serious and chronic gang members who engage in high levels of violent crime will require the suppression activities of the criminal justice system. Youths who live in neighborhoods plagued by gang violence who have not joined gangs will need substantial prevention and perhaps intervention services. Fourth, every intervention needs a well-defined problem statement, a carefully articulated intervention, and must be evaluated with a rigorous research design. Finally, while more complex to design and implement, comprehensive interventions are most likely to produce positive outcomes. Such interventions must involve law enforcement, community, education, juvenile justice, NGO, and the private sector.

The gang problem did not emerge overnight and won’t be solved with quick-fix responses. Communities must adopt long-term strategies to respond to the multiple layers of gang problems while addressing the more proximate or immediate output of gangs, such as gun violence, drug sales and threats to the socializing power of families, employment and schools.

## CONCLUSION

What does the future hold for gangs? There is widespread media speculation that many gang members are radicalized, especially in prison. At this point, there is little credible evidence to support this assertion rather than anecdotal evidence. The lack of ideological beliefs and political motivations seem to be the major reasons why this is the case.<sup>60</sup> The Internet also presents opportunities

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59. SCOTT H. DECKER, OFFICE OF COMMUNITY ORIENTATED POLICING SERVICES, U.S. DEP’T OF JUSTICE, *STRATEGIES TO ADDRESS GANG CRIME: A GUIDEBOOK FOR LOCAL LAW ENFORCEMENT* (2008).

60. Scott H. Decker & David Pyrooz, *Gangs, Terrorism, and Radicalization*, 4 J. STRATEGIC SECURITY 151 (2011).

for criminal involvement on the part of gangs. Gang members are usually teenagers and use the Internet for social media and for symbolic reasons rather than instrumental reasons.<sup>61</sup> Finally, as marijuana becomes more socially and legally accepted, it will be interesting to see how gang members who deal drugs will respond to those legal changes. As legal marijuana begins to saturate the market, it is possible that violence will break out for limited profits or dealers will begin to push harder drugs.

While concentrated economic and social disadvantage are associated with the presence of gang crime, social processes also play an important role in such events. A large proportion of gang violence involves retaliation and often has a contagious character to it. The links between street gangs and prison gangs are important and many incidents in prison are linked to the street. The role of prison gangs has especially important consequences for current re-entry initiatives. Involvement in prison gangs may thwart community re-integration and make transition to the community more difficult for such individuals. The problems of youth gangs and violent behavior are no longer confined to the United States. The prospect of youth gangs becoming an entrenched part of global youth culture is enhanced by the Internet and social media.

### RECOMMENDATIONS

Collaborative efforts and comprehensive strategies are needed to better understand gangs and minimize the threats they pose.

1. **Build a strong information network.** Multiple sources of information (law enforcement, school, prison, community, gang members) are needed to develop a solid knowledge of gangs and their members.
2. **Take a comprehensive approach.** Effective responses to gangs involve multiple agencies and different activities. Examples are outlined in the Healthy Community Pyramid in this chapter, and in the Comprehensive Gang Strategy.<sup>62</sup> Maintaining partnerships among different agencies can be difficult, but it is essential.
3. **Expand the focus of law enforcement.** Gangs are opportunistic and involved in a variety of offenses, particularly drug sales and violence. Thus a focus on a single offense type by police and prosecutors is likely to be ineffective.

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61. Pyrooz, Moule & Decker, *supra* note 42.

62. *OJJDP Comprehensive Gang Model*, NAT'L GANG CENTER, <https://www.nationalgangcenter.gov/Comprehensive-Gang-Model>.

4. **Intervene early.** Because the risk factors for delinquency and gang membership overlap so strongly, delinquency interventions offer great promise. Multiple intervention points should be utilized, including family, school, social service, recreation, and employment.
5. **Closely monitor the reentry process:** As a large number of gang members go to prison, their reentry is important to community safety. Often gang members return to the community no better—or even worse—than when they left for prison. Gang members returning from prison need close supervision and high-intensity levels of programming.



# Criminalizing Immigration

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*Over the past two decades, criminal justice systems at both the federal and the state level have been transformed to serve the goals of immigration law. Criminal justice reform efforts therefore must attend to the interdependence of the immigration and criminal enforcement systems. This chapter maps out those interdependencies and identifies resulting problems and pathologies. The chapter then proposes modest reforms, including an explicit move away from tolerance for racial profiling in immigration policing; sub-federal disentanglement from federal immigration enforcement; and greater willingness on the part of federal immigration enforcement officials to accept cues of leniency from state criminal justice actors when exercising federal immigration enforcement discretion. Generous immigration reform and the decriminalization of many migration-related offenses are needed to truly overcome the ongoing criminalization of millions of people whose only error was taking up work and residency in the U.S. without civil authorization. But the narrower proposals offered here provide a starting point for avoiding the burgeoning second wave of racialized mass incarceration spurred by this new wave of mass criminalization.*

## INTRODUCTION

For the past 20 years, scholars working at the intersection of criminal law and immigration law have documented the effects that these two bodies of law have on one another. Serious criminal convictions have long triggered possible deportation or exclusion (collectively known in immigration law as “removal”). But in the mid-1990s, Congress significantly expanded the range of removable offenses and eliminated many possible avenues of relief. This spurred great introspection in immigration scholarship about the criminalization of migration.

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The changes to immigration laws did not happen in isolation. Criminal enforcement systems have changed as well. These changes are not just the increasing severity in both the immigration and criminal sphere, although the well-documented severity turn in both spheres is an important part of the story. Criminal laws, procedures and enforcement practices also have changed—sometimes protectively but often punitively—in response to concerns about immigration.

The federal criminal system, for example, has increasingly focused prosecutorial resources on immigration-related crimes, particularly on misdemeanor illegal entry and felony reentry. The resulting high-volume prosecution of immigration crimes has converted federal courts along the southern border into sites of mass criminal processing. This, in turn, has produced a significant demographic shift in the federal penal system.

At the sub-federal level, the looming back-end consequence of removal has prompted state and local officials to revise their own criminal laws and procedures. Some jurisdictions have done so in ways intended to protect residents from undesirable entanglement with the immigration system, while many others have sought to strengthen the pipeline from the criminal enforcement system to the immigration system.

Motivated by immigration law-related goals, legislators and administrators have: changed states' substantive criminal law; incentivized new forms of criminal prosecutions; influenced county officials' bail determinations and decision-making about access to diversionary programs; constrained and shaped plea negotiations; and, ultimately, set the stage for the differential punishment of foreign nationals. Street-level policing practices have also changed to accommodate immigration goals, with some jurisdictions targeting immigrant communities for more aggressive enforcement efforts, and others revising their arrest and detention policies to minimize contact between their systems and the federal immigration enforcement apparatus.

This chapter explores these developments. Part I explains the changes in the areas of immigration and criminal law at the federal level. Part II focuses on the sub-federal criminalization of migration in both its substantive and procedural forms. Part III then synthesizes the available information concerning the nexus of criminal and immigration law to offer some reform proposals.

## I. FEDERAL “IMMIGRATIONIZATION” OF CRIMINAL PROCESS

For well over a century, the immigration laws of the United States have made criminal convictions a key criterion for sorting immigrants.<sup>1</sup> Defined classes of criminal convictions are removable offenses, and removal for such offenses is sometimes mandatory under the statute.<sup>2</sup> At the dawn of the 20th century, such removals were limited by statute to a defined period of years after entry, but that has changed dramatically over the past century.<sup>3</sup> Many convictions now trigger removal regardless of how long ago an individual entered the country or how long ago the offense was committed. Convictions can also be made into deportable offenses retroactively. Daniel Kanstroom described these changes in law as creating a shift from deportation as a means to correct errors in the admissions process to deportation as a form of post-entry social control.<sup>4</sup> Adhering to the 19th-century legal doctrines that predated this shift, constitutional case law treats immigration as a civil system rather than a form of punishment.<sup>5</sup> In reality, deportation and its contingent processes, including immigration detention, have been used punitively for many decades.<sup>6</sup> But recent trends have made this far more plain to see.

In 1996, Congress broadened significantly the class of criminal convictions that can result in removal and severely narrowed the availability of discretionary relief.<sup>7</sup> Congress also expanded the category of individuals subject to mandatory civil detention during removal proceedings and pending their ultimate removal.<sup>8</sup> Following the reorganization of the Immigration and Naturalization Service (INS) into three different agencies within the Department of Homeland Security (DHS) in 2003, congressional appropriations for immigration enforcement

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1. “Removal” is a legal term of art that includes both deportation and exclusion. Generally speaking, deportation grounds apply to individuals who have been formally admitted. *See* 8 U.S.C. § 1227. Individuals who have not been formally admitted to the United States (regardless of length of residency) are governed by the statute’s inadmissibility grounds. *See* 8 U.S.C. § 1182.

2. *See, e.g.*, 8 U.S.C. § 1227(2)(A)(iii).

3. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 200-13 (2007).

4. *Id.*

5. *Id.*

6. *See, e.g.*, Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); *see also* Cesár Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014).

7. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843-46 (2007).

8. *See, e.g.*, Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343 (David A. Martin & Peter H. Schuck eds., 2005).

soared.<sup>9</sup> As a result of these developments, increasing numbers of foreign nationals—particularly those lawfully present—have experienced the harsh effects of changes in law and policy that target “criminal aliens,” broadly defined.

Immigration scholars have been attentive to this punitive turn in the realm of civil immigration law. Many have noted that the close linkage between criminal conduct and removal, and legislators’ assertions that the linkage was intended as a punitive measure, call into question the legal framing of removal as “civil.”<sup>10</sup> This, in turn, suggests that immigration proceedings ought not to be immune from many of the procedural protections attached (at least theoretically) to the criminal process. Immigration scholars also have raised questions about the harsh immigration detention system. Federal legislators and executive-branch officials have justified the ongoing rapid expansion of immigration detention on both retributive and general deterrence grounds that seem ill-suited to a purportedly civil system.

But the civil immigration system is not the only place where this punitive turn in immigration policy has taken hold. The nation’s criminal enforcement systems also have been transformed to manage migration through the enforcement of criminal laws. The discussion below examines these changes at the federal level. Part A focuses on federal criminal prosecutions of migration crimes. Part B focuses on aspects of the federal civil immigration system that rely upon sub-federal criminal justice enforcement mechanisms.

#### A. FEDERAL CRIMINALIZATION OF MIGRATION

Immigration offenses like human smuggling and harboring have been on the books for decades, but historically, prosecution rates were negligible in the federal criminal scheme. Over the past two decades, the federal government has prioritized the prosecution of immigration and immigration-adjacent offenses over all other offenses. By 2011, immigration offenses were the single largest category of federal criminal prosecutions, and the bulk of those prosecutions were for misdemeanor illegal entry and felony reentry.<sup>11</sup> The aggressive

9. See, e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 630-35 (2012); see also DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013).

10. Cf. *Padilla v. Kentucky*, 559 U.S. 356 (2010) (rejecting efforts to characterize deportation as a criminal sanction but noting that it was also different from other civil collateral consequences).

11. See, e.g., U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2016 (June 2017); see also Chacón, *supra* note 9 (summarizing earlier trends).

expansion of immigration prosecutions leveled off at that time, but in 2016, immigration offenses were still the second-largest category of federal offenses (29.3%), barely trailing federal drug offenses (31.6%).<sup>12</sup>

Moreover, as Mona Lynch has observed, the drug prosecutions in the southern border region are structured to maximize immigration-control effects. As she puts it, “immigration policy has become so criminalized here that the immigrant status rather than criminal status of the defendants in drug cases drives the adjudicatory logics and practices.”<sup>13</sup> Prosecutors use high-volume drug plea strategies as a blunt instrument to support border control goals. A single southern border district accounted for 83% of the federal government’s felony drug possession convictions at the time of Lynch’s study,<sup>14</sup> and these drug convictions are serving as part of a broader immigration control strategy.

The federal strategy of disproportionately deploying criminal enforcement resources to the southern border has changed the complexion of the federal prison system. By 2016, the Federal Sentencing Commission reported that 52.7% of all federal prisoners were Hispanic.<sup>15</sup> The focus on the southern border region also helps to explain why more than 40% of federal prisoners are foreign nationals. This is particularly jarring given the extensive literature documenting the fact that foreign nationals are less likely to commit crimes than their citizen counterparts and that cities with substantial immigrant populations tend to be safer than those with small immigrant populations.<sup>16</sup>

The mass prosecutions of immigration and immigration-adjacent crimes in the southern border region have also transformed criminal court processes and logics in federal criminal courts. Misdemeanor illegal-entry pleas are counseled only nominally, with 6 to 10 defendants pleading at a time with the assistance

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12. See U.S. SENTENCING COMM’N, *supra* note 11, at 2, 9.

13. Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, 57 BRIT. J. CRIMINOLOGY 112, 117 (2015).

14. *Id.* at 120.

15. U.S. SENTENCING COMM’N, *supra* note 11. For a discussion of the impact of race on sentencing, see Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

16. Robert Adelman et al., *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. ETHNICITY IN CRIM. JUST. 52 (2016) (discussing how immigration is consistently linked to decreases in violent (e.g., murder) and property (e.g., burglary) crime throughout the time period); Bianca Bersani, *An Examination of First and Second Generation Immigrant Offending Trajectories*, 31 JUST. Q. 315 (2012) (“Foreign-born individuals exhibit remarkably low levels of involvement in crime across their life course”); Robert J. Sampson, *Rethinking Crime and Immigration*, CONTEXTS, Jan. 2008, at 28.

of one public defender.<sup>17</sup> The Federal Rules of Criminal Procedure concerning plea agreements are violated systematically in these procedures.<sup>18</sup> Equities like family ties and work connections in the U.S. are used against defendants in sentencing rather than in their favor; courts view evidence of community ties as proof that an individual is likely to “recidivate” by attempting to return to their families in the U.S.<sup>19</sup> Meanwhile, felony reentrants are sentenced much more harshly than similarly situated defendants without a prior immigration history, and the terms to which they are sentenced vary greatly depending on where they are sentenced.<sup>20</sup>

There is no good empirical evidence that this costly prosecution approach acts as a deterrent to unauthorized migration, let alone that it is cost-effective. As with the drug war, a social phenomenon that might be more productively and humanely addressed through other legal and social mechanisms is instead wrongheadedly managed through the criminal justice system. Society is only now awakening to the notion that the war on drugs might have been better fought through public-health and economic programs.<sup>21</sup> We should not wait for many years and witness millions of additional incarcerations, largely of Latinos prosecuted along the southern border, before we recognize that unauthorized migration would be better managed through effective labor policy, foreign policy, and civil and administrative migration management policies.

## **B. FEDERAL CIVIL IMMIGRATION ENFORCEMENT THROUGH SUB-FEDERAL CRIMINAL SYSTEMS**

The discussion above involves federal immigration enforcement actors working in the federal criminal system, but the federal government has also enticed and drafted sub-federal criminal enforcement actors into the project of civil migration control. For many years, the federal government used its own personnel to screen arrestees in the nation’s prisons and jails through the “Criminal Alien Program,” or CAP. CAP officials identify foreign nationals

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17. Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM. L. REV. SIDEAR 135, 142 (2009). Cf. Alexandra Natapoff, “Misdemeanors,” in the present Volume; Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report.

18. See, e.g., *United States v. Escamilla Rojas*, 640 F.3d 1055 (9th Cir. 2011); *United States v. Roblero-Solis*, 588 F.3d 692, 694–700 (9th Cir. 2009).

19. See, e.g., Lynch, *Backpacking the Border*, *supra* note 13, at 129. Cf. John Monahan, “Risk Assessment in Sentencing,” in Volume 4 of the present Report.

20. *Id.*; see also Alison Seigler, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT’G REP. 299 (2009).

21. For discussions of the drug war and legalization efforts, see Jeffrey A. Miron, “Drug Prohibition and Violence,” in the present Volume; and Alex Kreit, “Marijuana Legalization,” in the present Volume.

who are potentially removable and initiate removal proceedings when they deem it appropriate. In 2009, 48% of individuals apprehended by the DHS were screened through CAP.<sup>22</sup>

In recent years, CAP screening has been supplemented by more comprehensive database screening under the moniker of “Secure Communities.” This program, which was operating nationwide by 2013, required the fingerprints of all state and local arrestees to be run through the DHS’s IDENT database to determine the immigration history of the arrestee.<sup>23</sup> Unlike CAP, which places federal agents in state and local facilities either physically or virtually, Secure Community effectively makes state and local law enforcement front-line immigration screeners. Their arrest decisions are the “discretion that matters” when it comes to determining whether or not the DHS receives information about the individuals with whom they interact.<sup>24</sup> If an individual is found to be in violation of immigration law, federal agents can issue a detainer request (known informally as an “ICE hold”), asking the state or local entity to hold the individual for up to 48 additional hours while ICE makes arrangements to take custody.<sup>25</sup> This is true whether or not the state or local jurisdiction decides to pursue criminal charges, meaning that any contact with law enforcement is sufficient to trigger potential federal intervention regardless of criminal culpability.

After its rollout, the Secure Communities program faced a barrage of criticisms. Researchers found that the program had no effect on crime rates,<sup>26</sup> advocates argued that it decreased community trust of state and local law enforcement, and the government’s own statistics revealed that the majority of foreign nationals removed as a result of the program were low enforcement priorities.<sup>27</sup> The criticisms ultimately prompted the Obama administration to scale back the program, replacing it with the “Priority Enforcement Program,”

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22. MEISSNER ET AL., *supra* note 9 at 101.

23. *Id.*; see also Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013).

24. Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).

25. See, e.g., Christopher Lasch, *The Faulty Legal Arguments Behind Immigration Detainers*, PERSPECTIVES, Dec. 2013, at 1.

26. See, e.g., Cox & Miles, *supra* note 23.

27. *Secure Communities and ICE Deportation: A Failed Program?*, TRAC, <http://trac.syr.edu/immigration/reports/349> (last visited Apr. 8, 2017).



which would continue the mandatory database screening but would more rigorously adhere to stated enforcement priorities in setting determinations about whom to detain and deport.<sup>28</sup>

Notwithstanding the robust evidence of the shortcomings of Secure Communities, in his executive order of January 25, 2017, President Trump reinstated the program and eliminated the enforcement priorities set by the previous administration. Trump's executive order prioritizes anyone with a criminal record, anyone arrested, anyone who commits criminal acts (whether or not arrested), anyone with a purported gang affiliation,<sup>29</sup> and anyone deemed by an immigration judge to be a threat to public safety. Any foreign national whose data flows through the Secure Communities program will be an enforcement priority by definition because of their arrest, apparently regardless of their immigration status, and regardless of whether they are ever charged with, let alone convicted of, a crime.

Another set of criticisms of Secure Communities concerned the immigration detainers that create the pipeline between the state or local prison or jail and the immigration detention and removal system. ICE would issue detainer requests to localities when a database screening identified a person of interest to immigration enforcement officials, and the state or local entity that had custody of the individual was asked to hold the person for up to 48 hours to give ICE an opportunity to take custody.

Some states and localities bristled when forced to bear the costs of federal immigration enforcement by detaining individuals beyond their release date at the request of ICE.<sup>30</sup> In many of these jurisdictions, matters came to a head when detainees began to sue county facilities for holding them beyond their release date on the basis of nothing more than a federal request. Courts began to award damages to redress this violation of their Fourth Amendment right against unreasonable seizure, holding that detainer requests issued without a warrant or probable cause provided no basis for prolonged detentions.<sup>31</sup> As a

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28. See, e.g., Memorandum from Jeh Charles John, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement et al. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

29. On the dangers of over-ascription of gang membership to Black, Latino and Asian youth, see generally SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA* 459-60 (5th ed. 2012).

30. Christopher Lasch, *Preempting Immigration Detainer Enforcement*, 3 WAKE FOREST J. L. & POL'Y 281, 288-89 (2013).

31. *Miranda-Olivares v. Clackamas County*, No. 3:12-CV-02317-ST, 2014 WL 1414305, \*4-\*8 (D. Or. Apr. 11, 2014) (finding holds executed pursuant to an ICE request lacked basis in law and constituted a Fourth Amendment unreasonable seizure).



result, many states and localities have now enacted policies instructing officials not to prolong detentions based on an ICE detainer request.

Some sub-federal cooperation in immigration enforcement is governed by contract. In section 287(g) of the Immigration and Nationality Act (INA), Congress authorized state and local law enforcement agents to act in the capacity of federal immigration enforcement agents when trained and supervised by DHS agents.<sup>32</sup> The resulting “287(g) agreements” proliferated during the Bush administration. But after a January 2009 report by the U.S. Government Accountability Office (GAO) found serious shortfalls in supervision, documentation, and data collection under these agreements,<sup>33</sup> the Obama administration scaled back the 287(g) programs. The federal government canceled agreements that purported to give local agents the capacity to investigate immigration status as part of their ordinary policing functions, leaving in place only those agreements that allowed certain local agents to screen inmates for immigration violations in jails.

Several studies concluded that 287(g) agreements fueled racial profiling, and the DOJ also initiated investigations into jurisdictions where there were credible reports that 287(g) investigative powers were being used in racially discriminatory ways. An agreement with Maricopa County, Arizona, was canceled when experts found that Latino drivers were four to nine times as likely as similarly situated drivers of other races to be stopped by the police. Critics continue to observe substantial variation in how 287(g) agreements are implemented across jurisdictions, and overall, “the program does not target primarily or even mostly serious or dangerous offenders.”<sup>34</sup> One study concluded that about half of the individuals identified for removal through 287(g) programs were guilty of misdemeanors and traffic violations.<sup>35</sup>

Obama’s rollback of the 287(g) program was initiated in response to the problems identified by studies of the program. President Trump’s executive order of January 25 calls for reinvigoration of the 287(g) program, however, raising questions as to whether the federal government plans to screen out localities that engage in racial profiling and whether the administration will prioritize training and data collection that was found lacking in prior iterations of the program.

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32. 8 U.S.C. § 1357(g) (codifying section 287(g)).

33. U.S. GOV’T ACCOUNTABILITY OFFICE, BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009), <http://www.gao.gov/products/GAO-09-109>.

34. RANDY CAPPS ET AL., MIGRATION POL’Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2011).

35. Matthew Coleman, *The “Local” Migration State: The Site-specific Devolution of Immigration Enforcement in the U.S. South*, 34 LAW & POL’Y 159 (2012).

## II. SUB-FEDERAL CRIMINALIZATION OF MIGRATION

In addition to their participation in federal immigration enforcement schemes, state and local law enforcement also play an independent role in shaping immigration policy through the choices they make in their own criminal-enforcement practices. First, as previously noted, states and localities are effectively required to share arrest data with the DHS through Secure Communities and related programs. This has prompted some localities to change their arrest and detention practices to minimize immigration screening for residents on the basis of minor offenses and infractions. Santa Clara County, California, for example, initiated changes to its arrest and detainer policies when county officials were informed that they could not opt out of Secure Communities.<sup>36</sup> Other municipalities followed suit.<sup>37</sup> California later passed legislation prohibiting state and local law enforcement from detaining individuals pursuant to an ICE detainer request unless the individual fit into certain statutorily defined categories of higher-risk detainees.<sup>38</sup> At this time, at least 4 other states and 18 other cities and counties have done the same.<sup>39</sup> In contrast, states and localities that do not wish to shield immigrant residents from immigration enforcement have added incentives to arrest suspected foreign nationals, and some choose to comply with detainer requests notwithstanding the liability risks involved.

States and localities can and do exercise immigration discretion at every stage of the criminal process, including investigative practices, arrest decisions, booking practices, bail determinations, pretrial diversion decisions, charging,

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36. EDGAR AGUILASOCHO ET AL., MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 4-7 (2012), [http://www.law.uci.edu/academics/real-life-learning/clinics/MisplacedPriorities\\_aguilascho-rodwin-ashar.pdf](http://www.law.uci.edu/academics/real-life-learning/clinics/MisplacedPriorities_aguilascho-rodwin-ashar.pdf).

37. *Id.*

38. CAL. GOV'T CODE § 7282.5 (California TRUST Act).

39. *Locally Policies Nationally*, CAL. TRUST ACT, <http://www.catrustact.org/local-policies-nationally.html> (last visited Apr. 8, 2017). The site lists Miami-Dade County, but that county has recently withdrawn its protections in the face of the Trump administration's threats to withdraw funds from "sanctuary cities." See also Patricia Mazzei, *Miami-Dade Mayor Orders Jails To Comply With Trump Crackdown On 'Sanctuary' Counties*, MIAMI HERALD (Jan. 26, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/article128984759.html#storylink=cpy>. Policies like the California TRUST Act are not actually "sanctuary" policies at all. Trump's executive order defines that concept as involving a violation of 8 U.S.C. §1373, and that provision does not appear to be violated in any way by the non-detainer policy outlined in the TRUST Act. But some states, cities and counties, including California, are now contemplating the passage of even more protective ordinances in the wake of Trump's election.

plea bargaining, sentencing, and corrections.<sup>40</sup> At each stage of the process, criminal-enforcement actors can take immigration status into account in ways that either maximize or minimize the impact of immigration status on the criminal process.<sup>41</sup> For example, prosecutors can work with defenders to structure pleas that do not trigger mandatory deportation, or they can aggressively pursue pleas that maximize the likelihood of deportation in addition to the criminal punishment. A neutral stance toward immigration status in the criminal process can result in unintended and harsh immigration consequences for relatively minor criminal charges, so efforts to minimize the immigration consequences of criminal proceedings often require explicitly taking alienage into account in order to ensure the avoidance of immigration consequences when that outcome is seen as desirable.<sup>42</sup>

Some states and localities have actively sought to use their criminal-enforcement systems to promote immigration enforcement. Arizona's S.B. 1070, which sought to create a number of immigration crimes that purportedly complemented federal immigration law, is the best known example.<sup>43</sup> In *Arizona v. United States*, the Supreme Court struck down portions of S.B. 1070 that would have made it a state crime to work without authorization or to solicit day labor.<sup>44</sup> But the Court left intact a provision that required law enforcement agents in Arizona to enquire about immigration status during otherwise lawful stops and to communicate this information to the federal government whenever practicable.<sup>45</sup> By leaving open the door for sub-federal immigration policing, *Arizona v. United States* creates only a limited check on the practice of using state law tools to target immigrants assumed to be unauthorized. The decision may rule out state immigration laws, but the same effect can often be achieved through alternative routes.

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40. For an excellent discussion of the ways that immigration policy preferences can affect each stage of the proceedings, see Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variations in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1146-55 (2013).

41. *Id.* at 1157-1195 (describing three models for jurisdictions with differing practices: an "alienage neutral model," which attempts to neutralize the effects of immigration status on the criminal process by discouraging investigations into immigration status during routine policing and when structuring bail, pleas and sentences to minimize the impact of immigration status; an "illegal alien punishment model," which seeks to use the levers of the criminal justice system to ensure that unauthorized migrants are treated more harshly in the system than other defendants; and an "immigration enforcement model," which actively seeks to use state law to create potential immigration consequences and to funnel foreign nationals into federal detention and removal).

42. *Id.*

43. ARIZ. REV. STAT. ANN. § 11-1051.

44. *Arizona v. United States*, 567 U.S. 387 (2012).

45. *Id.*

For many years before S.B. 1070, jurisdictions like Arizona used their human-smuggling laws, anti-trafficking laws, and identity-theft laws to target unauthorized migrants. Arizona's practice of prosecuting immigrants for self-smuggling so clearly served as immigration enforcement tools that courts found that the self-smuggling law was pre-empted by federal immigration law.<sup>46</sup> But the state's identity theft laws, which have also blatantly been used to target undocumented residents, have managed to survive judicial challenge, suggesting that states and localities have significant capacity to manipulate their criminal laws and enforcement policies to serve their own immigration enforcement objectives.

### III. RETHINKING CRIMMIGRATION

The above discussion illustrates the many linkages and synergies between the nation's criminal justice systems and the immigration enforcement system. Federal immigration agents and federal courts and agencies obviously play a role in enforcing immigration law. But this discussion reveals the extent to which beat police officers, state prosecutors, probation officers, county sheriffs, state court judges, and federal prosecutors all make decisions that structure the priorities and shape the reach of the nation's immigration enforcement system. In some ways, they are just as important as the federal immigration bureaucracy in structuring U.S. immigration priorities. Immigration judges hear only about 17% of removal cases<sup>47</sup> and have very little discretion to stay removal in the cases that they do hear. Once individuals enter the removal system through the criminal justice system, there are few exit ramps. Numerically, state and local law enforcement agents are also more influential than federal immigration agents, who are responsible for far fewer front-line detentions of removable foreign nationals. Unsurprisingly, sub-federal law enforcement agents have been identified as important "force multipliers" in immigration enforcement efforts.

Scholars of immigration law and policy generally tend to agree that the immigration enforcement system is inhumane,<sup>48</sup> costly,<sup>49</sup> and surprisingly

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46. See generally Ingrid V. Eagly, *Local Immigration Prosecutions: A Study of Arizona Before S.B. 1070*, 58 UCLA L. REV. 1749 (2011).

47. ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (2014), <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom>.

48. See, e.g., BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY AND IMMIGRATION POLICY* (2006).

49. See, e.g., MEISSNER ET AL., *supra* note 9 (estimating that the U.S. spends over \$18 billion on immigration enforcement each year).

counterproductive.<sup>50</sup> There is no good empirical evidence that substantiates the effectiveness of ongoing efforts to manage migration through the criminal justice system. Unfortunately, public opinion on immigration is often premised upon serious misconceptions concerning the U.S. immigrant population.<sup>51</sup> Given the resulting political popularity of this approach among certain political constituencies, one might wonder whether the laws and policies at the heart of the criminal-immigration nexus are actually a worthy focus for bipartisan criminal justice reform. In many quarters, the widespread diffusion of enforcement responsibilities and the resulting ubiquity of immigration enforcement are politically popular, particularly when such efforts are perceived as targeting “criminal aliens.”<sup>52</sup>

But in fact, the success of broader criminal justice reform depends upon our ability to achieve some degree of bipartisan consensus to reform the laws and policies that criminalize migration and migrants. The current focus on punishing immigration through the criminal justice systems at the federal and state levels does not just echo the policies of the failed war on drugs, but it actually opens up a new front in that war,<sup>53</sup> raising the specter of a new wave of racialized mass incarceration.<sup>54</sup> Those hoping to reform criminal justice systems without paying attention to the increasing criminalization of migration are unlikely to succeed, because systemic choices around migrant criminalization are increasingly fueling the wide-scale criminalization and incarceration of Latinos.<sup>55</sup>

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50. See, e.g., Douglass Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J. SOC. 1557 (2016) (concluding that hard line border enforcement policies perversely increased the size of the settled unauthorized population in the U.S.).

51. Vivian Yee et al., *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html> (reporting that more than 60% of the unauthorized population has been present for 10 years or more and less than 20% of that population has been present for less than 5 year). Mexicans account for over half of these unauthorized residents, although individuals from parts of Central America, China and India are also well-represented. *Id.*

52. For an early endorsement of the devolution of immigration enforcement authority in this context, see Peter Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL'Y 367 (1999).

53. Lynch, *supra* note 13.

54. See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. Rev. 1457 (2014); Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a Post-Racial World*, 76 OHIO ST. L.J. 599 (2015). For a discussion of mass incarceration, see Todd R. Clear & James Austin, “Mass Incarceration,” in Volume 4 of the present Report.

55. See, e.g., Vazquez, *supra* note 54.

Developments in criminal-enforcement systems that unfurled during the war on drugs supply the mechanisms for the current overcriminalization of migration. Vast federal enforcement resources are shuffled between the federal prosecution of drug and immigration crimes in border regions, but they also fuel the efforts of sub-federal enforcement agencies. The severity of federal immigration law is amplified when the federal government steps in to prevent states from engaging in drug decriminalization<sup>56</sup> or the creation of immigration “sanctuaries.”<sup>57</sup>

As with the war on drugs, now that issue entrepreneurs have encouraged states and localities to view immigration enforcement as one of their own enforcement prerogatives, and one that is inextricably linked with anti-crime efforts aimed at controlling risky populations, the federal government has lost some of the levers necessary to exert control over the specific dimensions of sub-federal immigration enforcement efforts. The federal government can ramp up, but often cannot scale back, the use of sub-federal criminal-enforcement resources on immigration control.<sup>58</sup> Also, as with the war on drugs, when the federal government encourages the ramping up of enforcement efforts at all levels of government, the results are costly and punitive policies that have no beneficial effect on public safety commensurate to the harms they generate.

To prevent the ongoing criminalization of migration from ultimately paralleling the worst failures and excesses of the war on drugs, there are three issues that require immediate attention and reform: the insufficient restrictions on racial profiling in immigration policing; the growing lack of state and local

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56. The removal provisions pertaining to drug use are some of the harshest and most irrational in the immigration code. See Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163 (2008). State decriminalizations of drugs do not necessarily solve this problem for foreign nationals because the federal government can still prosecute these removable offenses. See *Gonzalez v. Raich*, 545 U.S. 1 (2005) (upholding Congress’s ability to regulate the cultivation of marijuana for personal, compassionate use, notwithstanding state law permitting such use). Attorney General Sessions has suggested that he does not intend to be bound by state drug decriminalizations, although he seemed to back away from his stronger prohibitionist stance during his confirmation hearings. See Tom Huddleston, Jr., *What Jeff Sessions Said About Marijuana in His Attorney General Hearing*, FORTUNE (Jan. 10, 2017), <http://fortune.com/2017/01/10/jeff-sessions-marijuana-confirmation-hearing>.

57. President Trump has been very vocal about his opposition to sanctuary cities, and has threatened to cut off federal funding to them, although the targets of these possible funding cuts are very narrowly defined in his executive orders to date. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017) (defining sanctuary jurisdictions as those that “willfully refuse to comply” with the requirement in 8 U.S.C. § 1373 that states not interfere with the ability of their employees to communicate with federal immigration agents). Few if any jurisdictions colloquially labeled “sanctuary cities” actually fall within this definition.

58. Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS J. 577 (2012).

autonomy to pursue integrationist public safety policies; and the need for greater rationalization of the criminal-immigration law nexus. Reforms around the first two issues can be achieved at the state and local level without federal intervention, although federal participation would be beneficial; however, the last will require federal action.

### A. RACIAL PROFILING

First, immigration policing is one of the few areas where the courts and the executive branch continue to expressly sanction the use of racial profiling.<sup>59</sup> This has remained true even after the Department of Justice prohibited the use of racial profiling in other forms of policing; the exception for immigration policing was retained by the Department of Justice in its 2014 memorandum prohibiting racial profiling.<sup>60</sup>

The enabling case law and the policies implementing it rest upon stated assumptions that the law-enforcement agents relying on these forms of profiling will have a certain level of expertise in immigration enforcement that will allow them to assimilate the information about race into their superior training to attain accurate results.<sup>61</sup> In other words, these cases generally assume that trained federal immigration agents are responsible for immigration enforcement and that they know when and how racial markers provide evidence of immigration status. If this were ever true even as applied to federal officers, it is increasingly difficult to credit as society becomes more multi-racial and multi-ethnic.<sup>62</sup> It is also impossible to justify the extension of this notion of expertise to every state and local law-enforcement agent with an interest in immigration enforcement.

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59. *Id.* at 606-07; Kevin R. Johnson, *How Racial Profiling in America Became the 'Law of the Land': United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L. J. 1005 (2010); Kevin R. Johnson, *Racial Profiling in the "War on Drugs" Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 MICH. J. L. REFORM 967 (2015).

60. U.S. DEP'T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (2014) [hereinafter DOJ GUIDANCE], <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

61. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

62. See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (finding Mexican appearance an inadequate justification for a stop given the large, lawfully present population of Latinos in Southern California). *But see United States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006) (applying *Brignoni-Ponce* and affirming a stop based largely on racial profiling in Montana, where the Latino population is small).



The harms of racial profiling are discussed extensively in other chapters of this volume.<sup>63</sup> Racial profiling is largely ineffectual as an investigative strategy, and it is also quite costly. It undermines community trust of law enforcement and it sends a repeated and insidious signal to some members of the community that they are considered outsiders more worthy of suspicion than protection.<sup>64</sup> In an age when the overbreadth of the criminal law makes charging easy, decisions about whom to stop and arrest are critical to determining the composition of the population of low-level offenders who wind up in prisons and jails. When those efforts are focused on Latinos out of a misguided sense that Latinos are the appropriate target of immigration enforcement,<sup>65</sup> it is unsurprising that Latinos are increasingly overrepresented in prisons, jails and removal proceedings.<sup>66</sup>

Courts and policymakers cling to the misguided notions that you can make judgments about legal status based on appearance and that racial profiling is necessary for effective immigration enforcement.<sup>67</sup> In fact, effective street policing of immigration status is an impossibility, and any attempt to achieve it should be discouraged among state and local law enforcement agents engaged in street policing activities. Immigration policing requires not a “sense” about national origin, but an awareness of an individual’s immigration status—a complex legal determination that can never be made by watching someone go about their daily business.

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63. See, e.g., David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; Jeffrey Fagan, “Race and the New Policing,” in Volume 2 of the present Report; Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report.

64. See generally CHARLES R. EPPS ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014).

65. There are almost twice as many Hispanics in the U.S. who are native born (about 36 million) as there are foreign born Hispanics (fewer than 20 million). See Renee Stepler & Anna Brown, *Statistical Portrait of Hispanics in the United States*, PEW RES. CTR (Apr. 19, 2016), <http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states/#current-population>. And, of course, many foreign born Hispanics are lawfully present and not currently removable. *Id.*

66. TANYA MARIA GOLASH-BOZA, *DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR AND GLOBAL CAPITALISM* (2015) (observing that Latino males are significantly overrepresented in the number of deportees relative to their percentage of the immigrant population and the unauthorized immigrant population).

67. See, e.g., *Maldonado v. Holder*, 763 F.3d 155 (2d Cir. 2014) (arguing that immigration enforcement relies on the ability to profile based on “national origin.”).



Consequently, federal racial-profiling guidelines should be revised. But even if this does not happen, state and local law enforcement agents should engage in training practices that discourage racial profiling in all law enforcement endeavors, including those that might link to immigration enforcement. And state legislatures should pass laws that encourage this move away from racial profiling.

### B. ENCOURAGING LOCAL PUBLIC-SAFETY SOLUTIONS

Second, commonly acknowledged errors of over-federalization that were made in the war on drugs should be avoided in the immigration context.<sup>68</sup> This point is not intuitive given that immigration policy is largely set at the federal level. But the federal government is increasingly trying to structure state and local law enforcement efforts to suit its own enforcement goals. This should be avoided.

Some jurisdictions want to use their resources to enforce immigration law, and there is a robust structure under federal statute for them to do so.<sup>69</sup> As previously mentioned, these cooperative arrangements are problematic; researchers have highlighted the role that race played in driving localities to seek 287(g) agreements, and in shaping emerging patterns of racially biased policing on the ground.<sup>70</sup> Renewed research of this kind will grow in importance as the federal government positions itself to once again encourage and promote sub-federal immigration enforcement.<sup>71</sup>

State-federal cooperation around enforcement should be encouraged and allowed only if it can proceed without the unjust targeting of discrete minority communities. To date, we lack an effective example of such enforcement. What evidence we do have suggests that jurisdictions engaged in cooperative immigration enforcement are profiling Latinos in ways that expose them to low-level interactions with the criminal justice system and criminal prosecution regardless of their immigration status. It is ironic that this is happening at the very time that society is increasingly arguing for a retrenchment of the criminal justice system on other fronts.<sup>72</sup>

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68. For a discussion of the federalization of criminal law, see Stephen F. Smith, "Overfederalization," in the present Volume. See also WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

69. See 8 U.S.C. § 1357(g) (codifying section 287(g) of the Immigration and Nationality Act).

70. See *supra* notes 34-35 and accompanying text.

71. See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017); Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Protection et al. (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

72. See, e.g., Yolanda Vazquez, *Crimmigration: The Missing Piece of the Criminal Justice System and its Reform in the 21st Century*, 51 U. RICH. L. REV. (forthcoming 2017).

Even if restrictionist jurisdictions are allowed or encouraged to continue to assist the federal government, jurisdictions that do not wish to do so should not be required to do so. All available academic evidence suggests that the presence of immigrants (including unauthorized immigrants) does not increase crime in neighborhoods, and in fact, has the opposite effect.<sup>73</sup> From a public-safety perspective, there is simply no reason that state or local law enforcement should be enforcing immigration laws. While some immigrants commit crimes, in the state and local context, those matters can be addressed like other crimes, using standard law enforcement tools.

Many law enforcement officials oppose federal efforts to draft them into immigration enforcement initiatives.<sup>74</sup> They argue that not only will such efforts not assist in addressing crime, but will actually undermine efforts to prevent or prosecute harmful activities because immigrant victims and witnesses may be afraid to collaborate with them.<sup>75</sup> These efforts to decouple state and local policing from immigration enforcement should be encouraged, not discouraged.

### C. RATIONALIZATION

Finally, where the immigration enforcement system and the criminal justice system cannot be effectively disentangled, they should be rationalized, with criminal justice actors leading the way. The Supreme Court recognized this in its 2010 decision *Padilla v. Kentucky*, which required defense counsel to advise noncitizens of the clear immigration consequences of criminal convictions.<sup>76</sup> Noting the proliferation of severe collateral immigration consequences and the increasingly harsh way that these consequences were imposed upon longtime and lawful residents of the U.S., immigration scholars and advocates successfully argued for an understanding of deportation as something more than a typical collateral consequence. Although the Supreme Court stopped short of acknowledging that deportation is, indeed, a punitive sanction, the Court did acknowledge its severity and required a limited degree of counseling

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73. See *supra* note 16 and accompanying text.

74. See, e.g., Tom Jackman, *Police Chiefs' Immigration Task Force Outlines Opposition to Trump Policy*, WASH. POST (Mar. 1, 2017), [https://www.washingtonpost.com/news/true-crime/wp/2017/03/01/police-chiefs-immigration-task-force-outlines-opposition-to-trump-policy/?utm\\_term=.014b39a88c25](https://www.washingtonpost.com/news/true-crime/wp/2017/03/01/police-chiefs-immigration-task-force-outlines-opposition-to-trump-policy/?utm_term=.014b39a88c25) (including a copy of the letter composed by law enforcement officers opposed to enforcing immigration law).

75. *Id.* For a discussion of collateral consequences, see Gabriel J. Chin, “Collateral Consequences of Criminal Conviction,” in Volume 4 of the present Report.

76. *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010) (citing numerous scholars in concluding that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation”).

on the clear immigration consequences of criminal convictions. The decision highlights how selective coordination of the criminal and immigration system can potentially generate more just outcomes in both systems.

As the Court's discussion in *Padilla* makes clear, some of the most severe and unjustifiable outcomes that arise at the intersection of the criminal and immigration system arise not because the systems are merging or working together, but because criminal justice systems substantially dictate immigration outcomes. Criminal justice actors are often unaware of the all-but-controlling weight of their decisions, although some certainly work to exploit it and others to mitigate it.<sup>77</sup> Regardless, because criminal justice inputs are so important in the immigration enforcement process, the current systemic overlay ensures that federal immigration policy is dictated to a large extent by local criminal justice policies and choices, resulting in a removal system that is superficially national, but operationally local, balkanized, and uneven. At the same time, the drive to achieve immigration control has restructured federal enforcement priorities in ways that also burden distinct geographies and populations. Although they result from systemic interplays that are ad hoc and sometimes accidental, the end results do bear the general features of a racial project.

The most effective way to address the problematic entanglements of the system would be for the federal government to enact comprehensive immigration reform that streamlined the list of removable offenses, restored discretion to immigration judges seeking to stay potential removals, and decreased the scope and penalties of federal immigration crimes on the books. By all indications, such reforms are a long way off. In the meantime, there may be more limited possibilities to ensure that the criminal justice system does not unfairly subject immigrants to overly harsh immigration consequences

Several scholars have offered suggestions for productive integration of criminal and immigration law to achieve this end. For example, over a decade ago, Margaret Taylor and Ronald Wright suggested that sentencing judges ought to have the ability to decide whether removal is an appropriate collateral consequence to a criminal sanction, and to impose that sanction themselves.<sup>78</sup> They argue that "[a] merger of sentencing and immigration determinations would ... yield less duplication of resources, quicker deportation, and lower detention costs. Deportable offenders would also benefit from quicker resolution of their claims, shorter detentions, the institutionalized use of prosecutorial discretion for immigration decisions, the presence of a truly

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77. See, e.g., Eagly, *supra* note 40.

78. Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

neutral judge, and (most important) the provision of counsel and the other procedural protections of the criminal system.”<sup>79</sup>

In fact, it seems problematic to bestow such broad immigration powers upon judges who are not trained in immigration law. But more limited forms of merger might be appropriate and useful. By way of example, Jason Cade has recently argued that the Department of Homeland Security ought to defer to findings by criminal court judges that removal is not an appropriate sanction in particular cases.<sup>80</sup> Allowing criminal court judges to make findings that favor immigration lenience, and encouraging DHS officials to defer to those findings, could go some way to alleviating the well-documented lack of proportionality in the immigration removal system.<sup>81</sup> Greater rationality could be achieved if federal immigration enforcement actors paid more attention to efforts by state and local criminal justice actors to signal the appropriateness of leniency in certain cases.

States can also modulate unilaterally the collateral immigration impacts of criminal convictions by addressing the overpunitive aspects of their own criminal codes. California has done this by revising its criminal penalties to avoid triggering immigration law’s harsh aggravated felony consequences for state misdemeanors.<sup>82</sup>

In the end, problems often labeled as “cimmigration” issues<sup>83</sup> need to be brought into mainstream criminal justice reform discussions. These issues relate to broader issues of race and policing, federalism and over- and under-criminalization. “Cimmigration” issues are not niche issues that arise at the edges of federal plenary power over immigration and national security, but issues at the heart of criminal justice policy. They are not that different from—

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79. *Id.* at 1132.

80. Jason Cade, *Return of the IRAD*, 90 N.Y.U. L. REV. ONLINE 36 (2015). Cade’s proposal, which relies on DHS officials to give weight to criminal court judges’ indicia of leniency, may seem less politically viable in the current administration. In truth, however, there is no reason why any administration should resist efforts to rationalize the prioritization of scarce enforcement resources, and voluntary reliance on information provided by criminal court judges seems like a potentially useful way to channel this discretion.

81. For arguments that the immigration law lacks proportionality and should incorporate principles of proportionality, see, for example, Angela M. Banks, *The Normative and Historical Case for Proportional Deportation*, 62 EMORY L.J. 1243 (2013); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); and Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012).

82. See e.g., Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017).

83. For the first scholarly use of this term and its concomitant description of rising immigration and criminal law severity, see Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 376 (2006).

and indeed are related to and intertwined with—many other developments in the field. Criminal justice reformers cannot hope to achieve effective reform of the criminal justice system without engaging these issues directly and incisively.

## RECOMMENDATIONS

Effectively reforming the “crimmigration” system would require changes to both the immigration laws and the criminal laws. Some of the reforms most urgently needed involve reforms of federal immigration law, including scaling back many grounds of removability; restoring discretion to immigration judges to suspend removals in a broad range of cases; providing for adequate immigration adjudication for all individuals in removal proceedings; significantly reducing reliance on immigration detention; and enacting broad immigration reform that would legalize the existing unauthorized population and create a more effective means of managing future migration flows. But these are immigration reforms, not criminal justice reforms. In the spirit of this project, the following recommendations, which flow from the discussion in the previous section, are divided into recommendations for federal actors and for sub-federal actors. The recommendations are also presented in order from more modest to more sweeping.

### A. FEDERAL CRIMINAL JUSTICE REFORM

1. **Revise and adhere to federal guidelines on racial profiling.** The current federal guidelines document on racial profiling explicitly “does not apply to interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities.”<sup>84</sup> The constitutional cases that undergird this exemption were decided in the 1970s. Those cases were problematic when decided and completely untenable now. Interdiction efforts in the vicinity of the border—and all immigration enforcement efforts—should comply with standard prohibitions on racial profiling. And while it is often appropriate to consider nationality when engaged in border screenings and inspections, this does not require racial profiling or reliance on physical markers of presumed national origin.
2. **Local law enforcement agencies should not be pressured to engage in cooperative enforcement.** Many state and local police have made clear that they are better able to keep communities safe if they are not required to engage in federal immigration enforcement. Statistics concerning immigrants and crime bear this out. Local law enforcement should be allowed to make that choice without pressure or funding revocations from

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84. DOJ GUIDANCE, *supra* note 60.

the federal government. States and localities should be able to declare to their residents that they do not engage in affirmative immigration investigations, and they should be able to ignore detainer requests when unaccompanied by a judicial warrant, particularly given the potential costs they will face in defending against strong Fourth Amendment claims.

3. **End mass adjudication of misdemeanor illegal entry.** Scholars of migration have conclusively established that migration is driven by a host of factors, including economic and social conditions in the home countries, access to the necessary resources to migrate, opportunities in the receiving country, and social networks in the receiving country. There is no good evidence that criminal prosecution is a cost-effective deterrent of unauthorized migration. At most, it is but one factor in a complex and often highly constrained decision to migrate. Yet the federal government invests massive resources in the criminal prosecutions of individuals whose only offense is crossing the border without a visa. The legal regime that governs these prosecutions is irrational and racialized. It is a misdemeanor to cross the border without a visa but it is only a civil violation to overstay a visa, and the southern border is the site of the vast majority of illegal-entry prosecutions. In short, the criminal regime is aimed at Mexican migrants (despite the fact that migration from Mexico is currently net negative).

Lately, some members of Congress have proposed adding a criminal offense—making it a crime to overstay a visa. This might make the criminal code more rational, but it would also be immensely more costly, both socially and economically. Experience with the war on drugs counsels a move in the other direction—decriminalizing misdemeanor illegal entry and treating both illegal entry and visa overstays as a civil and administrative matter.

4. **Substantially reduce federal sentences for illegal reentry.** When someone returns to the U.S., this is often indicative of the fact that they have substantial family or community ties here. Such factors are not good reasons for harsher punishment. Felony reentry prosecutions should target only individuals who pose a repeat threat to the community, and those individuals should be sentenced accordingly. Current sentencing practices purport to take into account community threat, but they do so in ways that are vastly overbroad and insufficiently attentive to individual equities.

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### B. STATE AND LOCAL REFORMS

1. **Leave federal immigration enforcement to the federal government.** Immigrants are less likely to commit crimes than their native counterparts, and communities with high concentrations of immigrants tend to have lower crime rates. In other words (and notwithstanding popular narrative), the presence of immigrants in communities generally enhances public safety. But if immigrants fear contact with law enforcement, this jeopardizes community safety; noncitizens will be less likely to report crimes, to serve as witnesses, and to help police proactively prevent criminal activity. For these reasons, state and local agencies are best served by creating clear demarcations between their functions and those of federal immigration enforcement agents. Rather than expending local resources to assist in federal immigration enforcement, these agencies should concentrate on enhancing public safety by leaving immigration enforcement to the federal agencies charged with that task.
2. **Take into account the immigration consequences of local choices.** Although the Supreme Court made clear in *Padilla* that defense counsel needed to inform clients of any clear immigration consequences of criminal pleas, this decision leaves many people without meaningful legal protection against future immigration consequences. Anyone serving as defense counsel should be required to complete a continuing legal education requirement at regular intervals concerning the immigration consequences of criminal pleas. Judges should also be made aware of the consequences of their decisions, since immigration consequences are often surprisingly severe and sometimes counterintuitive.
3. **Revise state criminal codes to eliminate the worst irrationalities of the immigration enforcement system.** Recently, California revised its criminal law to ensure that individuals were not liable to be deported as “aggravated felons” on the basis of a California misdemeanor conviction. State legislators should be aware that their decisions about how to define and sentence crimes in their jurisdictions will play a dispositive role in determining whether an individual in removal proceedings is deported or not, and they should define criminal conduct and sentences in a way that ensures that low-level offenders are not unnecessarily subjected to removal.

4. **Develop internal guidelines to penalize the inappropriate use of racial profiling by law enforcement agents.** Discussions of appropriate guidelines and their application can be found elsewhere in this volume. Here, suffice it to say that appropriate limits on the use of race in law enforcement are an important part of eliminating some of the worst social harms of the developing crimmigration system.



# Extraterritorial Jurisdiction

Julie Rose O'Sullivan\*

*Additional guidance is urgently needed regarding the analytical framework that ought to be applied to decide (1) when a crime that spans borders is committed domestically as opposed to extraterritorially; and (2) when a criminal statute that does not on its face speak to extraterritoriality ought to apply to conduct overseas. Scholars have raised legitimate questions about the precedential support for, and the wisdom of, the Supreme Court's current strong presumption against extraterritorial applications of federal statutes. The Court's recently announced "focus" test for determining when a crime is committed extraterritorially as opposed to domestically is also of questionable legitimacy. Congress ought to act promptly to enact a general provision that provides uniform guidance on these questions in criminal matters.*

## INTRODUCTION

Assume that a Russian citizen hacked into the e-mail of the Democratic National Committee and then provided masses of stolen DNC e-mails to WikiLeaks for publication. This type of unauthorized access and release is unlawful in many countries (which will be referred to here as "States"). But where was the crime "committed"? At the hacker's keyboard in Russia? Where the DNC's servers are—presumably somewhere in the United States? Where WikiLeaks' servers are—presumably *not* in the United States? Or perhaps where the actual and intended effect of the criminal activity was felt? If it is concluded that this criminal activity took place outside the territory of the United States—that is, extraterritorially—further critical questions include whether Congress has the constitutional power to regulate such conduct, whether Congress intended the anti-hacking statute to apply extraterritorially, and what, if any, due process limits exist on such exercises of criminal jurisdiction.

These questions have increasing importance in a world where criminal activity and criminals regularly cross national borders. The question of whether U.S. laws can or should apply to such transborder criminal activity, then, is one that courts encounter frequently. The difficulty is that the applicable analysis is unclear, particularly in criminal cases. Scholars agree that "the case

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law is so riddled with inconsistencies and exceptions that [attempting to bring coherence to the law on extraterritoriality] ... is probably futile and maybe even counterproductive.”<sup>1</sup> It will not surprise, then, that “the only thing courts and scholars seem to agree on is that the law in this area is a mess.”<sup>2</sup>

Despite this consensus, I will first attempt to summarize the analytical steps applied to extraterritoriality decisions, highlighting uncertainties and questions. I will then attempt to summarize the deep and rich literature on the modern Supreme Court’s presumption against extraterritoriality,<sup>3</sup> which is today the predominant factor in extraterritoriality decisions in the usual case where the statute does not explicitly specify its geographic applicability. The Supreme Court originally applied this strong presumption against application of U.S. federal law to conduct outside U.S. territory in the 1991 case of *EEOC v. Arabian American Oil Co. (Aramco)*,<sup>4</sup> and it has applied the presumption with vigor in its most recent extraterritoriality precedents, all of which were civil cases. I will conclude by proposing congressional action to clarify this critical but “messy” area of law.

My focus is on federal criminal law, but a preliminary note is in order regarding the question of the application of U.S. state criminal laws outside the territory of the United States. The Supreme Court has held that U.S. states

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1. Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1028 (2011); see also Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 507 (1997); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 89-90 (1998); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 351-52, 396 (2010); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT’L L. 750, 752 (1995); Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1458-1461 (2008); Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 599-601 (1990).

2. Colangelo, *supra* note 1, at 1028.

3. See sources cited in note 1, *supra*; see also Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INT’L BUS. 1 (1992); Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11, 33-34 (1987); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1 (2014); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121 (2007); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101 (1998); Larry D. Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179 (1991); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010); Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT’L & COMP. L. REV. 323 (2012).

4. 499 U.S. 244 (1991).

may regulate extraterritorially on the same terms as the federal government, at least where the state has a legitimate interest and its laws do not conflict with acts of Congress.<sup>5</sup> Generally the geographic scope of U.S. state criminal statutes is a question of state law. In resolving such questions, some U.S. state courts apply a presumption against extraterritoriality,<sup>6</sup> but a comprehensive analysis is beyond the scope of this article.

## I. PRESCRIPTIVE JURISDICTION

To begin, readers must have some understanding of the most generally relevant<sup>7</sup> international law principles that control prescriptive—here, legislative—jurisdiction in criminal cases. The prescriptive principles of international law delineate the legislative power “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things.”<sup>8</sup> Although Congress has the power to specify that statutes apply beyond the limits set by international law,<sup>9</sup> the Supreme Court, in many of its pre-1991 cases, was reluctant to ascribe such a purpose to Congress absent expressed congressional intent. Thus, where a statute did not on its face speak to its extraterritorial application, the Supreme Court often applied the *Charming Betsy* canon of construction (named after an early 19th-century case), which dictates that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>10</sup> The Supreme Court’s extraterritoriality decisions have not been a model of consistency, but it is fair to say that the Court, prior to 1991, frequently referenced the customary international law prescriptive principles in ascertaining the scope of federal statutes pursuant to *Charming Betsy*.

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5. See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941).

6. See, e.g., *Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 969 N.E.2d 187, 195 (N.Y. 2012).

7. Because Congress rarely uses it, I will not here discuss “universal jurisdiction.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (Am. Law Inst. 1987) [hereinafter RESTATEMENT]. I will also not address RESTATEMENT § 403, which advises application of a reasonableness balancing test in cases of concurrent jurisdiction. Even when U.S. courts reference the rule of reasonableness, “they are markedly disinclined to limit jurisdiction in transnational criminal matters on such grounds.” Stigall, *supra* note 3, at 338.

8. RESTATEMENT, *supra* note 7, § 401.

9. See, e.g., Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397–98 (1997).

10. *Murray v. Schooner Charming Betsy* (*Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804); see also RESTATEMENT, *supra* note 7, § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

The most traditional and important basis for prescriptive jurisdiction is territorial. The *Restatement (Third) of Foreign Relations Law of the United States* (*Restatement*) recognizes that there are two types of territorial principles.<sup>11</sup> First, a State has jurisdiction to prescribe law with respect to “conduct that, wholly or in substantial part, takes place within its territory”<sup>12</sup> (“subjective” territorial jurisdiction). The second type of territorial jurisdiction gives a State the power to regulate “conduct outside its territory that has or is intended to have *substantial effect* within its territory”<sup>13</sup> (“objective” territorial jurisdiction or “effects” jurisdiction). One might logically ask: How can a given claim or prosecution be founded on “territorial” jurisdiction if it may not involve actionable conduct (only effects) on the territory of the State seeking to address the crime? One answer is that effects jurisdiction was intended to capture situations such as the following (frequently used) example: In an illegal duel, Jones, on the Canadian side of the border, shoots with intent to kill Smith, who dies on the United States’ side of the border. In such a case, elements of the crime are committed in both jurisdictions: Firing the gun with intent to kill occurred in one country, but without the death in the other, there could be no murder prosecution. Many countries use some form of effects jurisdiction, but there is “disagreement over what it means and how the test should be applied.”<sup>14</sup>

For many years, the lower courts accepted the *Restatement’s* view that both domestic conduct and domestic effects could mean that a claim constituted a territorial, as opposed to extraterritorial, application of a statute. They therefore employed a “conduct-and-effects” test founded both on subjective and objective territorial principles to discern when a suit concerned territorial

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11. It should be noted that the American Law Institute is currently drafting a *Restatement (Fourth) of the Foreign Relations Law of the United States*. Its latest tentative draft no longer includes “effects” as a subset of territorial jurisdiction, delineating it instead as a discrete jurisdictional basis. See *RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §201(b) & cmts. 3, f (Am. Law Inst. Tentative Draft No. 2, Mar. 22, 2016).

12. *RESTATEMENT*, *supra* note 7, § 402(1)(a) (emphasis added).

13. *Id.* § 402(1)(c) (emphasis added).

14. INTERNATIONAL BAR ASS’N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 12 (2009).

claims and thus was unobjectionable, as opposed to extraterritorial claims that would require an analysis of whether the statute was intended to be employed extraterritorially.<sup>15</sup> With respect to effects jurisdiction, for example, the D.C. Circuit, in *United States v. Philip Morris USA Inc.*, explained that:

Because conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting this "effects" test is "*not an extraterritorial assertion of jurisdiction.*" Thus, when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply.<sup>16</sup>

As we shall see, however, the Supreme Court's modern presumption against extraterritoriality is keyed only to the subjective territoriality principle—that is, to conduct occurring on U.S. soil—and excludes the objective territorial principle—that is, reference to the effects of foreign conduct on the U.S. territory and population.

Another very traditional basis for jurisdiction concerns nationality. Thus, a State has prescriptive jurisdiction over "the activities, interests, status, or relations of its nationals outside as well as within its territory."<sup>17</sup> A less widely accepted basis for jurisdiction that relates to nationality, passive personality jurisdiction, "asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national."<sup>18</sup> Many civil law countries make extensive use of nationality and passive personality jurisdiction, but the United States traditionally has been sparing in its use of these principles. Finally, a State also has the prescriptive jurisdiction to address "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."<sup>19</sup> This so-called "protective principle" is intended to be limited to offenses directed against the security of the State or the integrity of governmental functions, involving crimes such as espionage, counterfeiting the State currency, and the like.

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15. See, e.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 984-993 (2d Cir. 1975); *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015-1018 (2d Cir. 1975); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1333-39 (2d Cir. 1972); see also *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1130 (D.C. Cir. 2009); *Laker Airways v. Sabena*, 731 F.2d 909, 923 (D.C. Cir. 1984); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilfields, Inc.*, 592 F.2d 409, 416 (8th Cir. 1979).

16. *Philip Morris*, 566 F.3d at 1130 (quoting *Laker Airways*, 731 F.2d at 923).

17. RESTATEMENT, *supra* note 7, § 402(2).

18. *Id.* § 402 cmt. g.

19. *Id.* § 402(3).

## II. STATE OF PLAY: GENERAL

### A. THE “WHERE” QUESTION

Logically, the first question is when a given application of a statute is “domestic,” and thus unexceptional, as opposed to “extraterritorial,” and thus questionable. If, as in the above WikiLeaks example, conduct occurs both in the United States and abroad, or if conduct abroad has concrete and harmful effects in the United States, where is the crime deemed to have been “committed”? When all the elements of a crime occur on one State’s territory, that crime is clearly “committed” domestically. Where, however, the elements of the crime occur in different States, as in our dueling case, it may be that two (or more) States will claim territorial jurisdiction. A critical difficulty in applying the territoriality principle is the question of just what, and how much, activity must occur on a State’s territory for a transborder crime to be deemed committed within that State and thus justified by the subjective territorial principle.

The Supreme Court did not address the question of what, or how much, conduct must occur in the territorial United States before a given claim or prosecution could be deemed domestic as opposed to extraterritorial until its 2010 decision in *Morrison v. National Australia Bank*.<sup>20</sup> Before *Morrison*, at least in securities and antitrust cases, the lower courts applied their conduct-and-effects test to determine whether they could adjudicate a case where the claim was founded on conduct that spanned borders.

The conduct-and-effects test, pioneered by the Second Circuit and adopted by other circuits, did not require a global inquiry into whether a certain statute was intended to apply extraterritorially or only domestically because the test *assumed* that only territorial cases could proceed. The courts assessed the facts of each case—the extent of the alleged conduct and effects—to determine whether “Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.”<sup>21</sup> If the answer was yes, the case proceeded; if the answer was no, the case was dismissed. In other words, the courts assumed that if the conduct-and-effects test was not satisfied, the claim concerned an extraterritorial application of the statute *and* that such extraterritorial claims could not proceed.

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20. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

21. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975) (Friendly, J.).

The Supreme Court emphatically rejected the use of the conduct-and-effects test, at least as applied in securities fraud cases, in *Morrison*.<sup>22</sup> Of course, the conduct-and-effects test can be abused, as Professor Parrish points out, as the test is subject to inconsistent results and can be manipulated.<sup>23</sup> Certainly, this was an argument that won the day with the *Morrison* Court.<sup>24</sup> (Courts could do better were Congress to provide more specific direction regarding what types of conduct and effects should satisfy the test, as is suggested below.)

In any case, the Court's rejection of the conduct-and-effects test meant that it had to come up with a global solution to the question of how to determine where a crime is committed. That is, given that the Court rejected use of an effects test, it had to decide what conduct must occur in a State for the crime to be considered domestic as opposed to extraterritorial. The *Morrison* Court articulated a "focus" test under which courts must evaluate what "territorial event" or "relationship" is the "focus" of the statute—that is, the "object[] of the statute's solicitude"—to identify the conduct that must occur in the United States for the suit to be deemed territorial.<sup>25</sup> In the *Morrison* case, the question concerned when a violation would be deemed domestic as opposed to extraterritorial when a civil securities fraud claim was based on conduct both in the United States and abroad. The Court identified one element of the claim to be decisive based on its "focus" test. It decreed that subjective territoriality is only present in civil securities fraud cases involving "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."<sup>26</sup> Under *Morrison*'s transactional focus, the place where the fraudulent activity occurred and the location of the harm flowing from the fraud are all irrelevant.

Shortly after *Morrison* was decided, however, Congress amended the jurisdictional provisions of a number of securities laws in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to authorize the SEC and Department of Justice to pursue securities violations where the "conduct within the United States ... constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or ... conduct occurring outside the United States that has a foreseeable substantial effect within the United States."<sup>27</sup> The

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22. *Morrison*, 561 U.S. at 255–61.

23. Parrish, *supra* note 1, at 1475, 1478–79.

24. See, e.g., *Morrison*, 561 U.S. at 258–61.

25. *Id.* at 266–67.

26. *Id.* at 267.

27. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864-1865 (2010) (codified at 15 U.S.C. § 78aa(b)(1) & (2)) (emphasis added).



amendments applied only to securities fraud cases brought by the SEC and Department of Justice; it left untouched *Morrison*'s holding as to private civil securities suits. This reinstitution of the conduct-and-effects test clarifies that in government suits the crime will be deemed to have happened in the State where the fraud was hatched in addition to where the transaction took place. (It should be noted, however, that there is some dispute as to whether this provision was effective in overruling *Morrison*'s exclusive focus on the site of the relevant transactions in government-initiated cases.)<sup>28</sup>

Because *Morrison* was relatively recently decided, it is unclear how one determines a statute's "focus," which is not something Congress normally identifies and which appears to be an extremely subjective, and manipulable, determination. The Court's decision to focus on the location of the securities transaction, to the exclusion of the site of the fraud, seems arbitrary. The focus test was also an unnecessary innovation because more logical and well-developed references were available—venue, for example. "The Constitution makes it clear that the determination of proper venue in a criminal case requires determination of where the crime was *committed*."<sup>29</sup> When federal courts have been asked to determine where a criminal securities fraud was committed for venue purposes, they have recognized that criminal securities fraud happens both where the transactions are consummated and where the fraud is hatched.<sup>30</sup> Indeed, in identifying the site of the securities transaction as the only relevant factor in determining subjective territorial jurisdiction, the *Morrison* Court ignored the fact that Congress had, by statute, expressly provided that a criminal securities fraud is committed (for venue purposes) where "*any act or transaction constituting the violation occurred*."<sup>31</sup>

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28. The question whether this provision was sufficient to overrule *Morrison* arises because Congress included its conduct-and-effects test in the securities laws' subject-matter jurisdiction provisions. *Morrison*, however, held that the extraterritorial limitation was a merits question and Congress did not amend the substantive portions of the statutes. See, e.g., SEC v. Chicago Convention Center, LLC, 961 F. Supp. 2d 905, 909-17 (N.D. Ill. 2013); Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Necessary or Sufficient?*, 1 HARV. BUS. L. REV. 195 (2011).

29. United States v. Cores, 356 U.S. 405, 407 (1958) (emphasis added); see U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed"); *Id.* amend. VI ("In 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.").

30. See, e.g., United States v. Lange, 834 F.3d 58, 68-71 (2d Cir. 2016).

31. 15 U.S.C. § 78aa(a) (emphasis added); see also United States v. Johnson, 510 F.3d 521, 524 (4th Cir. 2007).



### B. ARTICLE I CHALLENGES

If a situation is deemed to concern an extraterritorial application of the relevant statute, and if prompted (many litigants do not press this objection<sup>32</sup>), courts will then ask whether Congress had the power under Article I of the U.S. Constitution to reach the overseas conduct. The most popular Article I powers invoked to justify extraterritorial extensions of criminal prohibitions are the foreign or domestic Commerce Clause,<sup>33</sup> the power given Congress to define and punish piracies and felonies committed on the high seas and offenses against the law of nations,<sup>34</sup> and the Necessary and Proper Clause when employed by Congress to implement a treaty that requires the States that join it to enact criminal legislation pursuant to its terms.<sup>35</sup>

Assuming Congress has the constitutional power to extend a statute's coverage to extraterritorial conduct, courts will follow any direction provided in the statute as to its extraterritorial reach. Congress' instructions in this regard vary with the statute.<sup>36</sup> More commonly, Congress has not spoken to the issue of extraterritorially in the criminal statute itself. The inquiry then becomes whether Congress intended to give the statute extraterritorial effect.

### C. JURISDICTION VERSUS MERITS

One threshold question is whether the issue of the geographic scope of a statute goes to the subject-matter jurisdiction of the court or goes only to whether a plaintiff or prosecutor has made out a case on the merits. For decades, the courts of appeals treated the issue as going to the courts' subject-matter jurisdiction, which meant, among other things, that it was a non-waivable issue that was reserved for judicial determination. In *Morrison*, the Court clarified that, unless Congress specifies otherwise, whether a statute applies extraterritorially is a merits question and does not go to jurisdiction.<sup>37</sup> This determination means that persons who plead guilty or who fail to timely object to the extraterritorial application of a statute will waive that objection.<sup>38</sup> But other consequences are less clear. For example, as a "merits" question, is

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32. See, e.g., *United States v. Clark*, 435 F.3d 1100, 1106 n.7 (9th Cir. 2006) ("the more common scenario" is that a party will "challenge[] only the extraterritorial reach of a statute without contesting congressional authority to enact the statute").

33. U.S. CONST. art. 1, § 8, cl. 3.

34. *Id.* art. 1, § 8, cl. 10.

35. *Id.* art. 1, § 8, cl. 18.

36. See, e.g., CHARLES DOYLE, CONG. RESEARCH SERV., RL94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 42-62 (2016).

37. See *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 253-254 (2010).

38. See *United States v. Miranda*, 780 F.3d 1185, 1191 (D.C. Cir. 2015).

extraterritoriality now an element of the crime, and thus an issue that must be proven beyond a reasonable doubt to a jury? And, if so, just what would the jury be asked to decide?

#### D. CONGRESSIONAL INTENT

Where the statute is ambiguous as to its extraterritorial application, lower federal courts generally apply two canons of interpretation. The first is the presumption against extraterritoriality that the Supreme Court first articulated in its modern form in the 1991 case, *EEOC v. Arabian American Oil Co. (Aramco)*.<sup>39</sup> In *Aramco* and subsequent cases, the Court decreed that unless a statute gives a “clear indication”<sup>40</sup> that Congress intended it to apply outside the “territorial jurisdiction”<sup>41</sup> of the United States, it does not. The presumption has become something approaching a clear statement rule (although the Court disclaims this reality<sup>42</sup>). To be clear, the presumption assumes that Congress acts only with subjective territoriality in mind and thus intends statutes to apply only to conduct in the territory over which the United States is sovereign unless Congress affirmatively indicates otherwise.

The second canon of construction that lower courts reference is the *Charming Betsy* canon, in reliance upon the Court’s pre-1991 case law. As noted previously, “[f]or most of U.S. history, the Supreme Court determined the reach of federal statutes in light of international law—specifically, the international law of legislative jurisdiction. In effect, it applied a ... presumption that federal law does not extend beyond the jurisdictional limits set by international law. This presumption was an offshoot of the long-standing *Charming Betsy* canon.”<sup>43</sup>

39. 499 U.S. 244 (1991).

40. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Morrison*, 561 U.S. at 255).

41. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

42. See *Morrison*, 561 U.S. at 265. It is true that the Court has stated that there need not be “an express statement of extraterritoriality” and that “context can be consulted as well.” *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2102 (2016) (quoting *Morrison*, 561 U.S. at 265). And the “presumption” is not irrebuttable, as is demonstrated by *RJR Nabisco*, where the Court held that the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §1962 et. seq., has extraterritorial application in criminal cases where Congress has made extraterritorial the predicate statutes upon which the RICO case. That said, the *Morrison* Court required that congressional intent to apply a statute extraterritorially be “clearly expressed,” *Morrison*, 561 U.S. at 255; and the *RJR Nabisco* Court took it up a notch by requiring that Congress “affirmatively and unmistakably instruct[] that the statute” will apply extraterritorially. *RJR Nabisco*, 136 S. Ct. at 2100.

43. *Knox*, *supra* note 1, at 352; see also *Born*, *supra* note 3, at 1 (“the earliest U.S. judicial decisions relied on the ‘Law of Nations’ to define the territorial reach of federal law”).

Lower courts continue to ask, in cases raising extraterritoriality questions, whether the extraterritorial application of a statute will exceed the prescriptive jurisdiction of Congress under international law.

Although the Court employed the *Charming Betsy* canon in its pre-*Aramco* cases, it has referenced the canon in only one extraterritoriality decision over the past quarter century.<sup>44</sup> The Court, in its most recent extraterritoriality decision, *RJR Nabisco, Inc. v. European Community* (2016),<sup>45</sup> was explicit about its preferred analysis. First, the Supreme Court advised that courts must determine whether a statute has any extraterritorial purchase, and it again emphasized the strength of the presumption against extraterritoriality.<sup>46</sup> If the statute does *not* apply extraterritorially, the courts must take a second step and “determine whether the case involves a domestic application of the statute, and we do this by looking to the statute’s ‘focus.’”<sup>47</sup> Nowhere was the *Charming Betsy* canon referenced or applied. It seems likely, then, that the *Charming Betsy* canon currently applied in extraterritoriality cases by the lower courts is akin to the human appendix—a structure that has lost its original function.

### III. STATE OF PLAY: CRIMINAL CASES

#### A. BOWMAN

It is notable that, at least until recently, the lower federal courts have been very willing to find that federal statutes apply extraterritorially in criminal cases. They have resisted application of the Court’s modern strong presumption in two ways. First, until recently, many courts did so by employing a fairly forgiving (from the government’s point of view) conduct-and-effects test in a variety of cases, most notably antitrust and securities fraud cases. Lower courts’ willingness to use this test has receded after they were taken to task for using it in no uncertain terms by the *Morrison* Court. But it is worth noting that even the Supreme Court, post-*Aramco*, has recognized that the conduct-and-effects test still controls in antitrust cases without reference to any presumption.<sup>48</sup> Due to the post-*Morrison* congressional attempt to reinstitute the conduct-and-effects test in government-initiated securities fraud cases, this test may well also apply in criminal securities fraud cases despite *Morrison*.<sup>49</sup>

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44. See *F. Hoffman La Roche Ltd. v. Empagrn, S.A.*, 542 U.S. 155, 165 (2004).

45. 136 S. Ct. 2090 (2016).

46. *Id.* at 2101.

47. *Id.*

48. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

49. See *supra* notes 27-28 and accompanying text.

Second, in criminal cases, the lower federal courts escaped the presumption by relying on a Supreme Court opinion hailing from 1922, *United States v. Bowman*.<sup>50</sup> *Bowman* involved a scheme hatched on the high seas and brought to fruition in Rio de Janeiro pursuant to which a U.S. government-owned corporation was defrauded. The Court acknowledged that punishment of crimes against private individuals or their property “must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it.”<sup>51</sup> But, the Court stated:

The same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.<sup>52</sup>

*Bowman* is widely used—and some say misused—by lower courts looking to justify the extraterritorial application of criminal statutes. Some lower courts question whether, in light of *Bowman*, the presumption even applies in criminal cases, although those appear to be in the minority.<sup>53</sup> *Bowman* has never been overruled but it is arguably inconsistent with today’s Court’s emphatic embrace of the presumption against application of statutes in any circumstances other than where justified by the subjective territorial principle.

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50. *United States v. Bowman*, 260 U.S. 94 (1922).

51. *Id.* at 98.

52. *Id.*

53. *Compare* *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012), *and* *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011), *with* *United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013).

### B. DUE PROCESS

A final step in the extraterritoriality analysis in criminal cases deals with the potential application of the Due Process Clause. Although no decision of the Supreme Court has yet addressed the issue of whether constitutional due process limitations apply in transborder federal criminal cases, the courts of appeals have found that such limitations do exist. The difficulty, however, is that the courts are split on the applicable test—that is, whether due process requires only that the extraterritorial prosecution not be arbitrary and unfair, or whether the Due Process Clause also requires proof of a sufficient “nexus” between defendant and the United States. Regardless, the odds of succeeding on such a due process claim are vanishingly small. Out of the hundreds of extraterritoriality cases I have read, I have found only one case in which a due process challenge succeeded.<sup>54</sup>

## IV. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The above attempt to summarize the governing extraterritoriality analysis illustrates the extent to which the law is underdeveloped (*e.g.*, What does the Court mean by a statutory “focus” and how can one divine that focus? If extraterritoriality is a merits question, does that mean it is an element of the crime that must be proved beyond a reasonable doubt to the jury?). It also shows important areas of uncertainty (*e.g.*, What is the status of the *Charming Betsy* canon of construction? Does the presumption apply in criminal cases? What is the status of *Bowman*? Is there a due process limit on extraterritorial prosecutions, can it be invoked by non-U.S. nationals, and, if so, what is the applicable due process standard?).

Perhaps the only thing that is clear is the Court’s commitment to a very strong presumption against extraterritoriality—one founded only on subjective territorial jurisdiction—and the generally case-determinative effect of that presumption. This raises the question many scholars have struggled with: Does this presumption make sense?

To the extent that the modern presumption against extraterritoriality is founded upon 19th-century convictions about the absolute nature of territorial sovereignty, such notions can no longer be entertained.<sup>55</sup> The United States—and the rest of the world—has long since recognized that in fact a State may legitimately extend its jurisdiction beyond its borders where effects, nationality,

54. See *United States v. Perlaza*, 439 F.3d 1149, 1168–69 (9th Cir. 2006); see also *United States v. Ali*, 885 F. Supp. 2d 55 (D.D.C. 2012) (dismissing on due process grounds), *rev’d*, 718 F.3d 929 (D.C. Cir. 2013) (reversing due process determination).

55. Born, *supra* note 3, at 61.

passive personality, and protective jurisdictional principles permit. Then what, if anything, justifies the presumption against extraterritoriality upon which the modern Court is so insistent? Instead of adopting a default presumption, why not instead—as Larry Kramer suggested—“determine what policy a law was enacted to achieve in wholly domestic cases and ask whether there are connections between the case and the nation implicating that policy”?<sup>56</sup> The Court’s explanation for why a presumption against extraterritoriality is appropriately applied has changed over time and even today has a certain shape-shifting quality.

### A. CONFLICT WITH FOREIGN LAW

Probably the most consistent rationalization for the modern presumption against extraterritoriality is that it is necessary “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>57</sup> There is undoubtedly a potential for conflict where one sovereign seeks to enforce its laws on a non-national whose conduct occurred on the territory of another sovereign.<sup>58</sup> Subjecting foreign nationals to U.S. law for conduct that occurred on the territory of another State can create political controversies as well as retaliatory actions. Professor Parrish, a fan of the presumption, notes that the overextension of U.S. jurisdiction has provided a justification for other countries to aggressively use extraterritorial jurisdiction “for their own ends” and generated a number of other costs.<sup>59</sup>

But most commentators find that the conflicts argument is overstated and unpersuasive. First, as Professor Born notes, the presumption against extraterritoriality “unduly elevates Congress’s presumed desire to avoid conflicts with foreign laws over other important legislative goals. Much more important, in the real world, are legislators’ desires to assist local constituencies, to further domestic legislative programs and interests, and to make statements of political or moral principle.”<sup>60</sup>

The presumption also underestimates Congress’s appetite for conflict with other nations. Commentators generally concur that conflict with other States is most pronounced when the United States is exercising effects jurisdiction.<sup>61</sup>

56. Kramer, *supra* note 3, at 213.

57. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991); *see also* RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2100 (2016); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

58. *See, e.g.*, Stigall, *supra* note 3, at 328–31.

59. Parrish, *supra* note 1, at 1459; *id.* at 1489–93.

60. Born, *supra* note 3, at 76; *see also* Dodge, *supra* note 1, at 116–17.

61. Kramer, *supra* note 1, at 756.

Yet Congress has responded to the Supreme Court's application of the presumption and other extraterritoriality decisions in important regulatory areas—including areas, such as antitrust and securities law enforcement, most likely to generate international consternation—by expressly endorsing a conduct-and-effects test. Thus, Congress responded to lower courts' application of the conduct-and-effects test in antitrust cases by codifying it in the Foreign Trade Antitrust Improvements Act (FTAIA).<sup>62</sup> The FTAIA excludes from the Sherman Act's reach "conduct involving trade or commerce ... with foreign nations," other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce.<sup>63</sup> And as noted previously, shortly after *Morrison* was announced, Congress amended the jurisdictional provisions in various securities statutes with the apparent intention to codify the conduct-and-effects test in government-initiated securities fraud actions.<sup>64</sup>

The conflict-avoidance rationale also appears to be disingenuous at worst and under- and over-inclusive at best. The Court does not actually inquire into whether a threat of conflict exists in each case. The Court has recognized that this concern does not arise in all cases in which it chooses to apply the presumption.<sup>65</sup> It has applied the presumption in cases in which it acknowledged that no conflict was possible<sup>66</sup> and has not applied the presumption where conflicts might well eventuate.<sup>67</sup> Where there is no potential for conflict, yet the Court has applied the presumption, the result may well be that no national law applies to objectionable conduct (as in a case arising in the Antarctic).<sup>68</sup> Indeed, in failing to apply U.S. law to situations where only U.S. law might apply, the Court may actually create conflicts.<sup>69</sup> Thus, for example, in *Sale v. Haitian Centers Council, Inc.*, the Court refused to apply restrictions Congress put in place to comply with U.S. treaty obligations to a U.S. vessel over which no other nation could exercise sovereignty—a result that disappointed, rather than appeased, the international community.<sup>70</sup>

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62. 15 U.S.C. § 6a.

63. *Id.* § 6a(1)(A).

64. See *supra* notes 27–28 and accompanying text.

65. See, e.g., *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010); *Smith v. United States*, 507 U.S. 197, 206–07 (1993); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 174 (1993).

66. See *Sale*, 509 U.S. at 173–174 (U.S. ship on the high seas); see also *Smith*, 507 U.S. 197 (Antarctica).

67. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

68. *Smith*, 507 U.S. 197.

69. See, e.g., *Sale*, 509 U.S. 155.

70. See, e.g., *Knox*, *supra* note 1, at 380–83, 386–87.



Additionally, the Court draws no distinction in its application of the presumption between cases in which U.S. law would be applied to U.S. nationals as opposed to non-nationals abroad even though there is far greater potential for conflict in the latter cases than the former. And the Court does not seem to recognize that conflict-creation may occur whether or not U.S. statutes apply abroad. Many States employ all the prescriptive principles, including effects jurisdiction and expansive nationality and passive personality jurisdiction. Even where U.S. law is being applied strictly territorially, then, there may still be a potential for conflict because other States may, consistent with international law norms, apply their laws extraterritorially—for example, to their own nationals even if those nationals are acting on U.S. territory.<sup>71</sup>

Finally, the presumption overstates the potential for conflict. While it is true that, for example, many in the international community weighed in through amicus briefs in *Morrison* to argue against allowing civil securities actions in cases where extraterritorial elements predominate, it is also true that in *RJR Nabisco*, it was the European Community itself seeking damages in a civil RICO case against American cigarette companies. In that case, the European Community aggressively argued *for* extraterritorial application of U.S. law.

### B. DOMESTIC CONCERNS

A rationale for the presumption against extraterritoriality that appears to have gained traction in the Court's most recent cases is that "Congress ordinarily legislates with respect to domestic, not foreign matters."<sup>72</sup> This is the weakest of the Court's justifications. It is questionable whether Congress in fact is primarily concerned only with conduct occurring on U.S. soil given the increasingly globalized nature of many problems and certainly given the explosion in cross-border criminality.<sup>73</sup> Indeed, as noted above, Congress has repeatedly overruled judicial decisions limiting the reach of statutes to the shores of the United States.<sup>74</sup>

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71. See Clopton, *supra* note 3, at 12.

72. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 258–61, 255 (2010); see also *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007); *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

73. See, e.g., Turley, *supra* note 1, at 657.

74. See *supra* notes 27–28 and accompanying text. Congress also overruled *Aramco* by amending Title VII to extend protection to United States citizens working overseas. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1077 (codified at 42 U.S.C. § 2000e(f)) ("With respect to employment in a foreign country," the term "employee" "includes an individual who is a citizen of the United States.").



Second, and more importantly, there is a fundamental indeterminacy here—what, exactly, is a “domestic concern”?<sup>75</sup> The assumption appears to be that Congress is concerned only with conduct that occurs on U.S. territory, while conduct that occurs abroad but has concrete, harmful effects in U.S. territory or on its citizens is not a “domestic concern.” But as Professor Knox points out, “domestic concerns” “may include not only actions taken within U.S. borders, but also actions taken outside it when they either affect the United States or are taken by the U.S. government or even, in some cases, its nationals.”<sup>76</sup> Further, even if one assumes that Congress is concerned only with circumstances affecting the territory of the United States, “[f]oreign actions can and often do affect conditions within U.S. borders so that, at least under certain conditions, legislation must address foreign conduct in order to regulate domestic concerns.”<sup>77</sup> Professor Dodge in fact argues that Congress is primarily concerned with domestic effects and thus that the presumption should not apply at all when such effects are present.<sup>78</sup>

### C. LEGISLATIVE EFFICIENCY

A third modern rationale for the presumption is the Court’s stated belief that Congress knows of the Court’s devotion to the presumption, and thus “legislates against the backdrop of the presumption against extraterritoriality.”<sup>79</sup> This, the Court asserts, “preserv[es] a stable background against which Congress can legislate with predictable effects.”<sup>80</sup>

Many question the implicit assumption underlying this rationale: that the presumption is value-neutral and that, like “driving a car on the right-hand side of the road,” it “is not so important to choose the best convention as it is to choose one convention and stick to it.”<sup>81</sup> Professor Eskridge explains that, to justify the presumption against extraterritoriality on this basis, three conditions must be met: (1) Congress must be “institutionally capable of knowing and working from an interpretive regime that the Court is institutionally capable of devising and transmitting in coherent form”; (2) the application of the interpretive regime must be “transparent” to Congress; and (3) the interpretive regime should

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75. See, e.g., Clopton, *supra* note 3, at 14–15.

76. Knox, *supra* note 1, at 383–84.

77. *Id.* at 384.

78. Dodge, *supra* note 1, at 118.

79. *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991); see also *Smith v. United States*, 507 U.S. 197, 204 (1993).

80. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 261 (2010).

81. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 277 (1994).

not change in unpredictable ways.<sup>82</sup> He concludes that while the presumption established in *Aramco* may have satisfied the first of these conditions, it failed the second and “dramatically flunk[ed]” the third.<sup>83</sup> Many question whether the presumption is sufficiently transparent, coherent, and consistently applied to be a useful guide to Congress. Professor Knox, for example, argues that the Court has failed to clarify the application of the presumption and its rationales and has caused “chaos” among the lower courts.<sup>84</sup>

Finally, it is difficult to deny that the presumption has allocational effects.<sup>85</sup> The presumption advantages those, like transnational companies, who would rather avoid regulation whenever possible because the heavy burden of galvanizing Congress to overrule the Court after it has applied the presumption lies on advocates of regulation.<sup>86</sup> In part because of these obvious allocational effects, many commentators believe that the presumption is best understood as a disguised judicial normative preference.<sup>87</sup> This can be read as a commitment to territorial sovereignty or as a hostility to certain types of suits. For example, Justice Scalia, writing for the majority in *Morrison*, noted that one should be “repulsed” by the potential adverse consequences of a ruling permitting civil securities liability in cases like *Morrison* because this would lead to a “Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”<sup>88</sup>

#### D. SEPARATION OF POWERS/JUDICIAL COMPETENCY

Professor Bradley asserts that “the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.”<sup>89</sup> Arguably this rationale encompasses two concerns: judicial interference with the executive’s conduct of foreign policy and judicial meddling with congressional prerogatives in determining the scope of federal statutes.<sup>90</sup>

82. *Id.* at 278.

83. *Id.*

84. Knox, *supra* note 1, at 390; *see also id.* at 390–96.

85. ESKRIDGE, *supra* note 81, at 279.

86. Dodge, *supra* note 1, at 122–23; *see also* Turley, *supra* note 1, at 661–62.

87. *See, e.g.*, ESKRIDGE, *supra* note 81, at 283.

88. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 270 (2010).

89. Bradley, *supra* note 1, at 516; *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007); *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

90. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993).

In criminal cases, there is no legitimate concern over interference with executive prerogatives because it is, of course, the executive who determines whether to launch a given case.<sup>91</sup> The Department of Justice's own policies reflect that it recognizes the sensitivity of transnational prosecutions and applies increased scrutiny to their appropriateness. For example, only money-laundering prosecutions that involve extraterritorial application of the relevant statutes require Main Justice approval.<sup>92</sup>

With respect to arguments founded on avoiding judicial intrusion on congressional decisions, these arguments assume that Congress actually has a view on extraterritoriality when it legislates, but as Professor Brilmayer notes, "in the vast majority of cases, legislatures *have* no actual intent on territorial reach."<sup>93</sup> Further, "[t]he presumption against extraterritoriality is supposed to be used only when congressional intent is unclear, so by definition it is ambiguous whether applying the statute territorially or extraterritorially would be the 'activist' position."<sup>94</sup> One may legitimately question whether the presumption, which "always sacrific[es] legislative aims in order to avoid conflict with foreign law," is truly the best way to limit judicial intrusion.<sup>95</sup> "A court attempting to carry out congressional intent should apply a statute extraterritorially whenever doing so would advance the domestic purposes that Congress sought to achieve with the statute. To constrain the extraterritorial application of a statute on the basis of a court's intuition that conflict with foreign law is undesirable is—to borrow a phrase—judicial activism."<sup>96</sup> Congress can, of course, respond to a mistaken judicial decision to deny a statute extraterritorial application by legislatively expanding the scope of the statute; but the reverse is true as well. Professor Dodge queries whether the Court should apply a presumption designed to "force Congress to reveal its preferences by adopting a rule that Congress would not want,"<sup>97</sup> noting that this argument seems strongly counter-majoritarian and contrary to separation of powers.<sup>98</sup>

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91. See Knox, *supra* note 1, at 387–88.

92. See U.S. ATTORNEYS' MANUAL § 9-105.300(1).

93. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980).

94. Clopton, *supra* note 3, at 16.

95. Dodge, *supra* note 1, at 120.

96. *Id.*

97. *Id.* at 121.

98. *Id.*

Finally, “if the presumption is intended to respect the decisions of the political branches—legislative and executive—it needs work.”<sup>99</sup> Courts applying the Supreme Court’s strong presumption have rejected the views of the executive-branch departments or agencies charged with interpretation and application of the relevant statutes.<sup>100</sup> And given the strength of the modern presumption, the Court has arguably ignored strong, but less than “clear,” evidence of a congressional intent to apply statutes extraterritorially.<sup>101</sup>

### E. THE PRESUMPTION AS A PROXY FOR LENITY

The scholarly and judicial consensus seems to be that criminal and civil cases ought to be treated the same for purposes of extraterritoriality analysis. One could, however, argue that the presumption makes more sense in the criminal context than in the civil. This is because the rule of lenity applies only in criminal cases. This rule requires that “when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [the Court chooses] ... the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”<sup>102</sup> The rule of lenity is founded first on the theory that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”<sup>103</sup> Second, legitimacy concerns reflected in separation-of-powers principles justify lenity. As the Supreme Court has explained, “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”<sup>104</sup> “Lenity promotes th[e] conception of legislative supremacy not just by preventing courts from covertly undermining legislative decisions, but also by forcing Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to the courts.”<sup>105</sup>

99. Clopton, *supra* note 3, at 17.

100. See, e.g., *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 244 (1991); *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 846 (9th Cir. 2012).

101. See, e.g., *ESKRIDGE*, *supra* note 81, at 281–82.

102. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952).

103. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

104. *United States v. Bass*, 404 U.S. 336, 348 (1971).

105. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 350 (1994).

The Court has occasionally held that where a statute is capable of both civil and criminal enforcement, lenity ought to be applied<sup>106</sup>—but it has not done so in extraterritoriality cases concerning hybrid statutes. The presumption against extraterritoriality serves much the same function, at least in requiring Congress to specify, in advance, the extraterritorial application of a statute.

### RECOMMENDATIONS

There is no shortage of interesting suggestions regarding how the Supreme Court should amend its extraterritoriality analysis; most of the proposals recommend jettisoning the presumption and replacing it with another test.<sup>107</sup> My own take is that there is no clear and convincing reason for a general presumption against extraterritoriality in civil cases. In criminal cases, the presumption makes more sense because it could serve as a surrogate for the rule of lenity.

But my bottom line is that all this statute-by-statute litigation over extraterritoriality and statutory “focus” is a colossal waste of time and judicial and other resources, and it unfairly burdens the defendant whose case is the vehicle for determining whether a statutory provision applies extraterritorially and, if not, what the statutory “focus” is. The federal criminal code is sprawling and most provisions do not speak to the extraterritoriality question.<sup>108</sup> Is it truly wise or fair to wait for each code section to be charged and then to litigate, perhaps all the way to the Supreme Court, the extraterritoriality question? And

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106. See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Scheidler v. NOW*, 537 U.S. 393, 408–09 (2003); *United States v. Thompson/Center Arms*, 504 U.S. 505, 517–18 (1992) (plurality opinion); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *FCC v. ABC*, 347 U.S. 284, 296 (1954). But see *Babbitt v. Sweet Home Chapter, Communities for Great Or.*, 515 U.S. 687, 704 n.18 (1995).

107. See, e.g., *Knox*, *supra* note 1, at 383 (the Court should adopt a clarified version of its presumption against extrajurisdictional application of U.S. law such that a hard presumption against extraterritoriality applies when no basis in international law exists, a soft presumption applies where there is a basis but not a the sole or primary one, and no presumption applies at all when the U.S. jurisdiction is sole or primary); *Dodge*, *supra* note 1, at 124 (a presumption is warranted as a means of discerning congressional intent but the definition of “domestic” cases should be based not on where the conduct occurred but on where the effects are felt); *Turley*, *supra* note 1, at 659–60 (“Instead of beginning with a presumption that Congress intends all statutes to apply only territorially, it would make more sense to presume that, unless expressly limited, Congress intends statutes to apply extraterritorially.”); *Clopton*, *supra* note 3, at 1–5 (instead of applying the presumption to all extraterritorial cases, proposing that the *Charming Betsy* canon be applied to private civil litigation, the rule of lenity in criminal cases, and *Chevron* deference in administrative law cases). But see *Parrish*, *supra* note 1, at 1461–62 (arguing for reinvigoration of the territorial limits on jurisdiction in transnational cases).

108. See Stephen F. Smith, “Overfederalization,” in the present Volume.

need we now, with respect to every statute that does not have extraterritorial application, litigate about the statutory “focus,” again potentially all the way up to the Supreme Court?

This wasteful and unfair litigation is also completely unnecessary. Congress can and should step in to identify when it believes statutes ought to apply in transborder cases.

1. **Instead of reacting to each Supreme Court extraterritoriality decision that it does not like, Congress should act preemptively and create a general code section that dictates what crimes apply extraterritorially and under what circumstances.** Other countries have successfully done so.<sup>109</sup> Such a general extraterritoriality provision was drafted during the course of an attempted overhaul of the U.S. federal criminal code; unfortunately the overhaul, and thus this general provision, failed.<sup>110</sup> It appears that, at least recently, Congress has opted for territoriality jurisdiction as measured both in subjective (conduct) and objective (effects) territoriality terms. But effects jurisdiction has the potential for being limitless unless Congress exercises some discipline in defining its scope. It is worth keeping in mind the paradigmatic case for such jurisdiction: when a defendant, standing in State A, shoots and kills a victim who is present in State B. The effects, in other words, should be direct, substantial, and at the very least foreseeable if not intended.
2. **Congress should consider making an express provision, similar to that included in the Dodd-Frank Act, regarding where a crime is deemed committed for purposes of determining whether a given violation is domestic or extraterritorial.** In this respect, it may wish to reference the existing venue rules in criminal cases.

109. SWISS CRIM. CODE arts. 4–7, <https://www.admin.ch/opc/en/classified-compilation/19370083/201701010000/311.0.pdf> (unofficial English translation).

110. See, e.g., Kenneth R. Feinberg, *Extraterritorial Jurisdiction and the Proposed Federal Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 385 (1981); Note, *Extraterritorial Jurisdiction Under the Proposed Federal Criminal Codes: Senate Bill 1630 and House Bill 1647*, 12 GA. J. INT’L & COMP. L. 305 (1982).

# Mental Disorder and Criminal Justice

Stephen J. Morse\*

*The criminal law treats some people with severe mental disorders differently at every stage of the criminal process and such people often have special needs in the system. After providing legally relevant background information about mental disorders and data about the prevalence of mental disorders among inmates and their special needs, this chapter considers doctrinal and practical reforms related to mental disorder at every step of the criminal justice process. The goal is to suggest how people with severe mental disorders can be treated more humanely by the criminal justice system without compromising the system's retributive and crime-prevention functions.*

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## INTRODUCTION

The criminal law treats some people with severe mental disorders doctrinally and practically differently at virtually every stage of the criminal justice process, beginning with potential incompetence to stand trial and ending with the question of competence to be executed. Such people may also have special needs when they are in the system. This chapter begins by exploring the fundamental mental-health information necessary to make informed judgements about how the criminal justice system should respond to this population, including discussion of the causal relation between mental disorder and criminal behavior. The next section addresses the prevalence of mental disorders in jails and prisons and the mental-health needs of mentally disabled inmates. The third section addresses criminal mental-health law doctrines. Throughout, the chapter considers how changes could promote greater justice and humanity in the law's treatment of criminal offenders who suffer from mental disorders. A brief conclusion follows. Specific recommendations are made in bold and a complete list of those recommendations is found at the end of the chapter. Less important recommendations are discussed, but are not separately made in bold.

This chapter is different from most of the others in this report. Rather than addressing a discrete topic within criminal justice, it discusses the role of mental disorder throughout the entire criminal justice system. It is therefore necessarily considerably longer than almost all the other chapters. Readers will have different interests, so a table of contents was provided to permit easy access to those sections that a particular reader might find most relevant.

A final preliminary matter is that the American Bar Association has recently adopted its fourth edition of Criminal Justice Mental Health Standards.<sup>1</sup> Like this chapter, it addresses the entire criminal justice process. Readers interested in the issues this chapter discusses should also read the ABA Standards. Although there are many areas of agreement, there are also areas of disagreement and the argument and scope of analysis offered differ.

**RECOMMENDATION: Readers interested in the role of mental disorder in the criminal justice system should consult the ABA Criminal Justice Mental Health Standards.**

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1. AM. BAR ASS'N, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (4th ed. 2016), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/mental\\_health\\_standards\\_2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf). The current version replaces standards adopted in 1984. Professor Christopher Slobogin, who was chair of the ABA task force charged with revising the standards, has provided a particularly informative review of the 4th edition. Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 HASTINGS CONST. L.Q. 1 (2016).

## I. MENTAL DISORDERS BACKGROUND

Mental disorders encompass both mental disorder and intellectual disability (intellectual developmental disorder). Both are included in the American Psychiatric Association's, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition—DSM-5*.<sup>2</sup> No consensual generic definition of mental disorder exists, however. Here is the definition DSM-5 provides:

A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.<sup>3</sup>

Like the previous definitions earlier editions of DSM used, this one has been quite controversial. It should be apparent that it is not precise. On the other hand, the lack of a good general definition does not mean that the work of classifying mental disorders cannot be done. The question, to which we will return, is how scientifically sound and clinically useful the classification system is.

There are a number of important considerations about mental disorder that law reformers should understand. Diagnosis is based virtually entirely and in most cases entirely on behavioral criteria, defined here broadly to include cognitions (thoughts, beliefs), feelings, perceptions, desires, and actions. There is no external standard, such as a biological or psychological marker, to which the diagnostician can appeal to determine if the diagnosis is accurate. The mark of accuracy is whether two independent diagnosticians can agree on the diagnosis, which is called inter-rater reliability and which can be expressed numerically after correcting for chance agreement. Current diagnostic categories vary in their reliability, but, based on relatively rigorous field testing

2. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013) (DSM-5). Intellectual Disability was formerly termed "mental retardation" and then "developmental disorder." The bulk of the manual addresses mental disorder and this type of disability is far more prevalent in the population than intellectual disability.

3. *Id.* at 20.

of the categories, they are typically much higher than the reliability of DSM-II categories published in 1968. Reliability has not increased much since the publication of DSM-III in 1980, however.

Few clinicians in any setting seek an independent confirmation of their diagnosis, so the actual reliability of diagnoses in the hurly-burly of everyday practice is not clear. In research, investigators often use rating scales that may be more or less structured and that typically have known reliabilities. When judging the reliability of an individual assessment or a large-scale study, say, of the prevalence of mental disorder in a prison population, it is always useful to ask about the reliability of the evaluation method used to make the diagnoses. An unreliable diagnosis warrants extreme caution.

Even if a diagnosis is reliable, a further question is whether the category is valid. Validity refers to whether the category is a genuine and meaningful one. In the area of diagnostic categories, the issue is whether “nature is carved at the joints” as the categories describe or are the categories simply definitional. For example, I can define a cluster of strong personal preferences as the Brahms-Broncos-Bacon syndrome that applies to those people who express strong positive preference for the composer, football team and food. I assume one could reliably identify people as having B-B-B syndrome, but would they be alike in any other meaningful way? In mental health, a category may be meaningfully distinct if it has, for example, different genetic bases, different family histories, different treatment responses, and different neural correlates compared to other disorders. At present, the validity data for most diagnostic categories is considerably weaker than the reliability data, and there is much reason to believe that the allegedly discrete disorders may not be genuinely different (except definitionally).<sup>4</sup> For purposes of further discussion, however, I will bracket reliability and validity concerns.

Even if two people are reliably diagnosed with the same disorder, their behavioral presentations can be markedly different because the behaviors that will justify a discrete diagnosis can be remarkably heterogeneous. This is part of the reason why diagnostic reliability can be fraught. For the law, this is a crucial point. Criminal law criteria are acts and mental states—hold aside circumstances elements, which often themselves require an accompanying mental state. The behavioral heterogeneity of diagnoses means that a diagnosis

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4. For example, a recent review of functional Magnetic Resonance Imaging (fMRI) studies of various mental disorders indicates that there are no significant differences between the brain regions that activate across the various disorders. Emma Sprooten et al., *Addressing Reverse Inference in Psychiatric Neuroimaging: Meta-Analyses of Task-Related Brain Activation in Common Mental Disorders*, 38 HUM. BRAIN MAPPING 1846 (2017).

cannot, *per se*, answer any criminal law question. One must investigate the behavior underlying the diagnosis in order to determine if the subject's apparently abnormal behavior in fact meets a legal criterion. Some people with major mental disorders are incompetent to stand trial or legally insane; most such sufferers are neither incompetent nor legally insane. Whether a defendant with mental disorder meets a legal criterion must be evaluated case by case based on the subject's behavior. For the law, behaviors speak louder than diagnoses, psychological test data, neuroimages, or any of the array of methods diagnosticians employ in their work.

Long ago, I proposed and still believe that many of the difficulties caused by imprecision and controversy in mental-health concepts and categories could be avoided by the law eschewing technical diagnostic terms and focusing instead purely on the underlying behavior that is in any case the basis for diagnoses.<sup>5</sup> This recommendation met with scant success. Nonetheless, law reformers should recognize that the behaviors that justify a diagnosis make no rational sense in context. Less serious mental disorder is less irrational; more serious mental disorder, which is often marked by gross loss of contact with reality (psychosis), is markedly irrational. The law is mostly concerned with people whose mental abnormalities render them incapable of ordinary rationality in a particular context. This is the crucial issue. A technical diagnosis answers no legal question beyond the behavior upon which the diagnosis is based.

Before leaving the topic of diagnosis, it is important to call attention to three diagnostic categories that are common among criminal justice defendants and people incarcerated in jails and prisons: antisocial personality disorder, addiction, which DSM-5 terms substance use disorders (which are individuated according to the substance used and are characterized as "mild, moderate or severe") and sexual disorders. Personality disorders as a class identify maladaptive behavior patterns that are, roughly speaking, characterological, rather than marked by discrete cognitive, mood, or perceptual abnormalities. Antisocial personality disorder is diagnosed based on consistent disregard for and violation of the rights of others, as manifested by at least five of seven listed criteria, six of which are chronically antisocial behaviors. Only one of the seven criteria—lack of remorse—is purely psychological and need not be present to make the diagnosis. There is a real question whether this category, which is estimated to include 60% to 80% of inmates in secure custody, is properly considered a type of mental disorder rather than simply a description of purely antisocial behavior.

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5. Stephen J. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 521 (1978).

There is a diagnostic entity seemingly similar to antisocial personality disorder, “psychopathy,” which does include important psychological criteria, such as lack of conscience and lack of empathy, and which can be reliably diagnosed. It is estimated that 15% to 25% of maximum security prison inmates have this disorder, which overlaps imperfectly with and is different from antisocial personality disorder. Psychopathy is also the subject of an ambitious research program in many labs, including its relation to criminal behavior, but it is not included in DSM-5, although it seems to justify being considered a disorder more than antisocial personality disorder.

According to DSM-5, substance abuse is diagnosed when the persistent use of a substance causes clinically and functionally significant impairment, such as health problems and the failure to meet major responsibilities. Many addiction researchers in the field consider the criteria to be the persistent seeking and using of substances despite adverse consequences and often accompanied by subjective craving. The National Institute of Drug Abuse considers addiction to be a chronic and relapsing brain disease, but there is a strong case that this is an inaccurate and reductive definition and there is even dispute about whether addiction should be considered a disorder at all. Despite such disputes, it is clear that a very high percentage of felony arrestees test positive for various substances and many defendants and inmates have serious problems with substance use.

Sexual disorders are marked by abnormal sexual desires that are acted on or cause significant distress. Offenders who commit sexual crimes, such as pedophilia, exhibitionism, and voyeurism, commonly would be diagnosed with these disorders. Why such desires are considered the potential symptom of a disease rather than normal human variation is an open question. Nonetheless, the objects of some desires are considered both illegal and immoral to obtain and thus acting on them is criminalized even though virtually no one thinks that one “chooses” the objects of one’s sexual desire. Rather, they are typically discovered through life experience, especially in adolescence or young adulthood.

Although antisocial personality disorder, addiction and sexual-disorder diagnoses apply to so many criminal offenders, these disorders seldom trigger special legal treatment. For example, none will typically be sufficient to trigger incompetence-to-stand-trial proceedings or to be the basis for an insanity defense. In many states, these diagnoses are specifically excluded as the potential basis for an insanity defense. Indeed, the Supreme Court has rejected the idea that the Constitution requires a defense for addicts whose criminal behavior is

symptomatic of the disease of addiction.<sup>6</sup> Rather, the government may punish an individual for possessing or using illegal drugs, for instance, even if such conduct is a symptom of his addiction.

The most common special treatments for these groups are non-compulsory diversion of nonviolent defendants to specialty problem-solving courts and special quasi-criminal commitment of so-called mentally abnormal sexually violent predators, a practice the Supreme Court has upheld.<sup>7</sup> In later sections of this chapter, I shall return to whether the current legal treatment of these three categories of disorders is wise.

The next issue of importance is the effectiveness of various treatment methods, especially for severe mental disorder, because less severe disorders tend not to trigger special legal treatment and do not as compellingly warrant treatment provision. There are three primary treatment modes for people with serious disorders: pharmacotherapy with psychotropic medication, psychological therapy (individual and group), and psychosocial rehabilitation. The latter two are typically more labor-intensive if done correctly, and criminal justice system resources are limited. Consequently, for severe disorders, pharmacotherapy is typically the treatment of first resort. Such treatments can be enormously useful, but they are of benefit to only a moderate number of people who have severe disorders. The usual rule is about one-third of patients improve markedly, about one-third improve moderately, and about one-third do not improve at all. Moreover, although they may be of help in reducing cognitive and mood abnormalities, they do not necessarily help people with the interpersonal and social deficits that often result from mental disorder, especially chronic disorder. There is essentially no marker to guide clinicians in the choice of which drug from within an appropriate class will work best. There are general guidelines, but therapy is empirically guided in individual cases. Finally, many psychotropic drugs have serious side effects, which explains why many patients fail to adhere to the prescription regimen. To the extent that mood or cognitive abnormalities render an offender incompetent at any stage in the criminal justice process, pharmacotherapy may alone restore competence although it would be insufficient to meet all the offender's mental-health needs.

For the diagnoses of antisocial personality disorder, addiction, psychopathy, and sexual disorders previously discussed, there is either no effective treatment (antisocial personality disorder, psychopathy) for adults or the treatments are of limited effectiveness (addiction, sexual disorders), especially with an

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6. Powell v. Texas, 392 U.S. 514 (1968).

7. Kansas v. Hendricks, 521 U.S. 346 (1997); Kansas v. Crane, 534 U.S. 407 (2002).

uncooperative patient. To the extent that addicts use substances as a form of self-medication to deal with the suffering another independent disorder produces (a case of co-morbidity), treating the other disorder may help alleviate the addiction, but addiction tends to take on a life of its own. After unsuccessful attempts to quit, most addicts in the general population ultimately stop using on their own and without treatment when they have good enough reason to do so.<sup>8</sup> Whether the same is true of addicted inmates is unknown.

As a bridge between the issues of treatment and prediction, which will be addressed shortly, let us consider the causal relation between mental disorder and criminal conduct. The most important thing to recognize for lawyers and policymakers is that mental disorders that apparently play a causal role do not turn the person into an automaton. People with mental disorders act for reasons just like people without such disorders. Consider Daniel M’Naghten, for example, a 19<sup>th</sup>-century Scotsman who was delusional and believed the Tory Party was persecuting him and was attempting to kill him. He intended to kill British Prime Minister Robert Peel to save his own life, and acted on that intent (although, in the event, he killed Peel’s private secretary, Edward Drummond, who was riding in the prime minister’s carriage that day). Abnormal perceptions or beliefs motivate people with mental disorders and they then act on those beliefs. Their criminal acts should not be understood mechanistically, like a fever that spikes as the result of an underlying infection. Causation should be understood in this context in terms of assessing the defendant’s reasons for action.

Finally, simply because a mental disorder played a causal role in explaining criminal behavior, it does not follow that the person could not control that behavior. The notion of loss of control of action is notoriously fraught. A minority of jurisdictions have a control test for legal insanity in addition to a cognitive test, and the Supreme Court has approved the use of control criteria for sexual-predator commitments.<sup>9</sup> But the meaning of these tests—at least to the extent that a defendant’s control of his behavior is considered independent of his rationality—remains conceptually and empirically unclear. For these reasons, both the American Psychiatric Association and the American Bar Association recommended abolition of control tests for legal insanity.

Now let us turn to the statistical association between mental disorder and criminal behavior generally, but with the understanding just explored that the underlying causal account in an individual case should be understood in terms of reasons for action. If the relation is strong, adequate treatment might have a

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8. GENE HEYMAN, *ADDICTION: A DISORDER OF CHOICE* (2009).

9. *Crane*, 534 U.S. at 407–08.



preventive effect, and knowledge about a subject's mental disorder might enhance the accuracy of predictions about future criminal behavior. Policymakers should not be swayed, however, by a few high-profile acts of violence committed by people who apparently had mental disorders. Instead, they should focus on the best large-scale studies that have been properly done methodologically.

Investigation of good studies discloses a far weaker connection between major mental disorder and criminality than many people stereotypically assume. Most people with mental disorder do not engage in serious criminal behavior and are more likely to be victims of violence than perpetrators. The rate of serious criminal behavior among people with major mental disorder is approximately the same as the population as a whole—about 3% to 4%—unless the person is also abusing substances, which does increase the rate. This is unsurprising because people with serious disorders do have higher rates of substance-use problems, probably because they are self-medicating to deal with the pain of mental disorder and related problems. Nonetheless, even in this co-morbid population—people with major mental disorder and substance abuse—the rate of serious criminal behavior is low.<sup>10</sup> Moreover, the association between psychotic states and violent behavior is weak and inconsistent. The strongest association between mental disorder and violent conduct is self-harm, especially suicide by gun.<sup>11</sup> This is tragic, but not a criminal justice issue.

In short, there are clear cases in which mentally abnormal thoughts and moods may be causally related to criminal conduct, but for the most part, major mental disorder is not a major cause of crime. There is a powerful moral and social argument that better mental-health services should be provided to the population at large and especially to those without the resources to afford private care. It is a mistake, however, to believe that more aggressive mental-health care, including increased use of involuntary civil commitment or compulsory treatment, will make much inroad in preventing serious criminal behavior. Such interventions, which often involve substantial deprivations of liberty, may have positive mental-health outcomes for some sufferers, but they will have slight impact on criminal conduct.

The final general issue is the relation of mental disorder to the prediction of future criminal behavior. Policymakers must recognize that very serious violent behaviors are relatively low frequency. That is, the base-rate for such behavior

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10. Cf. Jeffrey A. Miron, "Drug Prohibition and Violence," in the present Volume. Cross-references to other chapters in this Report are inserted in the footnotes for the convenience of the reader. Such cross-referencing does not indicate that the author of this chapter necessarily endorses any or all of the arguments presented in the cross-references.

11. Cf. Franklin E. Zimring, "Firearms and Violence," in the present Volume.



is small. It is very difficult to predict low base-rate behaviors accurately unless one has a very sensitive prediction method that has a high true positive rate. Unfortunately, with low base-rate behaviors, a sensitive method may identify most true positives, but it will also produce a vast number of false positives in which criminal behavior will be predicted but will not occur.

At present, there are three general types of prediction methods that are used in mental health (and in other contexts): clinical prediction, semi-structured clinical judgment (SCJ), and actuarial. In the former, the predictor decides what data are relevant and how to combine them based on his personal education and experience. In the latter, the types of data to be obtained, the methods for obtaining them, and how they should be weighed are prescribed based on large-scale studies that produce an algorithm for prediction. The outcome is preordained by the algorithm. This is the method used by large life-insurance companies to assess death risk among applicants for life-insurance policies. In SCJ, the predictor typically uses some type of structured prediction rating scale, but then may adjust the outcome depending on personal experience and judgment. Actuarial prediction is vastly more accurate than clinical prediction, which tends to be quite inaccurate. There is a dispute about whether actuarial is more accurate than SCJ, but for now the default probably is that they are about equally accurate and both are substantially more accurate than clinical. Nonetheless, probably the majority of predictions made in the criminal mental-health context are clinical despite the clear evidence that this is not best practice. That must change. SCJ or actuarial prediction methods should be mandated if they exist for the type of prediction in question. If none exists, there is no alternative to clinical judgment, but policymakers and decision-makers should understand how inaccurate such prediction will be.

**RECOMMENDATION: When predicting future behavior, the most accurate type of prediction method available should be used. If actuarial or structured clinical judgment methods are available for the type of prediction in question, they should always be preferred to purely clinical prediction.**

Using a mental-disorder variable as part of a criminal-behavior prediction system can improve accuracy, but not by much. Many other variables, such as sex, age, and especially prior history, are far better predictors than a diagnosis. One diagnosis that is associated with higher accuracy is psychopathy because it includes antisocial behavior as part of its criteria and thus builds in prior history. Still, it independently does increase accuracy. One would expect this among a population marked by indifference to morality and the rights and needs of others. Among the highest-risk group of inmates or forensic

patients with mental disorder, short-term prediction is decently good with actuarial methods, approaching 70% accuracy. With less-risky people in these populations, the accuracy drops off markedly. In general, however, accuracy is produced largely by variables other than diagnosis. In brief, mental disorder is a very weak predictor of future criminal behavior.

Given the history of the United States, there is a serious question whether one sensitive variable that perhaps increases accuracy in the criminal justice system—race—should be used when predicting future criminal behavior, both among subjects with and without mental disorder. It would be hard to avoid using it, especially unwittingly, in the case of clinical and SCJ, but it could be omitted from an actuarial algorithm. There is general consensus that race independently of, say, socioeconomic status, is at most an extremely weak predictor of recidivism.<sup>12</sup> Using it contributes to negative stereotypes and arguably perpetuates the structural problems that cause the association between race and criminal behavior.<sup>13</sup> Policymakers must be sensitive to the issue when considering predictive technologies, but race could safely be ignored in most instances of predicting recidivism without compromising accuracy.

**RECOMMENDATION: Race should not be considered as a variable when predicting recidivism.**

## **II. MENTAL DISORDER AMONG CRIMINAL JUSTICE INMATES: PREVALENCE AND NEEDS**

According to large-scale epidemiological studies that used DSM-IV diagnostic categories, which are largely similar to those in DSM-5, about 1 in 10 United States adults suffers from some mental disorder. The most serious disorders, e.g., schizophrenia, major depression, bipolar disorder (manic depression), have lower rates. For example, schizophrenia is diagnosed in about 1% to 2% of the general population. The prevalence of disorders among prison and jail inmates varies substantially by jurisdiction and by the diagnostic criteria used and the methodology employed to collect the data. Nonetheless, there is wide agreement that mental disorder and especially serious mental disorder is considerably more prevalent among inmates than among the

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12. See John Monahan, “Risk Assessment in Sentencing,” in Volume 4 of the present Report.

13. For discussions of the impact of race on criminal justice, see, for example, Jeffrey Fagan, “Race and the New Policing,” in Volume 2 of the present Report; Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; L. Song Richardson, “Police Use of Force,” in Volume 2 of the present Report; Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

general population.<sup>14</sup> Estimates run from about 50% to 75% of inmates, with higher rates in jails, and among females and younger people. These numbers have risen substantially in recent decades, including the numbers of inmates with serious mental disorders, such as psychotic and major mood disorders. For example, on any given day according to the American Psychiatric Association, between 2.3% and 3.9% of inmates in state prisons are estimated to have schizophrenia or another psychotic disorder; between 13.1% and 18.6% have major depression; and between 2.1% and 4.3% suffer from bipolar disorder. The prevalence of drug problems is cloudier because of the changes in diagnostic criteria, but estimates range from 25% to 60% and co-morbidity seems true for about 45% to 50%. Whatever the precisely accurate prevalence is in fact, it is clear that prison and jail inmates suffer from very high rates of mental disorders and more people with serious disorders are in prisons and jails than in hospitals.<sup>15</sup>

In addition to the suffering that many inmates with mental disorder experience as a result of the disorder itself, inmates with disorder are more likely to be victimized and placed on suicide watch, can be management problems, are more likely to get into fights, and to have other difficulties. In addition, as a result of their history of mental disorder, many have substantial interpersonal and psychosocial deficits that make it difficult for them to be productive, law-abiding members of the community. Treatment needs in prisons and jails are large and acute.

The United States Constitution gives little purchase to the mental-health treatment rights of people incarcerated in the criminal justice system. The Court has never held that there is a general right to adequate mental-health treatment in either the criminal justice or involuntary civil commitment contexts. Two cases, *Estelle v. Gamble*<sup>16</sup> and *Youngberg v. Romeo*,<sup>17</sup> provide

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14. All the following data come from the sources cited in this note. See Dean Aufderheide, *Mental Illness In America's Jails And Prisons: Toward A Public Safety/Public Health Model*, HEALTH AFFAIRS BLOG (Apr. 1, 2014), <http://healthaffairs.org/blog/2014/04/01/mental-illness-in-americas-jails-and-prisons-toward-a-public-safetypublic-health-model/>; PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (July 1999); DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (revised Dec. 14, 2006); AZZA ABUDAGGA ET AL., INDIVIDUALS WITH SERIOUS MENTAL ILLNESSES IN COUNTY JAILS: A SURVEY OF JAIL STAFF'S PERSPECTIVES: A RESEARCH REPORT FROM PUBLIC CITIZEN'S HEALTH RESEARCH GROUP AND THE TREATMENT ADVOCACY CENTER (July 14, 2016).

15. This is true, but it ignores the evidence that hospitalization would not be necessary for most people with severe disorders if appropriate services were provided in the community.

16. 429 U.S. 97 (1976).

17. 457 U.S. 307 (1982).

only minimal guidance. In *Estelle*, which addressed the constitutional right to health care of prisoners generally, the Court noted that the prisoner had no access to services other than those the prison provided, but held that an Eighth Amendment violation was colorable only if the prison demonstrated “serious indifference” to the health-care needs of an inmate. This is a very low bar. One assumes that ordinary indifference would not raise a potential claim.

In *Youngberg*, the Court was asked to decide whether the Due Process Clause guaranteed a profoundly intellectually disabled inmate of a *civil* state institution the rights to safety in confinement, freedom from bodily restraints, and treatment. Applied in the context of intellectual disability, the latter was termed training or “habilitation.” The Court held that the inmate had the first two rights and the third in so far as it was necessary to guarantee the first two. But the Court also noted that no constitutional violation would obtain if “professional judgment” was used to determine the inmate’s needs and otherwise inadequate habilitation would be acceptable within broad limits if it resulted from insufficient availability of state resources. It should be apparent that these two cases do not offer strong constitutional support for the state’s need to provide robust, effective mental-health treatments in prisons and jails. As long as the state is not seriously indifferent to prisoners’ mental-health needs, and, assuming *Youngberg* roughly applies to prisoners, some professional judgment is applied (even if constrained by state resources), constitutional requirements are satisfied. As a matter of morality and justice, however, this is unconscionable.

It is of course unrealistic to expect prisoners to receive the highest level of care that would be available in freedom and on the open market. But, at the least, they should receive a level of care reasonably adequate to meet medical, psychiatric, and psychological ethical standards. There is widespread agreement that mental-health treatment for prisoners, especially in local jails, does not meet this standard.<sup>18</sup> Medication is typically available in prisons, but far less so in jails. Adequate pharmacological treatment for psychotic, severe mood, and serious anxiety disorders is not a simple matter, however. Done properly, it requires a careful evaluation and careful follow-up to consider how the medication chosen is working and whether the dosage or the medication itself needs to be changed. There is virtually no treatment for substance use disorders in jails and prisons, including methadone maintenance, although large number of inmates have such disorders and could benefit greatly from such treatment. Contingency

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18. See TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY (2014), <http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf>.

management programs for addicted inmates, in which there are rewards and graduated sanctions for abstinence and lack of it, would also be helpful.

For many reasons, there are simply insufficient numbers of mental-health professionals working in the prisons and jails to satisfy this need. There are large numbers of inmates who need help, but states and localities seldom budget enough resources. Most qualified professionals would rather work in more pleasant environments. In virtually all jurisdictions, only psychiatrists among the mental-health professionals are qualified to prescribe medication. Psychologists, social workers, and psychiatric nurses are limited to providing psychological services, which, although important, are not the first line of treatment in custodial settings, and there are simply not enough psychiatrists properly to prescribe medication and to follow the care of inmates. Outside of prison, a great deal of psychotropic medication is prescribed by family physicians, internists and other primary-care doctors, and non-psychiatrist prison doctors can prescribe, but such professionals are not mental-health specialists, and the quality of care is lower.

A major reform that would permit enhanced pharmacological treatment would be to authorize other mental-health professionals to prescribe psychotropic and substance-use medications. Psychologists who have special training in psychopharmacology already have prescription privileges in limited jurisdictions, including Louisiana, New Mexico, and Illinois. Many psychiatrists object to this, but it would immeasurably alleviate the burden of providing more adequate and available drug treatment without endangering patients. Even if a jurisdiction was unwilling to permit non-physicians to prescribe psychotropic medications generally, the practice might be limited to other professionals working in jails and prisons. In my opinion, psychiatric social workers and psychiatric nurses as well as psychologists who undergo the necessary training should have prescription privileges for psychiatric medications.

**RECOMMENDATION: Non-physician health-care providers in jails and prisons, especially psychologists, psychiatric social workers, and psychiatric nurses, who have received adequate training in prescribing psychotropic medication, should be permitted to prescribe psychotropic medication and medication for substance use disorders.**

Psychotherapy (counseling) and psychosocial rehabilitation are indicated for many people with mental disorder for whom drug treatment might be useful but still insufficient to help alleviate psychological abnormalities and to

decrease interpersonal and social-skill deficits.<sup>19</sup> These services can be provided by any trained mental-health professional, not just by psychiatrists, but they can be labor-intensive, especially individual therapies with sufficient frequency of provision to be useful. Such services are rare in custodial settings, although various forms of group therapy are often available. How effective such services are with prisoners and which ones have not been rigorously evaluated, so it seems to me premature to recommend much greater allocation of resources for psychological services. Rather, experimental trials of various forms of therapies should be performed to develop the database to determine whether and for whom such services are cost-benefit justified.

Treatments for the special populations of addicts and sexually disordered sexual criminals are of limited effectiveness. Indeed, some data concerning the latter suggest that treatment is an increased risk factor for recidivism. If treatments for these types of offenders were effective, then it would probably be quite cost-benefit justified to make them available. Relevantly, the Supreme Court held in *Hendricks*<sup>20</sup> that the provision of treatment was not necessary to justify the involuntary commitment of mentally abnormal sexually violent predators, and experience with these commitments suggests that treatment is not of great help because almost no one committed under these schemes is ever released. My conclusion is that until more-rigorous data proves the effectiveness of treatment for these groups, major resource allocation would not be justified.

**RECOMMENDATION: Until rigorous data support the effectiveness of various psychological treatment methods for prisoners, including special populations such as addicts and sexual offenders, large-scale resource allocation for such methods should be limited, especially for methods focused on individual cases.**

Although many populations need and deserve services for various problems and money is not limitless, prisoners are entirely under state control and have no alternative means of obtaining care. To the best of my knowledge, there is no rigorously obtained database that links increased resources and care among prisoners to long-term mental-health outcomes. Decency demands, however, that more money should be spent on research concerning prisoners' mental-health care and the provision of such care itself, especially appropriate prescription of and follow-up for psychotropic medication and substance use treatment.<sup>21</sup>

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19. For a discussion of rehabilitation, see Francis T. Cullen, "Correctional Rehabilitation," in Volume 4 of the present Report.

20. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

21. See generally Margo Schlanger, "Prisoners with Disabilities," in Volume 4 of the present Report.

**RECOMMENDATION: Jail and prison mental-health services need to be dramatically improved.**

### III. DOCTRINAL AND PRACTICE REFORMS

In this part of the chapter, I address those aspects of doctrine and practice that seem most in need of reform. For those who wish more information and analysis, in earlier writing, I have treated these issues at vastly greater length.<sup>22</sup>

#### A. CRIMINALIZATION OF MENTAL DISORDER

A particularly vexing problem is the rise of mental disorder among local-jail inmates. Many attribute this to the de-institutionalization movement that began in the 1960s and that led to the closing of mental hospitals, the reduction in psychiatric hospital beds generally, and the decreased use of involuntary civil commitment. One phrase characterizes the history as a movement from de-institutionalization to “trans-institutionalization,” with local jail facilities replacing hospitals as the location of first resort for holding people with mental disorders who are presenting public problems. In other words, in the absence of a viable hospitalization alternative, we are now using the misdemeanor public “nuisance” behavior of people with mental disorder to send them to jail rather than to hospitalize them. Sometimes we use arrest even in the absence of probable cause to believe a misdemeanor has occurred.

Although there is truth to some of the descriptive parts of this argument—for example, hospitalization has declined and penal incarceration in jails has increased—I think much of the trans-institutionalization claim is misguided. Involuntary hospitalization is a massive intrusion on the liberty of the individual, as the Supreme Court recognized in *O'Connor v. Donaldson*,<sup>23</sup> and it was often based on inaccurate clinical predictions that the person was going to be a danger to himself or to others. Hospitalization is the most expensive form of mental-health treatment, and there is much evidence to suggest that it is not necessary if proper services are provided in the community. De-institutionalization did not fail. It was never really tried because most communities did not make adequate services available when the hospitals closed. Further, there was good evidence that hospitalization was not cost-benefit effective for mental disorders, although it did remove bothersome people from the community.

22. Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885 (2011).

23. 422 U.S. 563 (1975).



Some people with serious mental disorders can seem threatening or be offensive and are often responded to negatively. Petty assaults may result. If people with disorder are poor and homeless, they may commit petty theft, and public disturbance can occur. Previously, the police would take such people to a mental hospital's emergency room. Although that is still possible, it is much less common for the reasons given. As a result, they are far more likely to be jailed if the police believe they must be taken out of the community. This is particularly unfortunate because jails, especially in big cities, are highly stressful environments and the mental-health care available is very poor. We should also note that for more serious criminal behavior, there has been no "trans-institutionalization." People arrested for such crimes have always been responded to by being jailed. No suspected murderer, rapist, or armed robber was taken to the mental hospital's emergency room as the venue of first resort.

There is undeniably a problem of large numbers of mentally disordered misdemeanants being in jail.<sup>24</sup> But how should it be addressed? A return to large-scale involuntary hospitalization would be unwise for the reasons the system was dismantled in the first place and it would be infeasible to re-create it. One could decriminalize low-level misdemeanors generally, but that, too, would be infeasible. So, assuming that the behaviors resulting in jailing should be criminalized, the most obvious solution has already been addressed in the preceding section: provide sufficient mental-health care in the jails. Assuming, too, that most of the jailed inmates with mental disorder are responsible for the criminal behavior that resulted in jail time, they are rightly there and should then be treated properly.

Jailing mentally disordered, low-level misdemeanants seems harsh and inefficient to many, including me. Diversion from the criminal justice system is a much more attractive option in appropriate cases, but the mechanisms now available are problematic.<sup>25</sup> Despite the popularity of specialty problem-solving courts, such as drug courts and mental-health courts, there are significant civil-liberties concerns about these courts.<sup>26</sup> Also, they have not been rigorously evaluated for effectiveness. Finally, they are not used in cases of violent crime, which would include assaultive behavior, but such cases are common among mentally disordered people who are arrested.

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24. For a discussion of misdemeanors, see Alexandra Natapoff, "Misdemeanors," in the present Volume.

25. See generally Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

26. See generally Richard C. Boldt, "Problem-Solving Courts," in Volume 3 of the present Report.



Involuntary outpatient commitment is another promising diversion possibility. Without some form of coercion, many mentally disordered people who have been arrested for misdemeanors will not adhere to treatment regimens. Outpatient commitment has been shown to be successful, but only if treatment of sufficient intensity and duration is provided. In either case, effective mechanisms for triggering diversion would have to be adopted. Police officers typically have a fair degree of experience assessing whether a subject is seriously mentally disordered, and with training, they could do even better at making such judgments and interacting successfully with disordered people. When officers arrest misdemeanants, they might be able to make on-the-spot decisions to call psychiatric emergency teams to trigger outpatient commitment. In the alternative, all misdemeanants placed in jail could be evaluated within 24 hours for their suitability for outpatient commitment. Both mechanisms—police judgment and in-jail evaluation—might be highly successful in diverting misdemeanants to outpatient treatment rather than jail. In addition to the problems noted above, specialty courts would not provide an efficient diversion mechanism for misdemeanants because invoking this process is time-consuming and jail terms are typically relatively short.

Assuming that an effective and efficient mechanism for diversion could be devised, it is still utterly crucial that sufficient resources for adequate treatment in the community be provided. If mentally disordered misdemeanant arrestees are diverted to an inadequate treatment environment, little will be gained.

**RECOMMENDATION: Mentally disordered people arrested for nonviolent or minimally violent offenses should be diverted from the criminal justice system to the mental-health system. Adequate methods for effective and efficient triggering of diversion must be devised, and adequate treatment must be provided in the community to the people diverted. Law enforcement officers should receive special training in dealing with mentally disordered people to enhance diversion and to deal with such people humanely.**

*B. FORENSIC EVALUATION AND THE RIGHT  
TO A MENTAL-HEALTH EXPERT*

Pretrial forensic evaluations are routine both to determine various competencies and to evaluate legal insanity and whether the defendant committed the alleged crime with the mental state, the *mens rea*, that is part of the definition of the offense. For example, one definition of murder is that the defendant acts with the *intention* or the *purpose* to kill the victim. The results of such evaluations can also have a major impact on sentencing, and, indeed, a forensic evaluation at any time may be useful for sentencing alone even if no

competence or defense issue is raised. For example, a defendant with a mental disorder who is competent and has no plausible insanity defense or mens rea claim may nonetheless have a good argument for mitigation at sentencing. Major issues are whether determinations requiring a forensic evaluation are truly adversarial and whether an indigent defendant should be entitled to a genuinely independent expert to assist him.

In the case of competence evaluations, the defendant seldom has his own expert. State-appointed forensic professionals are virtually always the only experts who examine the defendant, and trial judges—this issue is seldom decided by a jury—routinely simply rubber-stamp the state experts' opinions. Much is at stake in competence evaluations. This type of process is unlikely to lead to a full evaluation of the issues. These proceedings should be fully adversarial with experts on both sides.

**RECOMMENDATION: Competence determinations should be fully adversarial, with experts representing both sides.**

Suppose defense counsel suspects that a defense based on mental disorder is a plausible claim at trial or simply wishes to evaluate whether it is. Or, suppose that the defense counsel believes that although no doctrinal defense based on mental disorder is likely to succeed, mitigation at sentencing is appropriate. Anyone with experience in criminal mental-health practice understands that mental-health experts, typically psychiatrists and psychologists, play a crucial role. Although either the defense or prosecution can succeed with or defeat a claim involving mental disorder without using expert witnesses, as a practical matter, it is extremely difficult and perhaps impossible for the defense.<sup>27</sup> This is not a problem for wealthier defendants who can retain a genuinely independent expert, but it is a major problem for indigent defendants. Unless an indigent defendant has access to an expert paid for by the state, the defendant will seldom have a fair chance of succeeding with his or her claims.<sup>28</sup>

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27. ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 124 (1967) ("Though the cases say again and again that expert testimony is not 'essential' to raise the insanity defense, it is clear that a persuasive case is unlikely to be made on lay testimony alone."). Although a guilty verdict will typically be upheld even if the defense presents unanimous expert testimony that the defendant was legally insane and the prosecution rebuts this testimony only with lay witnesses and cross-examination, such cases are rare at the trial level. See WAYNE R. LAFAYE, *CRIMINAL LAW* 453 (5th ed. 2010) (noting that it is difficult to succeed without expert witnesses, but that appellate courts uphold verdicts based on lay testimony "not infrequently").

28. *Id.* For a discussion of indigent defense, see Eve Brensike Primus, "Defense Counsel and Public Defense," in Volume 3 of the present Report.

In *Ake v. Oklahoma*,<sup>29</sup> the Supreme Court finally recognized the unfairness of not providing an indigent defendant with a mental-health expert. It noted that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims.<sup>30</sup> The Court further held that a mental-health expert is necessary for this purpose when the defendant has a significant claim of legal insanity or needs expert assistance at capital sentencing hearings to rebut expert predictions of dangerousness.<sup>31</sup> The Court left the implementation of the right to the states.<sup>32</sup> The decision is correct, but it left open important questions about the extent of the right and how it should be implemented. In particular, it did not decide whether the indigent defendant is entitled to a truly independent expert to represent him.

The Court's opinion did not address whether experts also needed to be provided to assist the defendant with other claims concerning the relation of mental disorder to culpability and to sentencing. A majority of states permit defendants to use evidence of mental disorder to negate mens rea, although usually with limitations.<sup>33</sup> Mental disorder can also be a mitigating factor at both capital and noncapital sentencing, and expert predictions of dangerousness at noncapital sentencing may need to be rebutted. Even if there is no expert prediction of dangerousness in capital and noncapital sentencing proceedings, there may be a plausible case for mitigation.

In all these contexts, the defendant is in peril without expert assistance. It is difficult to understand how these other types of questions involving mental disorder can be distinguished from legal insanity and rebutting expert predictions at capital sentencing. It is true that legal insanity is a complete defense and that death is "different." Nonetheless, mens rea is a crucial culpability issue. In many cases, a mens rea negation claim may be more important to a defendant than raising legal insanity because the defendant can thereby potentially defeat the prosecution's ability to prove the mental state element for higher levels of offense, thus reducing his potential sentence, and can avoid lengthy post-insanity acquittal commitments. Moreover, sentencing is vitally important to the defendant in all cases, and raising mitigation at capital sentencing is especially important, as the Supreme Court recognized beginning with *Lockett v. Ohio*.<sup>34</sup> Experts should be appointed and paid for

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29. 470 U.S. 68 (1985).

30. *Id.* at 77.

31. *Id.* at 83–84.

32. *Id.* at 83.

33. *Clark v. Arizona*, 548 U.S. 735, 800 (2006) (Kennedy, J., dissenting).

34. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

in all these cases that so fundamentally affect the defendant's culpability and punishment, but the reach of *Ake* is unclear. Failure to do so is substantially unfair because a defendant with a potentially meritorious claim of innocence or mitigation will not be able to raise it effectively.

**RECOMMENDATION: A mental-health expert should be appointed to assist a defendant with any potential claim based on mental disorder that bears on culpability and punishment.**

The more difficult problem is how the right has been implemented in many jurisdictions. *Ake* has not been interpreted to guarantee the defendant a mental-health professional that the defense chooses.<sup>35</sup> If a defendant has resources, he can "shop around" to try to obtain a mental-health professional who will support his claims, but indigent defendants do not have that ability.<sup>36</sup> If the professional consulted will not render a favorable opinion, the defendant's mental health-based argument will almost certainly fail. In some jurisdictions with a sizable number of forensic professionals, some experts may have a reputation for being favorable to the defense and the problem may be somewhat alleviated. There is no guarantee, however, that even a favorably inclined forensic professional will reach the expected conclusion, and the possibility of using a predisposed expert may not arise in jurisdictions with fewer forensic specialists. What is worse, in some jurisdictions the defendant may be assigned a mental-health professional who is an employee of the state and the prosecution may immediately have access to the report.<sup>37</sup> A state employee inevitably has a conflict of interest. The indigent defendant should be entitled to an independent professional, as some jurisdictions, including a majority of the federal circuits, hold.<sup>38</sup>

*Ake* was ambiguous about whether it required the provision of a genuinely independent mental-health expert who is part of the defense team or whether a single neutral, court-appointed expert who makes his findings available to both parties and the court is sufficient. Just this past term, the Supreme Court had the opportunity to resolve the resulting split among the lower federal and state courts about *Ake*'s reach. In *McWilliams v. Dunn*,<sup>39</sup> the Supreme Court re-affirmed *Ake*'s language that in an appropriate case raising a mental-disorder issue, an indigent defendant is entitled to an expert independent

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35. *E.g.*, *United States v. Osoba*, 213 F.3d 913 (6th Cir. 2000).

36. *Ake*, 470 U.S. at 83.

37. *Granviel v. Texas*, 495 U.S. 963, 963–64 (1990) (Marshall, J., dissenting from denial of certiorari).

38. JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY 131–32 (2009).

39. 137 S. Ct. 1790 (2017).

of the prosecution to assist with an examination, an evaluation of the case, preparation for trial, and presentation of the defense. But the decision failed to resolve the fundamental issue that had divided the lower courts. Instead, the Supreme Court ruled on case-specific grounds that the defendant had not been granted the minimum *Ake* requires because the state had provided only an examination and no further assistance.

*McWilliams* is a lost opportunity. The Supreme Court should have decided that *Ake* requires the provision of an expert who is part of the defense team and not simply neutral and independent of the prosecution. In the absence of a controlling Supreme Court decision, legislatures should impose this requirement statutorily. Once the threshold questions of indigency and a legally relevant mental disorder have been satisfied, it is clear that there is an issue to be decided and that some qualified mental-health professional will be able and willing to assist the defense in the ways *Ake* demands. Some mental-health professionals may, of course, conclude that the defense claim is not meritorious, including some who might be neutral and independent of the prosecution. If the narrower reading of *Ake* prevails, the defendant will not be able to present his claim if a single neutral, court-appointed expert concludes it is not meritorious—despite a virtual certainty that another professional could ably assist the defense. An expert who concludes that the defense claim is invalid obviously cannot help the defendant in evaluating, preparing, and presenting his mental-health claim. In an adversarial system of criminal justice, it is simply unfair not to provide an indigent defendant with a professional dedicated to his defense.

Even providing a genuine defense expert does not go far enough. The expert should not be an employee of the state and should be chosen by the defense. Further, the defense expert's report should not be disclosed to the prosecution unless the defendant decides to go forward with a mental health-based argument. An independent expert's report should be the defense's "work product" and thus confidential unless the claim is raised. The fruits of an evaluation of a potential claim should not be of benefit to the prosecution. It may fairly be asked how many experts the indigent defendant is entitled to consult in order to obtain an expert who will support the defense claim. As noted, in jurisdictions with many forensic mental-health professionals, it will usually be easy to identify those professionals who are disposed to the defense. Nonetheless, a usually well-disposed expert may reach a conclusion unwelcome to the defense. To even the role of wealth in criminal justice outcomes, I would allow the indigent defendant to consult a second expert if the first is not favorable.

**RECOMMENDATION: Defendants with a mental health-based claim should be entitled to a genuinely independent mental-health expert of his own choosing retained for the defense team, and the results of the evaluation should be confidential work product and not disclosed to the prosecution unless the defendant intends to use the evaluation to support a claim.**

Should the defense attorney be present when the defendant is clinically examined by the prosecution's expert? Courts have rejected such arguments on the ground that the attorney's presence will undermine the expert's attempt to obtain information and could be otherwise disruptive.<sup>40</sup> For example, the attorney might try improperly to caution or to coach the client during the evaluation. There is some truth to these worries, but I think that they are exaggerated and that there is good reason to have the attorney present. The examiner inevitably will be wittingly or unwittingly selective in his report and testimony about which aspects of the examination are focused on. It is all too easy for an expert to succumb to confirmation bias and to ignore contrary evidence. Moreover, inferences from, and conclusions about, particular parts of the examination are subject to subjective interpretation.

As the Supreme Court has repeatedly said, psychiatry is not an exact science.<sup>41</sup> Consequently, it would be very helpful to both sides to be able to view the examination of the defendant by the opposing expert or by the sole expert in non-adversarial proceedings. Both attorneys can then have a better sense of whether an evaluation actually supports or is consistent with the testifying expert's inferences and conclusions based on the evaluation. The potential for disruption remains, however, so I suggest that all forensic evaluations should be videotaped. This would not be disruptive and would allow the type of assessment that would be helpful. Indeed, in some cases, the tapes might be shown to the jury guided by the expert testimony about them.

Psychological testing, the other major form of forensic evaluation, need not be taped. It is true that a psychological test can be improperly administered in various ways and there is some evidence that testers tend to interpret results more favorably to the side that retained the expert. It seems, however, that taping will not substantially alleviate this problem. It will be sufficient if the opposing expert has access to the raw scores on the tests in question so the expert can determine if the test was properly scored and interpreted.

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40. *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (rejecting the claim that the State does not need an independent evaluation).

41. *See, e.g., Kansas v. Crane*, 534 U.S. 407, 413 (2002).

**RECOMMENDATION: Clinical forensic evaluation interviews should be videotaped, and the raw scores of psychological tests should be provided to the opposing side.**

In cases involving allegedly civil preventive detention, such as sexual-predator commitments, the subject of the potential commitment is not constitutionally entitled to the service of an independent professional and seldom has one unless the subject has independent means. Moreover, the subject does not have the right to remain silent.<sup>42</sup> Great weight will be placed on the testimony of the state-appointed evaluator, and the subject's only means of defeating an adverse opinion will be through effective cross-examination. There are no data on this question, but I suspect that judges and juries seldom find that the subject does not meet the commitment criteria, even if cross-examination is effective. For example, the subjects have typically committed seriously dangerous acts and it is difficult to establish the negative that the subject will *not* commit another dangerous act if released. Most preventive detention commitments associated with criminal justice are potentially indefinite. A subject faced with such a drastic loss of liberty should have a right to the services of an independent mental-health professional to defeat the allegation that he should be detained preventively.

**RECOMMENDATION: In quasi-criminal proceedings, such as those involving the civil commitment of mentally abnormal, sexually violent predators, the person facing commitment should be entitled to a genuinely independent mental-health professional to assist him.**

### C. COMPETENCE TO STAND TRIAL

Competence to stand trial is the most frequently raised doctrinal mental health issue in the criminal justice system. The Supreme Court has repeatedly held that an incompetent defendant cannot be tried.<sup>43</sup> Although the criteria for incompetence vary among the jurisdictions, a common standard is that the defendant must have the ability to understand the charge and proceedings and must be able to rationally assist defense counsel in order to be found competent. There is a good argument that many defendants who are incompetent could nonetheless receive a fair trial, thus avoiding some of the negative consequences of a finding of incompetence, but it is settled constitutional doctrine that an incompetent defendant may not be tried. In this section, I shall focus primarily on the restoration of competence.

42. E.g., *Allen v. Illinois*, 478 U.S. 364, 374 (1986).

43. *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162, 173 (1975). Some refer to *Dusky v. United States*, 362 U.S. 402 (1960), as the crucial precedent, but *Dusky* was simply an interpretation of the federal statute and not a constitutional case.



I suggest that lawyers appointed solely to evaluate trial competence would be better evaluators of a defendant's trial competence than mental-health professionals because lawyers comprehend much better what understanding and assistance are necessary. The mental-health expert will have a better understanding of why the defendant is allegedly incompetent, and the clinician is certainly better positioned to recommend treatment. Nonetheless, the cause is usually apparent, and why the defendant is incompetent is relevant only to the potential treatment to restore competence. The evaluating professional is virtually never involved in the treatment process, so the treatment evaluation will have to be made independently in any case. For now and for the foreseeable future, however, the evaluations will be done by mental-health professionals.

A defendant found incompetent to stand trial will typically be committed to a forensic hospital or forensic unit of a hospital for treatment to restore competence. In the leading precedent, *Jackson v. Indiana*, the Supreme Court held that due process requires that the nature and duration of the commitment should bear a reasonable relation to its purpose, which is to restore trial competence.<sup>44</sup> The Court did not provide much guidance about the length of these commitments, and they vary substantially among jurisdictions. Thus, although there is only probable cause to believe the defendant has committed the crime, he can be incarcerated without trial in a secure facility for many years—in some cases as long as the sentence for the crime charged—despite the lack of a conviction.<sup>45</sup> Although the time hospitalized is counted toward any criminal sentence ultimately imposed, the hospitalized incompetent defendant is in legal limbo, and incompetence can be used as a tactic by both the prosecution and the defense.<sup>46</sup> To the extent that incompetence commitment is used by the prosecution to preventively detain an accused for whom the case may be weak, this is an abuse of the incompetence procedures. The Supreme Court in *Jackson* also held that a defendant who is irreversibly incompetent to stand trial must be released from the criminal justice system, but state officials clearly have substantial discretion to decide that the incompetence is not irreversible and thus to continue what may be improper preventive detention.<sup>47</sup>

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44. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). In some jurisdictions, trial competence treatment can be performed in the local jail. See CAL. PENAL CODE § 1369.1(a).

45. PARRY, *supra* note 38, at 116.

46. NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 49–50 (2002).

47. *Jackson*, 406 U.S. at 738. If the examining or treating mental health professionals unanimously conclude that an incompetent defendant cannot be restored, then the state will have to use some other means, such as civil commitment, to restrain a permanently incompetent defendant who is believed to still be dangerous.



Finally, the Court suggested, but did not require, that pretrial motions, such as to suppress evidence, could be adjudicated, even if the defendant were incompetent to stand trial.<sup>48</sup> In some cases, this might have the effect of ending the prosecution because suppressed evidence is crucial to the prosecution's case, but there are no data about how often such pretrial proceedings are used. In sum, much potential exists for abuse of incompetence-to-stand-trial doctrines and practices. It is time to rethink them. Virtually everything I shall say in what follows has been suggested previously,<sup>49</sup> but the system does not change and abuses are not curtailed.

If the criminal process can be halted by the suppression of evidence or other pretrial proceedings, it should be. An incompetent defendant is presumed innocent and should have available any pretrial action that can halt the prosecution. The defendant may go free because the constable has blundered, but that is the cost of doing business in a system dedicated to protecting the rights of defendants. If the defendant is still mentally disordered and non-responsibly dangerous as a result, the state can resort to traditional involuntary civil commitment to protect the public. This is an imperfect remedy, but no system of preventive detention can guarantee society's perfect safety and still be consistent with due process concerns. The defendant may not ever be brought properly to justice, but such a commitment is preferable to outright release, which is what would happen if the defendant were competent.

**RECOMMENDATION: Defendants who are incompetent to stand trial should be permitted without exception to raise pretrial motions that might end the prosecution.**

Intellectual disability and severe mental disorder are the primary abnormalities related to incompetence. Intellectual disability itself cannot be treated, but it is possible through educational techniques to teach a defendant some of the communication or other cognitive skills, such as an understanding of the criminal process, necessary to restore trial competence. If such interventions are provided soon and with reasonable intensity, the treating personnel can discover in a matter of months and perhaps only weeks if the defendant is capable of learning the necessary skills. There is utterly no need for long-term hospitalization and its use is simply a means to reach another, constitutionally impermissible goal in this context, such as preventive detention.

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48. *Id.* at 741.

49. *E.g.*, AM. BAR ASS'N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-4.13 (1989); Robert Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972).

Severe mental disorder, including psychotic states, is more treatable, especially with psychotropic medication. Psychotropic medication is not a cure-all, however. A substantial number of patients do not respond, even to the most effective agents. All the drugs have side effects that can be extremely serious and unpleasant, and the drugs do not provide life skills that the person did not formerly possess. Thus, even if the person responds well to psychotropic medication and regains reasonable cognitive control, some educational interventions may also be necessary to prepare the defendant for a criminal trial. Despite the difficulties, medication will be the first treatment of choice for most defendants who are incompetent because they are out of touch with reality. In virtually all cases, a determination can be made within six to nine months that the defendant is or is not treatable. There is no need for longer commitment to restore trial competence.<sup>50</sup> A conclusion of irreversibility can be reached and further commitment for restoration is once again preventive detention. Thus, all jurisdictions that permit lengthy restoration commitments are in virtually all cases engaged in permitting preventive detention rather than in genuine restoration commitment.<sup>51</sup>

Finally, in many cases, especially those involving nonviolent defendants, there may be no need at all for in-patient hospitalization. Community-based treatment may be sufficient either to restore competence or to determine that this is impossible. Community treatment is preferable because it deprives a defendant not yet convicted of less liberty than hospitalization and it is much less expensive.

**RECOMMENDATION: Long-term inpatient commitments to restore trial competence are unnecessary. Short-term commitments are adequate to either restore the defendant or to determine that the defendant cannot be restored. In appropriate cases, restoration should be performed in the community.**

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50. Suppose the defendant competently refuses to take psychotropic medication, thus preventing the government from restoring his or her trial competence. It is perfectly possible that a defendant with mental disorder might be incompetent to stand trial but competent to refuse medication. Disordered thinking can be relatively domain-specific, diminishing competence in some areas of functioning and not in others. On the other hand, Robert Schopp has argued convincingly that an incompetent defendant will also be incompetent to refuse treatment in virtually all cases. Robert F. Schopp, *Involuntary Treatment and Competence to Proceed in the Criminal Process: Capital and Noncapital Cases*, 24 BEHAV. SCI. & L. 495 (2006). The law is not entirely clear about the government's right to override an incompetent refusal of a committed person without a special procedure such as securing a guardian who can substitute judgment, but I shall argue that the government should have the right to treat defendants incompetent to stand trial whether or not they are competent to refuse treatment.

51. Most defendants are restored to competence within six months. POYTHRESS ET AL., *supra* note 46, at 51. Nonetheless, the potential for lengthy commitment remains and can be abused.

In *Sell v. United States*,<sup>52</sup> the Supreme Court addressed whether and under what conditions the state could forcibly medicate an incompetent defendant for the purpose of restoring the defendant's competence to stand trial. The Court agreed, as it had previously,<sup>53</sup> that citizens have a strong liberty interest in being free of unwanted medical interventions.<sup>54</sup> The Court nonetheless held that an incompetent defendant could be involuntarily medicated if four conditions were met: the treatment was medically appropriate, the governmental interest was strong because the charges were serious, the treatment would not cause trial prejudice, and less restrictive means of restoring competence were not effective.<sup>55</sup> The Court did express a preference for treating the defendant under an independent and less fraught rationale, however, such as the defendant's dangerousness.<sup>56</sup> Not all incompetent defendants will satisfy such an independent rationale for involuntary treatment and trial courts will have to apply the *Sell* criteria.

Three of *Sell*'s conditions are appropriate, but I would go further and argue that the government's interest in trying an accused is sufficiently strong in the case of any felony to justify forcible medication of an incompetent defendant for the purpose of restoring competence. A criminal prosecution is an extremely serious matter. Neither the case nor the prosecution and defense should remain in limbo while an incompetent defendant languishes in a hospital untreated. The incompetence standards and consequences are not meant to be used strategically by either side. What is the point of keeping an

52. *Sell v. United States*, 539 U.S. 166 (2003).

53. In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court decided under what conditions a prisoner could be forcibly medicated with psychotropic drugs. The Court noted that everyone has a substantial liberty interest in being free from unwanted medical interventions. *Id.* at 221–22. The Court held, however, that prisoners could be forcibly medicated for their own safety or the safety of others if medication was medically appropriate and the prisoner posed a danger to himself or others. *Id.* at 227. I will discuss *Harper* in greater detail in Section III.I, *infra*.

54. *Sell*, 539 U.S. at 178.

55. *Id.* at 180–81. Whether the medication will have an adverse effect on the fairness of trial because it alters the defendant's behavior negatively, such as impairing communication abilities, is an important issue. *See id.* at 185–86. Anti-psychotic medication at proper dosage levels typically does not sedate the defendant or otherwise impair a person's abilities. Rather, if effective, it restores cognitive functioning and should enhance the defendant's performance. On the other hand, it may make the defendant appear "normal" to the judge or jury, which might undermine a claim that the defendant was legally insane, or it might alter the defendant's demeanor in a prejudicial way. Such possibilities especially concerned Justice Kennedy. *See Riggins v. Nevada*, 504 U.S. 127, 142–45 (1992) (Kennedy, J., concurring). These potential difficulties could be alleviated by expert testimony and judicial instructions. In an extreme case, however, the *Sell* criteria will not be met.

56. *Sell*, 539 U.S. at 181–82. The Court expressed a preference for justifying medication according to the *Harper* criteria. *Id.*

incompetent defendant in a hospital to restore competence if restoration is made impossible by treatment refusal? The intrusion of forcible medication is not trivial, to be sure, especially if refusal is based on religious convictions, but neither is it so extensive that it should block the progress of the case. It is not a form of thought control or any other type of unjustifiable intervention. Forcible medication simply tries to restore the person's cognitive control and ability to test reality. Moreover, hospitalization is expensive and should be terminated as soon as possible. Finally, no good alternative presents itself. If the defendant can prevent restoration, rendering him permanently incompetent, then the government must dismiss the charges, presumably with prejudice, and seek involuntary civil commitment. As we have seen, however, this is an imperfect remedy. If the person could be forcibly treated in involuntary civil commitment or in some other way, such as the substitution of judgment by a guardian because the defendant is not competent to refuse, then perhaps trial competence could be restored in those ways.

**RECOMMENDATION: Forcible medication to restore trial competence should be justified in the case of all felony prosecutions.**

Unless the Supreme Court reverses decades of incompetence jurisprudence, it is not possible to try incompetent defendants even in those cases in which they could receive a fair trial. Permitting a trial to proceed despite a defendant's incompetence would solve many of the problems raised by *Sell* or by cases of seeming permanent incompetence, allowing final resolution of the criminal justice process. One may fairly ask how we could be sure that such a trial would be fair, but I suggest that this could be resolved at pretrial hearings. Everything depends on how complicated the issues are and whether difficult strategic choices will be necessary in which the defendant would be likely to disagree with the attorney's advice. We could also adopt various protective rules, such as requiring the prosecution to disclose evidence that may not pass the *Brady* threshold of actual-innocence evidence, but which arguably favors the defense.<sup>57</sup> In any case, the issue will not arise frequently because most state and federal cases are resolved by plea bargains.<sup>58</sup> Nonetheless, the incompetence process would be rationalized in those cases in which going to trial seems optimal and a fair trial was possible despite incompetence. I recognize it is controversial to suggest that trial could proceed against an incompetent defendant, and undoubtedly the procedural requirements to guarantee fairness would be complex. In principle, though, this is a reform that could work.

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57. *Brady v. Maryland*, 373 U.S. 83 (1963).

58. See generally Jenia I. Turner, "Plea Bargaining," in Volume 3 of the present Report.

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#### D. COMPETENCE TO PLEAD AND TO WAIVE COUNSEL

In *Godinez v. Moran*,<sup>59</sup> the Supreme Court was asked to impose a standard of competence to plead guilty and to waive the right to counsel, a so-called “reasoned choice” test that was different from the standard for incompetence to stand trial. The argument for doing so was that pleading is more complicated than going to trial and therefore a different and presumably higher standard was required to satisfy due process. The Court refused to adopt a different test, holding that the competence-to-stand-trial standard was sufficient to protect the defendant’s rights as long as the waiver of the right to trial and other constitutional protections was actually knowing and voluntary.<sup>60</sup> After all, a defendant might be competent but might not actually understand what he is doing as a result of confusion, marginal competence, or the like. In my view, the Court missed the theoretical and policy mark, although the holding is not self-evidently wrong.

All competence standards are essentially functional rationality tests. The question is what rational understanding and skills are required. Although competence standards generally should be low, what is required can vary according to the context. Consequently, “one size fits all” standards in many contexts make little sense. For example, some trials are complicated and some guilty pleas are not, and vice versa. It is a fantasy to believe that any particular standard, such as competence to stand trial, adequately operationalizes the test. Even if the standard specifies what must be understood, it does not specify how much understanding and of what type is required. Is the ability to accurately recite information previously provided sufficient or must the agent be capable of a process of rational weighing and assessment?

Although different “skills” may in theory be necessary to accomplish different tasks successfully, such as assisting counsel and deciding whether to plead guilty, it is not clear that the allegedly higher standard that the Court rejected, “reasoned choice,” would make much difference in practice. Rational understanding and reasoned choice are both vague formulations that provide little guidance. The test should be a functional and context-dependent rationality standard, focusing on what skills are demanded in a particular context, whichever words are used to express the standard. Waiver of distinct constitutional rights implicates distinct rational understandings of each right waived. Thus, a defendant who appears to have general rational understanding may appear on close examination to lack that understanding for a particular trial right. If the trial court makes a careful inquiry concerning whether a particular waiver is

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59. 509 U.S. 389 (1993).

60. *Id.* at 400. In his concurrence in *Godinez*, Justice Kennedy characterized the requirement as “knowing, intelligent, and voluntary.” *Id.* at 403 (Kennedy, J., concurring).

knowing and voluntary, the more general and specific inquiries should merge, as the *Godinez* dissent recognized.<sup>61</sup> Once again, however, what is necessary is not a distinct formulation for competence to plead guilty or to waive the right to counsel, but a context-dependent evaluation by the trial court of the defendant's rational capacities necessary in each context. Finally, if a different or higher standard had been imposed, it is not clear that trial courts would have behaved differently, and appellate courts would rarely second-guess a trial court's substantive determination that a defendant was or was not competent.

Requiring deeper or more detailed rational understanding risks parentalism,<sup>62</sup> but requiring less risks an unjust outcome. I have a preference for limiting parentalism as much as possible and perhaps the Court's recognition that the defendant must actually waive his rights knowingly partially remedies the vagueness of the general test. On the other hand, defining knowing or intelligent is as vulnerable to manipulation as defining competence itself. In short, evaluating any competence case is a normatively fraught and difficult enterprise. I have no easy answer, but simply a policy preference for keeping the bar relatively low to let most defendants over it. This will maximize liberty, but the danger is that it will also unduly risk the defendant's ultimate liberty by increasing the possibility of an irrational outcome.

**RECOMMENDATION: The test for competence to plead guilty and to waive counsel should be a context-dependent assessment of whether the defendant has the rational skills necessary to meet a generally low standard for competence.**

#### *E. THE RIGHT TO PROCEED PRO SE*

Should a criminal defendant who meets the *Godinez* standard for waiving the right to counsel, which is essentially the competence-to-stand-trial standard, be permitted to proceed pro se—that is, without an attorney—if he suffers from serious mental disorder? The constitutional right to proceed pro se announced by the Supreme Court in *Faretta v. California*<sup>63</sup> does not depend on the defendant's ability to function as an able defense counsel. As long as the defendant understands the consequences of representing himself, he is entitled to do so. Consequently, one would have thought that as long as a defendant with severe mental disorder understood what he was doing, he would be entitled to represent himself.

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61. See *id.* at 409 (Blackmun, J., dissenting).

62. Parentalism is a gender-neutral synonym for paternalism.

63. 422 U.S. 806 (1975).

Nevertheless, in *Indiana v. Edwards*,<sup>64</sup> the Supreme Court held otherwise, unpersuasively distinguishing *Godinez* on the grounds that the issue of self-representation was not raised in the previous case and that *Godinez* involved permitting a defendant to represent himself whereas the instant case involved a state trying to prevent the defendant from doing so. Writing for the majority, Justice Breyer cautioned against trying to apply a unitary competence standard to address two very different questions: whether a represented defendant is capable of going to trial and “whether a defendant who goes to trial must be permitted to represent himself.”<sup>65</sup> Instead, Justice Breyer tried to apply a more nuanced understanding of competency that properly considered context. He recognized that a defendant with a disorder might be able to assist counsel but might nonetheless be too disabled to perform basic trial tasks at even a minimal level. He therefore worried that an apparently unfair trial could result. Discretion was left in the hands of trial judges to decide if a defendant is competent to represent himself.

This is a difficult issue for those like myself who are advocates for the rights of people with mental disorder and who wish to treat them no differently from other people if possible. Let us assume that if the defendant represents himself, the trial will not be a complete sham, especially if backup counsel or some other protective method is used to try to mitigate the dangers of self-representation. On the one hand, if the defendant understands the perils of self-representation, including how his own mental difficulties will interfere with his performance, why should he not enjoy the usual, constitutionally protected liberty to represent himself that *Faretta* established? On the other hand, if mental disorder, which affects the defendant’s rational capacities, interferes substantially with his abilities fully to understand the peril of self-representation or minimally adequately to represent himself, the risk of an unfair trial is high. It is not clear which approach best balances the rights of the accused with systemic concerns.

I believe the solution lies with a more egalitarian approach to *Faretta*. People might simply be too incompetent to represent themselves for a variety of reasons other than mental disorder,<sup>66</sup> even if they are competent to recognize how badly they will do and wish to represent themselves anyhow. *Edwards* makes clear that

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64. 554 U.S. 164 (2008).

65. *Id.* at 165.

66. See Jodi L. Viljoen et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26 LAW & HUM. BEHAV. 481 (2002) (demonstrating that some defendants are incompetent to plead or to stand trial for reasons other than mental disorder).



this type of restriction can constitutionally be placed on the *Faretta* right, at least in cases involving a defendant with mental disorder, but there seems little reason not to apply an “unreasonable trial incompetence” standard to deny the right to represent oneself to any defendant who wishes to assert it. This will mostly apply to defendants with disorder, but at least it is a cause-neutral standard that does not discriminate against defendants with mental disorder.

#### F. NEGATING MENS REA

In some cases, mental disorder may explain why a requisite mens rea (mental state) was not formed, whether or not it actually prevented the defendant from forming it. A defendant who is making such a claim, which is often mischaracterized as the “defense” of “diminished capacity,” is not raising a claim of mitigation of responsibility or of excuse; it is simply a denial of the prosecution’s prima facie (legally sufficient; all the criteria for guilty the prosecution must prove beyond a reasonable doubt) case, which includes the mens rea required by the crime charged. I have termed this the “mens rea variant” of so-called diminished capacity.<sup>67</sup> For example, in *Clark v. Arizona*,<sup>68</sup> defendant Clark shot and killed a police officer who had pulled the defendant over in his police cruiser and was in full uniform. The defendant was charged with the aggravated murder offense of intentionally killing a human being knowing the victim was a police officer. The defendant claimed he lacked the mens rea because he did not intend to kill a human being and did not know the victim was a police officer. This claim would have been incredible, of course, except that the defendant was suffering from paranoid schizophrenia and had delusions that space aliens were threatening him. He claimed that he actually believed that the victim was a space alien impersonating a police officer. If he were believed—and there was evidence consistent with the truth of this belief—he did not intend to kill a human being and did not know the victim was a police officer. In this case, the mental disorder produced an irrational belief that is inconsistent with the formation of the mens rea required to be guilty of this aggravated murder offense.

It is also possible that mental disorder explains a failure to form a mens rea that is not a result of an irrational belief. Imagine that a severely disordered person is confused and disorganized on the streets of a large city in a deserted neighborhood. It is freezing cold and the person realizes that he cannot find

67. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

68. 548 U.S. 735 (2006). All the facts in the following description are taken from the Court’s opinion.



his way home and fears freezing. He therefore breaks into a building simply to keep warm. The police catch him and charge him with burglary on the theory that he intended to commit the felony of larceny in the building. In this case, the defendant was surely capable of forming the intent to commit larceny and there was no rationality problem about what he was doing, but he simply did not form the intent to steal. His disorganization resulting from mental disorder simply helps explain why he broke in just to keep warm.

In most cases, mental disorder does not interfere with the formation of mens rea. The primary effect of mental disorder on the mental states required by the definitions of crimes is to give the defendant abnormally irrational reasons for actually forming the requisite mens rea. Consider Daniel M’Naghten again. His delusional belief about the Tories motivated him to form the intent to kill Peel. In some cases, however, mental disorder may be the only credible explanation for why a defendant did not form the mens rea required by the definition of the offense. If a plausible claim of mens rea negation can be made, can the state nonetheless exclude the evidence?

In *Clark*, the Supreme Court addressed precisely this issue and held that the state could constitutionally exclude all non-observational expert evidence of mental disorder that would be introduced to negate mens rea.<sup>69</sup> The Court approved Arizona’s “channeling” of all such evidence into the issue of legal insanity because so-called mental disorder and capacity evidence bearing on mens rea would simply confuse the finder of fact.<sup>70</sup> Judge Morris Hoffman and I have severely criticized the Court’s reasoning in *Clark*,<sup>71</sup> but I will not repeat those arguments here. Rather, I will simply go to the heart of why the Court’s decision is unfair.

Criminal blame and punishment are the most awesome, painful exercises of state action toward a citizen. In our adversarial system of criminal justice, the defendant is presumed innocent and the prosecution has the burden of proving the defendant’s guilt, including the requisite mens rea. Criminal liability should

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69. *Clark v. Arizona*, 548 U.S. 735, 772 (2006).

70. *Id.* at 774–78.

71. Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071 (2007). The decision was disappointing but not unsurprising after *Montana v. Egelhoff*, 518 U.S. 37 (1996), in which the Court upheld Montana’s complete exclusion of admittedly relevant and probative voluntary intoxication evidence to negate mens rea on the grounds that the state had valid policy reasons for doing so and that a criminal defendant does not have an absolute right to have relevant and probative evidence admitted. Voluntary intoxication is of course distinguishable from mental disorder because the latter is not the defendant’s fault, but the Court’s deference to the state rule and justification for it was generalizable.

not be imposed unless the defendant deserves such treatment.<sup>72</sup> Desert is at least a necessary condition of just punishment, and the fair ascription of criminal culpability thus requires the presence of mens rea, which is a prime indicator of the degree of the defendant's fault. One would think that in such a system of justice, fundamental fairness would require that a criminal defendant should be given every reasonable opportunity to defend against the state's charge with credible and probative evidence.

There are a number of reasons that a jurisdiction might want to reject or limit mens rea variant claims, many of which were discussed in the *Clark* opinion. Psychiatric and psychological evidence can admittedly be scientifically and clinically questionable and sometimes of faint legal relevance. I have been a long-term critic of much forensic mental-health testimony and remain so.<sup>73</sup> Moreover, even good forensic testimony can be confusing to lay witnesses. Despite these problems—and the Supreme Court has repeatedly acknowledged them, including in *Clark*—mental-health testimony is routinely and generously admitted in a wide variety of civil and criminal contexts because it is considered relevant and probative. Indeed, the Court has accepted the admission of expert testimony about the prediction of future dangerousness in capital sentencing proceedings in the face of virtually unanimous professional opinion that such predictions were too inaccurate to be the basis of a death sentence.<sup>74</sup> The Court held that such weaknesses were matters of weight rather than admissibility and could be exposed through cross-examination and by opposing witnesses.<sup>75</sup> If such prosecution testimony is admissible to put a defendant to death, how can it be fair to prevent the defendant from negating the prima facie case by using credible, relevant, probative testimony that is admissible in every other legal context?

The “channeling” of mental-abnormality evidence into legal-insanity claims is no remedy for the inconsistency because the mens rea variant is a claim entirely distinct from legal insanity, even if the evidence used is similar for both claims. In the former case, the defendant claims, “I didn’t do it”; in

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72. See generally Jeffrie G. Murphy, “Retribution,” in Volume 4 of the present Report.

73. Morse, *Crazy Behavior*, *supra* note 5, at 600–25; Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 973 (1982) (providing a detailed critique of psychodynamic psychology and forensic testimony that is based on this theory of behavior); Stephen J. Morse, *The Ethics of Forensic Practice: Reclaiming the Wasteland*, 36 J. AM. ACAD. PSYCHIATRY & L. 206 (2008) (claiming that forensic practice is not an ethical wasteland, but recommending major changes to practice). Although there are still major problems with forensic mental health testimony, I believe the situation is much improved since I first addressed this, largely as a result of the creation of specialty boards in both forensic psychology and psychiatry and the general professionalization of the field.

74. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

75. *Id.* at 896–903.

the latter, the claim is, “I did it, but I’m not responsible.” How can it be fair to permit the prosecution to use abnormality evidence to put a defendant to death but to prevent the defendant from using credible and probative evidence that he or she did not commit the crime charged in the first place?

A related rationale for denying or limiting mens rea negation is that it “undermines” the insanity defense. It is not clear precisely what this rationale means. Some courts reject the mens rea claim because they appear to assume that this claim is a lesser form of legal insanity and thus a mitigating (but not fully excusing) affirmative defense that should be adopted by legislatures rather than by courts,<sup>76</sup> but this is a confusion. Roughly speaking, the insanity defense is based on the premise that the legally insane defendant substantially lacks rational capacity or the capacity to control his or her criminal behavior. The mens rea claim does not specifically address either capacity, however. It simply addresses whether the defendant possessed the mental state required by the definition of the crime.

A better argument is that a defendant who successfully raises the mens rea variant may negate all mens rea and thus would simply be acquitted and freed. In contrast, an insanity acquittee will be involuntarily civilly committed. Moreover, the mens rea claim will be easier to establish than the legal-insanity claim. Success in the former case requires casting only a reasonable doubt on the prosecutor’s case, whereas the burden of proof for affirmative defenses like legal insanity may be placed on the defendant, which significantly reduces the defendant’s chance of succeeding.<sup>77</sup> Thus, permitting the mens rea claim may compromise public safety more than the insanity defense—a point to be addressed immediately below—but this is distinguishable from claiming that the insanity defense is thereby undermined. As we have seen, criminal liability should not be imposed unless the defendant deserves such treatment, and a defendant does not deserve blame and punishment for a particular crime unless he possessed the mens rea required by the definition of that crime. The defendant can avoid unjust blame and punishment either by negating mens

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76. *State v. Wilcox*, 436 N.E.2d 523, 526–33 (Ohio 1982) (conflating the mens rea and partial responsibility variants of diminished capacity and suggesting that the legislature and not the court should adopt this “defense”) (quoting *Bethea v. United States*, 365 A.2d 64, 92 (D.C. 1976)).

77. HENRY J. STEADMAN ET AL., *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* 84–85, 144–46 (1993). This study found that shifting the burden of persuasion caused a decline in the number of insanity pleas raised and that the presence of a major mental disorder was a necessity for success. It also found, however, that among the very few defendants in New York who did raise the defense, the success rate increased. This seemingly paradoxical effect was almost certainly caused because the defense was probably raised in only the clearest cases after proving insanity became more difficult.

rea or by establishing an affirmative defense. Mens rea and legal insanity are independent doctrines. Both implicate public safety, but, more fundamentally, they are aimed at doing justice. Permitting the defendant to negate mens rea achieves justice independently rather than undermining the justice the insanity defense achieves.

Perhaps the strongest reason for limiting or rejecting the mens rea variant is the fear for public safety, a concern that might be the underlying foundation for the claim that the mens rea variant undermines the insanity defense. It is true that mens rea variant claims present cases in which fair ascriptions of culpability and public safety might conflict. The defendant who lacks the mens rea required by the definition of the crime is simply less culpable. But a defendant with a sufficiently severe mental abnormality to negate mens rea may also be a serious danger to the public because such severe abnormalities also suggest that the defendant's general capacity for rationality is diminished in situations in which criminal conduct occurs. A defendant who succeeds with a negation of mens rea claim will be convicted of a lesser offense that carries lesser penalties or perhaps will be completely acquitted. Consequently, the defendant will be incapacitated by imprisonment for a shorter period than if he or she had been convicted for the offense charged or acquitted by reason of insanity and then civilly committed.

The fear for public safety is genuine but overwrought. As noted, the effect of mental disorder, including severe mental disorder, is seldom to negate the "subjective" mens reas, such as purpose, knowledge, and recklessness, that are part of the definitions of crimes. Mental disorder may give people irrational reasons to form the mens rea, but it almost never interferes with formation of that mental state. There are instances in which subjective mens rea is entirely negated, but they are few, indeed. Moreover, no defendant can use evidence of mental disorder to negate negligence because failing to recognize a risk the defendant should have recognized because the accused is abnormal is per se unreasonable. There are attempts to "individuate" the reasonable-person standard by endowing the reasonable person with the characteristics of the accused, such as being mentally abnormal, but this abandons objectivity altogether.<sup>78</sup> After all, what does it mean to talk of the "reasonable abnormal" person?

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78. Stephen J. Morse, *The "New Syndrome Excuse Syndrome,"* 14 CRIM. JUST. ETHICS 3 (1995). For example, H.L.A. Hart suggested general individuation of reasonable person standards for negligence, but recognized that the individuation would be a matter of mitigation or excuse and not of "subjective justification." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 153–54 (1968). The most common doctrinal examples of the attempt to individuate the reasonable person standard are in cases of self-defense and in cases concerning the reduction from murder to manslaughter if the defendant was legally adequately provoked and killed in the heat of passion.

In short, even if a jurisdiction permitted a defendant to negate mens rea without any restriction whatsoever, public safety would scarcely be compromised and greater individual justice would be gained. I propose that this is precisely the rule that should be adopted and it is the Model Penal Code rule.<sup>79</sup> There will be occasions in which defendants raise implausible claims about mens rea negation based on mental disorder, but these can be limited by pretrial motions to exclude the evidence and similar remedies.

**RECOMMENDATION: Defendants should be permitted to introduce evidence of mental disorder without limitation to negate any subjective mens rea but should not be permitted to use such evidence to negate negligence.**

### G. LEGAL INSANITY

Legal insanity is an affirmative, complete defense to crime; when successful, it results in a verdict of not guilty (by reason of insanity), thereby excusing a defendant for his otherwise criminal conduct. Forty-six states and the federal criminal code have the defense.<sup>80</sup> Most have some variant of the “cognitive” *M’Naghten* standard, which asks whether as a result of mental disorder the defendant did not know the nature and quality of his act or did not know right from wrong.<sup>81</sup> A minority also have an alternative “control” test, which, as discussed earlier, asks whether as a result of mental disorder the defendant could not control his criminal behavior.<sup>82</sup> In *Clark*, the Supreme Court upheld the constitutionality of Arizona’s test, which was simply the right/wrong alternative in *M’Naghten*, although it is the narrowest conceivable test.<sup>83</sup> The Supreme Court has never held that the insanity defense is required by substantive due process and in 2012 denied review in a case that squarely raised the issue.<sup>84</sup> Further, the state supreme courts of four of the five states that abolished the defense have upheld the constitutionality of abolition.<sup>85</sup> A compelling constitutional argument could be made for the necessity of the

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79. MODEL PENAL CODE § 4.02 (Proposed Official Draft 1962).

80. *Clark v. Arizona*, 548 U.S. 735, 749–53 (2006) (providing a description of the various rules and the number of jurisdictions that adopt each).

81. *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843).

82. *Clark*, 548 U.S. at 749–53.

83. *Id.* at 742.

84. *Delling v. Idaho*, 568 U.S. 1038 (2012).

85. *State v. Bethel*, 66 P.3d 840 (Kan. 2003); *State v. Mace*, 921 P.2d 1372 (Utah 1996); *State v. Cowan*, 861 P.2d 884 (Mont. 1993); *State v. Winn*, 828 P.2d 879 (Idaho 1992). Nevada also abolished the defense, but the Nevada Supreme Court held that abolition was unconstitutional. *Finger v. State*, 27 P.3d 66 (Nev. 2001).

insanity defense,<sup>86</sup> but, as I shall argue presently, abolition is a bad policy even if it is constitutional. First, however, let us address a number of issues that need to be clarified.

Legal insanity is a legal and moral issue, not a medical, psychiatric, or psychological issue. The criteria for finding someone not criminally responsible—for deciding who is a fit subject for blame and punishment—are thoroughly normative. Thus, the claim that a test is “unscientific” is a category mistake. One may believe that certain types of mental states should excuse a criminal who possessed them at the time of the crime and may therefore criticize on moral grounds a test that does not include them, but that is a normative and not a scientific critique. A narrow test may be morally offensive, but it will not be scientifically erroneous.

Mental disorder alone, no matter how severe, is not an excusing condition even if it played a causal role in explaining the defendant’s behavior. Causation, per se, is not an excusing condition.<sup>87</sup> The moral basis for the insanity defense is that in some cases mental disorder affects the defendant’s capacity to act rationally or to control his behavior. These are the genuinely excusing conditions that the other criteria for legal insanity address. The issue is the defendant’s impaired reasoning. Excuse is warranted only in those cases in which the impairment is sufficient, which is a moral and legal question. As a practical matter, the defendant will have to be out of touch with reality to succeed with the insanity defense,<sup>88</sup> but many defendants who are concededly delusional at the time of the crime may be convicted because their reasoning about the crime was nonetheless not sufficiently impaired. For example, Eric Clark was indisputably suffering from paranoid schizophrenia, but the court convicted him because it concluded that Clark did know that what he was doing was wrong.<sup>89</sup>

Much scholarly ink has been spilled and many pixels illuminated about specific issues within *M’Naghten* and its variants, such as whether knowledge of right versus wrong means moral or legal wrong and whether an allegedly broader substitute for knowledge, such as appreciation or understanding, is preferable. I believe that such debates are beside the point. To begin, the test

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86. Stephen J. Morse & Richard J. Bonnie, *Abolition of the Insanity Defense Violates Due Process*, 41 J. AM. ACAD. PSYCHIATRY & L. 488 (2013).

87. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592–94 (1994) (characterizing the erroneous belief that causation is per se an excusing condition as the “fundamental psycholegal error”).

88. STEADMAN ET AL., *supra* note 77, at 85.

89. *Clark*, 548 U.S. at 745–46.

used does not seem to make much difference in the outcome,<sup>90</sup> a result I think is best explained by the jury's rough and ready conclusion that the defendant was or was not sufficiently irrational to deserve to be punished.

To the extent that an outcome might turn on moral versus legal wrong, the former should be preferred because it is more action-guiding and provides a better fit with the underlying rationale for the defense. Note that all crimes for which an insanity defense is typically raised are acts that are also objectively and clearly immoral and illegal. The reason a legally insane offender typically commits the crime is primarily because she believes that she has a sufficient moral or legal justification for what she is doing. Consider Andrea Yates, who delusionally believed that she needed to kill her children while they were still sufficiently pure or they would become corrupted and would be tormented in hell for eternity.<sup>91</sup> Yates knew it was legally wrong to kill her children and she might also have recognized that her neighbors might think it morally wrong to do so. Nonetheless, from her deluded, subjective point of view, she surely thought she was doing the right thing. If the facts and circumstances were as she believed them to be, the balance of evils was positive in this case. Ms. Yates's knowledge of moral and legal wrong is beside the point, however. Although Ms. Yates was instrumentally rational, she deserved to be excused because her actions were deeply irrationally motivated through no fault of her own.

Many critics of cognitive tests believe that the word "know" is too narrow and that other, apparently broader terms should be used that encompass a somehow deeper understanding of what one is doing or that it is wrong.<sup>92</sup> Every lawyer realizes, however, that almost any term used can be interpreted more or less broadly to reach the morally preferred result. Consider knowledge itself. Did Ms. Yates know what she was doing? The answer depends on whether one takes a narrow or broad view of such knowledge. Ms. Yates knew that she was killing her children, so she knew what she was doing in the narrow sense. On the other hand, her material motive for action—to save the children from eternal torment—was deluded, so she did not know what she was doing in a broader sense. She thought she was saving the children, but she was not. The same could be said of her knowledge of moral and legal wrong. Either result could be obtained by narrow or broad readings of "understand," "appreciate,"

90. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 884 (8th ed. 2007).

91. Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1 (2003) (providing a complete account of the case).

92. E.g., MODEL PENAL CODE AND COMMENTARIES § 4.01, at 166, 169–70 (1985); Douglas Mossman, *United States v. Lyons: Toward a New Conception of Legal Insanity*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 49, 54–57 (1988).



or other contenders. Fine-grained parsing of small definitional differences will not be helpful to finders of fact. A legislature can certainly signal by using a term different from knowledge that it wishes to adopt a broader reading of its cognitive test, but juries will still make a rough and ready judgment and the word used has no influence on whether expert and lay testimony will be admissible. In practice, the complete clinical picture will be brought to bear whichever word is used.

If a defendant was sufficiently irrational, no separate control test will be necessary to excuse him. Suppose, however, that the defendant was rational according to any ordinary definition, but claims that he could not control himself. Such claims are often associated with sexual disorders, substance disorders, and impulse-control disorders generally. These are the cases in which an independent control test is thought to be necessary. In the wake of John Hinckley's acquittal by reason of insanity for attempting to assassinate President Reagan and others, many legislatures abolished a control test for legal insanity. The American Bar Association and the American Psychiatric Association also took positions rejecting the validity of control tests.<sup>93</sup> Although it may seem unfair to blame and punish an otherwise rational agent who cannot control himself, there was good reason to jettison control tests. The primary ground was the inability of either experts or jurors to differentiate the defendant who could not control himself from one who simply did not. The presence of mental disorder is of no help in this regard because criminal conduct is human action, even if it is the sign or symptom of a disease. Concluding that human action is not controllable because it is a sign or a symptom is simply question-begging.<sup>94</sup> An independent demonstration that the conduct could not be controlled is required.

I am an opponent of control tests because I have not encountered a convincing conceptual account of an independent lack of control and an operational definition of such an incapacity that would permit expert or lay testimony to resolve whether a defendant had such a problem.<sup>95</sup> I readily concede that lack of control may be an independent type of incapacity that

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93. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS COMMITTEE, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 cmt. (1984); Am. Psychiatric Ass'n, *American Psychiatric Association Statement on the Insanity Defense*, reprinted in 140 AM. J. PSYCHIATRY 681 (1983).

94. HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 148–53 (1979).

95. Stephen J. Morse, *Against Control Tests*, in CRIMINAL LAW CONVERSATIONS 449 (Paul H. Robinson et al. eds., 2009). The latter was a "target" chapter that challenged proponents of control tests to provide the psychological process or mechanism that produced lack-of-control capacity and that could be the focus of testimony about it. Five critics responded to the chapter, but not one even remotely suggested a mechanism or process.



should mitigate or excuse responsibility, but until a good conceptual and operational account of lack of control is provided, I prefer to limit the insanity defense to cognitive tests.

Moreover, I believe that virtually all cases in which a control test seems attractive or necessary can be better explained as a cognitive problem. People who are out of touch with reality may have trouble controlling themselves in the sense that they cannot be guided by reason, but irrationality is the problem. For example, people with sexual or substance disorders may not appear irrational, but they do report intense craving and often engage in repetitive actions that can be ruinously costly to them. It seems natural to infer that they somehow cannot control themselves. I suggest that the lack of control arises from the intensity of desire that seems to drown out all the competing considerations that most of us use to control untoward desires. In other words, at times of peak arousal, people with these problems simply cannot be guided by the good reason not to yield to their desires.<sup>96</sup> Even if one accepts a control theory of mitigation or excuse, in most cases the agent can still be held responsible. During those times when arousal is dormant or low, they do have intact rational capacity and recognize that they will yield in the future. It is therefore their duty to take whatever steps are necessary, such as entering treatment, to ensure that they do not offend. If they do not take such steps, they are responsible for not avoiding the condition of their own excuse. In other words, even if sexual and substance disorders were to qualify as a sufficient mental abnormality for establishing legal insanity and even if people with these disorders were not rational at the time of the crime, a successful insanity defense might nonetheless be inappropriate in most cases.

**RECOMMENDATION: All jurisdictions should adopt a cognitive test for legal insanity but should not adopt a control test.**

An interesting and important issue that implicates the mental-disorder criterion and both the cognitive and control tests is whether psychopathy should qualify as a mental disorder for purposes of legal insanity and whether at least some psychopaths seem to meet either a cognitive or a control test. The issue is important because psychopathy is highly predisposing to criminal

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96. See Stephen J. Morse, *Addiction, Science and Criminal Responsibility*, in *THE IMPACT OF BEHAVIORAL SCIENCES ON CRIMINAL LAW* 241 (Nita Farahany ed., 2009) (providing a fuller account).

behavior, including heightened recidivism,<sup>97</sup> and is common among prisoners.<sup>98</sup> Psychopaths simply do not get the point of morality or the underlying moral basis of criminal law prohibitions. Criminal punishments are simply prices to them. It may sound as if such people are simply callous and have an unfeeling character, but the dominant understanding today is that they are disordered for reasons not yet well understood.

The Model Penal Code's insanity provisions exclude from the defense a mental disorder "manifested only by repeated criminal or otherwise anti-social conduct."<sup>99</sup> Most courts have interpreted this provision to exclude psychopathy, but the words of the section do not entail this conclusion.<sup>100</sup> Repetitive anti-social and criminal behavior is one factor that can increase psychopathy scores, but the diagnosis is not based on this factor alone. Thus, the language of the various tests for legal insanity permits a reasonable case for inclusion. In brief, the argument for excusing psychopaths, or at least some of them, is that they lack the strongest reasons for complying with the law, such as understanding that what they are doing is wrong and empathic understanding of their victim's plight.<sup>101</sup> Most people can use empathy, conscience, understanding of the reason underlying a criminal law's prohibition, and prudential reasons to guide their behavior. In contrast, as a result of their psychological deficits, psychopaths can be guided only by prudential, egoistic reasons not to be caught and punished. In other words, they cannot grasp or be guided by the good reasons not to offend, which could be expressed either as a cognitive or

97. Kevin S. Douglas et al., *Risk for Criminal Recidivism: The Role of Psychopathy*, in HANDBOOK OF PSYCHOPATHY 533, 534 (Christopher J. Patrick ed., 2006) (urging caution on methodological grounds).

98. See Thomas A. Widiger, *Psychopathy and DSM-IV Psychopathology*, in HANDBOOK OF PSYCHOPATHY 156, 157–59 (Christopher J. Patrick ed., 2006) (noting that there is strong overlap between psychopathy and Antisocial Personality Disorder (APD), but the relation is asymmetric; APD is more prevalent among prisoners and virtually all prisoners who score high on psychopathy meet the criteria for APD, but not the reverse). As discussed in Part I, psychopathy must be distinguished from APD, which is included in the DSM. APD is diagnosed on the basis primarily of repetitive antisocial conduct. There are only one and perhaps two psychological criteria among the diagnostic criteria—lack of remorse and, arguably, impulsivity—but neither needs to be present to make the diagnosis. Psychopathy, by contrast, always includes psychological criteria. As a result, psychopathy might plausibly be a candidate for a mental disorder that would support an insanity defense, but APD would clearly not qualify.

99. MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962).

100. Indeed, the Model Penal Code makes clear that its provision did not exclude a mental condition "so long as the condition is manifested by indicia other than repeated antisocial behavior." MODEL PENAL CODE AND COMMENTARIES § 4.01(2), at 164 (1985).

101. See Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205 (2008) (providing a fuller account).

control defect. And according to the same argument, people with lesser but still substantial psychopathy should qualify for mitigation. In response, most advocates for continuing exclusion of psychopathy as a basis for the insanity defense argue that they are in touch with reality and know the rules and it is sufficient for criminal responsibility that psychopaths can reason prudentially about their own self-interest.<sup>102</sup>

Finally, in the United States, there is a major practical objection to applying the insanity defense to psychopathic defendants. In all jurisdictions, a defendant acquitted by reason of insanity may be involuntarily committed to a secure hospital facility, a practice that the Supreme Court has held is constitutional and that will be discussed in a later part of the chapter.<sup>103</sup> The term of commitment varies, but the Supreme Court has upheld an indefinite term<sup>104</sup> as long as the acquitted inmate remains both mentally ill and dangerous.<sup>105</sup> It thus appears that this would be a secure form of incapacitation for dangerous psychopaths if psychopathy were accepted as a potentially excusing mental disorder. Despite the initial attractiveness of this solution to the danger psychopathy presents, it is unlikely to be successful. The insanity defense cannot be imposed on a competent defendant who does not wish to raise it,<sup>106</sup> and virtually no psychopath would raise the insanity defense because at present there is no effective treatment for adult psychopathy. Any psychopath acquitted by reason of insanity for any crime would potentially face a lifelong commitment to an essentially prison-like facility. In short, even if American law came to the conclusion that psychopaths should be excused, few psychopaths would be willing to accept such “lenient” treatment and we would still have to rely on a pure criminal justice response. Thus, the only potential solution to the desert-disease gap psychopathy produces would be some special form of involuntary civil commitment similar to sexual-predator commitments.<sup>107</sup>

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102. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 746–47 (1992). For an intermediate position, see Walter Glannon, *Moral Responsibility and the Psychopath*, 1 NEUROETHICS 158 (2008) (arguing that psychopaths are capable of instrumental reasoning and are capable of being guided by moral considerations to some degree, but their cognitive and affective impairments warrant mitigation).

103. *Jones v. United States*, 463 U.S. 354 (1983); see *infra* Section III.M.

104. *Jones*, 463 U.S. 354.

105. *Foucha v. Louisiana*, 504 U.S. 71, 76 (1992).

106. *E.g.*, *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991).

107. Sexual-predator commitments are discussed in Section III.L. The same conceptual and constitutional concerns would apply if a legislature attempted to create a special form of commitment for some psychopaths.

Finally, let us consider proposals to abolish the insanity defense and potential alternatives to it. Abolition of the insanity defense is simply unfair and there is no adequate substitute for it. Some people are so lacking in rational capacity through no fault of their own that it would be as unjust to blame and punish them as it would be to blame and punish young children or people with dementia. The consequential grounds for abolition are unpersuasive,<sup>108</sup> so the only potentially convincing ground must be that it is not unfair to abolish the defense. The late Norval Morris tried to make such an argument on behalf of the American Medical Association, which took a position in favor of abolition in the wake of Hinckley. Professor Morris argued that since poverty is a stronger cause of crime than mental disorder and we think it is fair to blame and punish poor criminals, it follows that it is fair to blame and punish criminals with severe mental disorders. With respect, however, Professor Morris confused causation with excuse. Poor criminals are not excused because they do not have rational or control incapacities. Some offenders with mental disorder do have such incapacities, which is why they are excused.

There is no suitable alternative to legal insanity. The most common alternative is to permit evidence of mental disorder to be admitted to negate mens rea, but this will fail to do justice and it can lead to morally and legally bizarre results. As previously discussed, mental disorder, even severe disorder, seldom negates mens rea; rather it gives the offender an abnormal, irrational reason to form mens rea. In the *Delling* case cited in the beginning of this section, Delling delusionally believed the two victims were sucking his brain out of his skull and would thereby kill him. He carefully planned to kill the victims to save his own life, just like M'Naghten. He clearly formed the intent to kill and was therefore prima facie guilty of premeditated murder, but the trial judge explicitly found that he did not know right from wrong. Idaho had abolished the insanity defense, however, and thus Delling was convicted of murder. This case and others like it are the clearest confirmation of the insufficiency of the mens rea alternative because, even those

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108. Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 795–801 (1985) (rejecting various consequential and practical arguments for abolition). It is possible that abolishing the defense will increase social safety because it will deter both some severely mentally ill defendants who would succeed with the defense of legal insanity and some normal defendants who might think that they can fake the defense. See HART, *supra* note 78, at 48–49 (conceding that abolition of all excuses might increase social safety, but arguing that the cost to individual rights would be too high). Such deterrent benefit is entirely speculative, however, and in the case of abolishing the insanity defense, the likelihood of achieving these benefits is tiny. For a general discussion of deterrence, see Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report.

defendants most out of touch with reality will have no opportunity to raise a defense unless there is a potential insanity defense. Justice Breyer's dissent from the denial of review in *Delling* explicitly recognized this.<sup>109</sup>

In some cases, a defendant charged with premeditated homicide might use evidence of hallucinations or delusions to cast doubt on whether his intention to kill was premeditated, but then he would still be convicted of a lesser form of intentional homicide. If a defendant has an auditory hallucination of God's voice telling him to kill, conviction of second-degree murder would be unjust because the defendant is not rational. Reconsider the facts in *Clark*.<sup>110</sup> If the defendant actually believed he was killing a space alien who was impersonating a police officer, then he is not guilty of purposeful, knowing, or reckless homicide. He would be convicted of involuntary manslaughter on a negligence theory, however, because his deluded mistake was unreasonable. But this defendant is not negligent in the ordinary sense. He cannot correct the error by being more careful. He is irrational and does not deserve to be punished at all. Conviction of involuntary manslaughter is morally and legally obtuse in such a case of gross lack of rational capacity.<sup>111</sup>

Another alternative deserves brief mention: the verdict of "guilty but mentally ill" (GBMI). This verdict has been adopted in a substantial minority of states in addition to legal insanity, so it is an alternative rather than a replacement. A GBMI verdict does not indicate reduced culpability, it does not require lesser punishment, and it does not provide for hospitalization and treatment that would not otherwise be available to the convict. Essentially, the finder of fact is being asked to make a diagnosis in addition to a guilt determination. It is not different from "guilty but herpes." In short, GBMI

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109. *Delling*, 133 S. Ct. at 504 (Breyer, J., dissenting).

110. *Clark*, 538 U.S. at 743–44.

111. In addition to the mens rea alternative if the insanity defense is abolished, Professor Christopher Slobogin's "integrationist" proposal for abolition should be briefly mentioned because it is the only serious contemporary scholarly proposal and interesting in its own right. CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 51–60 (2006). This proposal would allow the defendant to use evidence of mental disorder to indicate that he would have been justified or excused if the facts had been as he believed them to be. The proposal depends, however, on adopting a subjectivized view of justification that is unacceptable if the distinction between justification and excuse is to be preserved. It would also fail to acquit many disordered defendants who have substantial rationality defects. Professor Slobogin rejects rationality impairments as the basis for legal insanity, but he then inconsistently uses lesser rationality to argue that juveniles are less responsible than adults. The integrationist proposal has been subject to a great deal of criticism. See Christopher Slobogin, *Abolition of the Insanity Defense and Comments*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 95, at 473–92; Morse & Hoffman, *supra* note 71, at 1123–31. No legislature has seriously entertained adopting the proposal.

is a fraudulent verdict because it does not address any issue relevant to just criminal blame and punishment and it has the potential to deflect juries from proper insanity acquittals because they do not understand the insanity defense or fear that it will cause the release of a dangerous offender.<sup>112</sup> When GBMI is available, jurors may falsely believe that they are “taking account” of the defendant’s impairment and thus may improperly return the GBMI verdict when an acquittal of insanity was appropriate. Paradoxically, defendants who raise the verdict may receive even harsher sentences, so there is evidence that its use is declining.<sup>113</sup>

**RECOMMENDATION: All jurisdictions should adopt an insanity defense to ensure that justice is done in appropriate cases and no alternative will equally achieve this result.**

Finally, should the jury be informed that the outcome of an acquittal will be a form of involuntary civil commitment with a potentially indefinite term? In *Shannon v. United States*,<sup>114</sup> the Court held that federal trial courts need not instruct the jury about commitment unless the prosecution affirmatively misleads the jury about the consequences. Justice Thomas’s majority opinion focused primarily on the traditional assumption that juries should decide whether the defendant is culpable and should not be concerned with the consequences of their verdict.<sup>115</sup> Although this assumption may make sense for the vast majority of cases in which the defendant will be imprisoned or freed depending on the verdict—a fact jurors know—the insanity defense is the only form of complete excuse that does not result in the defendant being immediately freed. I recognize that jurors may not fully understand what sentence will follow a conviction, but the insanity defense is unique because the acquitted defendant is not freed. It would be understandable if a juror voted to convict a legally insane defendant because the juror feared that a disordered and dangerous person might be freed. Similarly, jurors may be far more inclined to reach the just result if they learn that the insanity acquittee will be preventively detained by post-acquittal commitment.<sup>116</sup> Thus, I conclude that the defendant should be entitled to a “consequences” instruction upon request.

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112. STEADMAN ET AL., *supra* note 77, at 102–20 (describing the verdict as a compromise).

113. *Id.*

114. 512 U.S. 573 (1994).

115. *Id.* at 579–80, 586–87. In fact, Justice Thomas’s entire majority opinion relies on the validity of this assumption.

116. This form of commitment is discussed in Section III.M, *infra*.

I would not make it mandatory because, as Justice Thomas recognized, there may be situations when the defendant would think it is not in his interest to have the jury learn of the consequences.

#### H. "GUILTY BUT PARTIALLY RESPONSIBLE"

In 2003, I proposed that the criminal law should include a generic, doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact.<sup>117</sup> This partial excuse would apply in cases in which a defendant's behavior satisfied the elements of the crime charged, but the defendant's rationality was non-culpably and substantially compromised and thus the defendant was not fully responsible for the crime charged.<sup>118</sup> Current Anglo-American criminal law contains no such generic partial excuse. Some doctrines, such as provocation/passion and extreme mental or emotional disturbance for which there is reasonable explanation or excuse, appear to operate in effect as partial excuses. They typically apply only in limited contexts, however, such as to reduce a homicide that would otherwise be murder to manslaughter.<sup>119</sup>

Criminal law already recognizes the moral importance of "partial responsibility" for determining just punishment. Despite the lack of a generic mitigating excuse and strict limitations on the few doctrines that serve this purpose, the relevance of diminished rationality and diminished responsibility to sentencing is widely and generally accepted. For example, *Atkins v. Virginia*,<sup>120</sup> which categorically prohibited capital punishment of people with retardation on Eighth Amendment grounds, was based precisely on this recognition. The Court wrote:

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117. Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003). I will use the terms "partial responsibility" and "diminished responsibility" interchangeably, but the former should be preferred because there is no extant legal doctrine by that name with which the proposed doctrine could be confused. Diminished responsibility is probably more accurately descriptive, but there does exist a doctrine with which the proposal might be confused. See Coroners and Justice Act 2009, c. 25, § 52 (Eng.) (discussing criteria for "diminished responsibility"). This section came into force on October 4, 2010 as a result of Statutory Instrument No. 2010/816.

118. The defendant could also plead in the alternative any other mitigating or full affirmative defense, such as legal insanity.

119. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962). The English doctrine of "diminished responsibility," which is quite expansive, is likewise limited to reducing murder to manslaughter. See Coroners and Justice Act 2009, c. 25, § 52 (Eng.). See generally GEORGE MOUSOURAKIS, CRIMINAL RESPONSIBILITY AND PARTIAL EXCUSES (1998); PARTIAL EXCUSES TO MURDER (Stanley Meng Heong Yeo ed., 1991).

120. 536 U.S. 304 (2002).



Mentally retarded persons frequently know the difference between right and wrong.... Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.... With respect to retribution—the interest in seeing that the offender gets his “just deserts”—the severity of the appropriate punishment necessarily depends on the culpability of the offender.<sup>121</sup>

The Federal Sentencing Guidelines also explicitly adopt this principle by providing for a reduced sentence if a “significantly reduced mental capacity ... contributed substantially to the commission of the offense.”<sup>122</sup> Although this provision applies only to nonviolent offenders, the limitation is based on considerations of public safety, rather than on the belief that violent offenders never suffer from reduced mental capacity or that such incapacity does not affect the culpability of violent offenders. Even a preference for determinate sentencing does not undermine the general acceptance of this view because it is typically motivated primarily by concerns with disparate sentencing, rather than by the belief that impaired rationality is unrelated to diminished responsibility.

I have long argued that the capacity for rationality is the fundamental criterion for responsibility. Young children and some severely disordered defendants are excused not because they are young or ill, but because youth and disorder, respectively, are inconsistent with or impair the capacity for full rationality.<sup>123</sup> Sentencing reduction based on mental abnormality is premised upon the same basis. Provocation/passion and extreme mental or emotional disturbance as partially excusing mitigating doctrines are best explained by the theory that these conditions non-culpably reduce the capacity for rationality.

121. *Id.* at 318–19. Note that these are largely rationality considerations.

122. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (U.S. Sentencing Comm’n 2004).

123. The Supreme Court confirms this in the case of juveniles. *See Roper v. Simmons*, 543 U.S. 551 (2005) (declaring unconstitutional application of capital punishment to juveniles who committed capital murder at the age of sixteen or seventeen). The Court listed those characteristics of adolescents, such as impulsivity, ill-considered action, and susceptibility to peer pressure, as diminishing juveniles’ culpability and cited *Atkins* for the proposition that lesser culpability should lead to lesser punishment, at least in the capital punishment context. *Id.* at 569–71. The factors used in both *Atkins* and *Roper* to justify diminished responsibility are best understood, I believe, as rationality considerations. In the case of juveniles, lesser rationality results from developmental immaturity rather than from an abnormality. *See generally* Barry C. Feld, “Juvenile Justice,” in the present Volume.



Finally, the claims for excuses based on newly discovered, alleged syndromes are best justified as irrationality claims. How much rational capacity must be impaired under what conditions to warrant excuse or mitigation is, of course, a moral, political, and legal question.

Present law is unfair because it does not sufficiently permit mitigating claims. Criminal defendants display an enormously wide range of rational and control capacities. In some cases, there may be quite substantial impairments, but such defendants simply have no doctrinal purchase to argue for mitigation at trial or in the plea bargaining process. If criminal punishment should be proportionate to desert, blanket exclusion of doctrinal mitigating claims and treatment of mitigation solely as a matter of sentencing discretion are not fair.

To understand the unjustifiable limitations of current doctrine, consider the impaired-rationality doctrines that reduce a murder to manslaughter: heat of passion upon legally adequate provocation, and extreme mental or emotional disturbance for which there is reasonable explanation of excuse.<sup>124</sup> Why should these doctrines be limited to homicide? For example, suppose a defendant acting in the heat of passion intentionally burns the provoker's property on the spur of the moment, rather than killing the provoker. Or suppose that an agent suffering from a non-culpable state of substantially diminished rationality commits arson. Some arsonists and some criminals generally might act with non-culpable, substantially impaired rationality that does not meet the standards for a full legal excuse. Compromised rationality and its effect on culpability are not limited to homicide. Moreover, such a generic mitigating doctrine would be a more just and practical response than either legal insanity or subjectivizing justification for claims of reduced responsibility based on alleged newly discovered psychological syndromes. Fairness and proportionality require that doctrinal mitigation should be available in all cases in which culpability is substantially reduced.

I therefore propose the adoption of a new verdict, "guilty but partially responsible" (GPR), that would apply to all crimes and that would be adjudicated at trial (or that would be a new variable in plea bargaining). This would be a true mitigating affirmative defense. I am not wedded to any particular set of criteria for this doctrine. Any formula, such as the Model Penal Code's "extreme mental or emotional disturbance,"<sup>125</sup> that captures the essence would be acceptable. I would require that the impairment would have to be substantial, as does the MPC. The consequence of this verdict would be a legislatively mandated

124. The English "diminished responsibility" doctrine operates similarly and is similarly limited. *See* *R. v. Golds*, [2016] UKSC 61.

125. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

reduction in punishment for the crime. I am not committed to any particular reduction scheme, but considerations of public safety would have to play a large role in determining how much reduction would be possible for various crimes. This proposal has been called a “punishment discount,” and so it is. But substantially impaired or coerced defendants deserve to pay a lesser price. There are various practical problems that adopting this verdict might create, but I argued in the original paper and still believe that these can be solved. It is certainly worth trying the experiment in the interest of justice.

**RECOMMENDATION: Legislatures should adopt a generic verdict of “guilty but partially responsible” that would reduce the defendant’s sentence in cases in which the defendant’s rationality was substantially compromised.**

#### *I. FORCIBLE MEDICATION AND TRANSFER TO HOSPITAL*

In the context of potential forcible medication in the criminal justice system, there is an inevitable and deep tension between traditional common law and constitutional rights of the individual to refuse unwanted medical and psychiatric treatment and the legitimate needs of the criminal justice system. In *Harper*, the Supreme Court held that prisoners have a liberty interest in avoiding unwanted psychotropic medication, but the state’s interest in the safety of the prisoner and others would justify forcible psychotropic medication if it were medically appropriate and the prisoner would otherwise be a danger to himself or others as a result of mental disorder.<sup>126</sup> I believe that the case is properly decided. Prisons are a particularly difficult environment and interests of institutional and personal safety are paramount. There are a few difficulties, however. Psychotropic medications can be used as instruments of pure social control, which is not justified. This could occur if the prisoner were dangerous and mentally disordered, but there was no relation between the two. *Harper* criteria should explicitly include a connection between the mental disorder and the potential for danger.

**RECOMMENDATION: Prisoners should be forcibly medicated under a *Harper* rationale only if the prisoner’s dangerousness is a result of his disordered state of mind.**

The second problem is the nature of *Harper* hearings. The Supreme Court approved Washington’s process, which permitted all the personnel involved, including the prisoner’s adviser, to be employed by the institution.<sup>127</sup> This creates an inevitable conflict of interest, much akin to a non-independent evaluator

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126. *Washington v. Harper*, 494 U.S. 210, 225–29 (1990).

127. *Id.* at 233–36; *see also id.* at 250–55 (Stevens, J., dissenting).

appointed under *Ake*. It is understandable that these hearings need not be fully adversarial with the full set of criminal justice procedural protections because this would be unduly burdensome for the state. The prisoner is facing the loss of an important liberty right, however, and some independent check on the institution should be provided. There are many ways this might be reasonably accomplished without undermining the efficiency of the process, such as providing counsel from a public defender's office or a panel of community attorneys, or an independent adviser or mental-health professional from another institution.

**RECOMMENDATION: Prisoners facing a *Harper* hearing should be represented by an adviser, preferably an attorney, who is independent of the prison or mental-health system in the jurisdiction.**

If a prisoner's mental disorder renders him unmanageable in the prison, *Vitek v. Jones*<sup>128</sup> held that the prisoner can be transferred to a hospital after a hearing at which the prisoner has a right to be heard and the right to an adviser (although not a lawyer). The Court recognized that the prisoner has an interest in avoiding the stigmatization associated with mental hospitalization and the possibility of forcible treatment. This is a sensible decision that reasonably balances individual and governmental interests as long as the hearings provide the defendant with a genuine chance to contest the transfer. It would be better if the prisoner were represented by adversarial counsel rather than by an appointed adviser who will typically be a prison employee and therefore subject to conflict of interest. Providing counsel would not be unduly burdensome in this context and it would provide greater fairness. Although *Vitek* does not compel the government to provide adversary counsel, the state should do so in the interest of justice.

### J. SENTENCING

The issue in all types of sentencing, capital and noncapital, is the role mental disorder should play for both mitigation and aggravation. Sentencing schemes vary substantially across the United States, but I shall assume for the purpose of argument that the judge has the authority to use mental disorder as a sentencing factor. I should say at the outset that if the offender has a colorable mitigation claim based on mental disorder or if the prosecution will introduce mental-disorder evidence to support enhancement, as argued in Section III B., the state should provide an independent mental-health professional to aid the offender with sentencing. As people with criminal justice experience know, for many offenders, the length of time that they will spend in prison is more

128. 445 U.S. 480 (1980).

important than whether they are convicted. All sentencing, not just capital sentencing, is vital to the offender, and the process will not be fair unless he has the assistance of a mental-health professional in appropriate cases.

**RECOMMENDATION: In all capital and noncapital sentencing proceedings in which the defendant has a colorable mitigation claim based on mental disorder or in which the prosecution will introduce mental disorder evidence for the purpose of enhancement, the defendant should have the right to an independent mental-health professional retained for the defense to assist him with the claim.**

Let us begin with mitigation. If the “guilty but partially responsible” mitigation I proposed above were adopted, then the defendant would have two chances to have his mental abnormality short of legal insanity considered. If the jury accepted the GPR claim, then there would be no need for the judge to consider mental-abnormality evidence at sentencing because a reduction would be automatic. For now, however, using mental disorder to mitigate will be almost entirely a matter of judicial discretion at sentencing.

In *Graham v. Florida*,<sup>129</sup> the Supreme Court held that the Eighth and Fourteenth Amendments prohibited imposing sentences of life without the possibility of parole (LWOP) on juveniles who committed non-homicide crimes, because juveniles were less responsible than adults and did not deserve such severe sentences even for heinous non-homicide crimes. The Court’s conclusion about diminished responsibility followed its reasoning in *Atkins*,<sup>130</sup> which excluded people with retardation from receiving death sentences for capital crimes, and in *Roper*,<sup>131</sup> which exempted 16- and 17-year-old capital murderers from capital punishment. The ground for diminished responsibility was essentially that these defendants suffered from diminished rationality.<sup>132</sup>

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129. 560 U.S. 48 (2010).

130. *Atkins v. Virginia*, 536 U.S. 304 (2002).

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

132. In *Graham*, the Court explicitly relied on the *Roper* factors discussed *supra*, and also re-emphasized that juveniles were not yet fully mature and might change as normal maturation occurred. Nonetheless, lack of rational capacity was the primary ground. *Graham*, 560 U.S. at 68–69.

*Graham* was the first occasion that the Court used a diminished desert rationale based on diminished rationality to insist on what is in effect mitigation for a term-of-years sentence.<sup>133</sup>

The reasoning of *Graham* or the arguments I have made about guilty but partially responsible generalize perfectly to using evidence of mental disorder at the time of the crime for sentencing mitigation generally. Defendants do not deserve mitigation solely because they were disordered, but they do deserve it if the disorder impaired the rationality of their practical reasoning about the criminal offense. Such rationality impairments can range along a long continuum, however, and thus fine-grained differences in responsibility are possible in principle. At present, however, we lack the conceptual and practical capacity to respond in a fine-grained manner and the result will be inevitable, unwitting abuses of discretion and unjustified disparities in sentencing. Principled, finely calibrated sentencing is impossible. In such circumstances, greater justice will be done if we recognize the inevitable limitations on fine-grained individualization and try to achieve proportionate equality within limited bounds.

In a few cases, mental-disorder evidence might also tend to show that the defendant is less dangerous because it renders the defendant disorganized, ineffective, or the like. If this were the case, there would be grounds for mitigating a sentence on consequential grounds as well. Again, diminished dangerousness would be a continuum, but we lack the empirical resources to make such distinctions and predictions accurately.

There should be a legislatively mandated mitigation if the judge finds that substantial diminished rationality existed at the time of the crime. The amount of reduction could be a uniform percentage or might vary by crime to adjust for social-safety concerns, but the sentencing judge would have no power to individualize beyond the mandated reduction. Such one-size-fits-all approaches risk unfair lumping and “cliff effects,”<sup>134</sup> but the overall effects will

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133. In *Graham*, the majority relied on *Roper*'s conclusion that adolescents are relevantly different, but cited amicus briefs for the proposition that the adolescent brain was not yet fully mature. *Id.* at 68. This has produced irrational exuberance among those who want courts to take more account of neuroscience evidence. The Court referred generally to neuroscience to support its conclusion that nothing in the science of adolescent development in the intervening five years changed the *Roper* conclusion, but no one had argued to the contrary. Arguments in support of juvenile LWOP in non-homicide cases were based entirely on other normative and empirical arguments, and thus, I submit, the neuroscience was dictum.

134. I borrow this term from the economic literature on enforcement, which notes that equal punishment for crimes of different seriousness produces crimes of greater seriousness. See George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

be positive. Most desert and danger criteria cannot be reliably measured, but instead require rougher retributive judgments and often speculative empirical assessments. Further, given the limits on human judgment and the greater reliability of judgments with fewer categories, everyone can understand the need for bright-line rules that risk some disparity at the margins. Less injustice will be produced by this approach than the inequality flowing from the unreliability of judgments involving more numerous categories.

**RECOMMENDATION: Legislatures should adopt a mandated scheme of mitigation if the sentencing judge finds that substantial diminished rationality existed at the time of the crime. The amount of reduction could be a uniform percentage or might vary by crime to adjust for social-safety concerns, but the sentencing judge should have no power to individualize beyond the mandated reduction.**

Evidence of mental disorder can also be used for enhancement within the authorized sentence range if it is a risk factor for future antisocial conduct. For example, substance abuse and psychopathy are both serious risk factors for future crime.<sup>135</sup> Mental abnormality is thus a knife that cuts both ways in sentencing. Although the relevance to both mitigation and aggravation is true in theory, the empirical basis for the alternatives of mitigation and aggravation is asymmetrical. Despite the problems with mental-abnormality evidence, establishing that the defendant had a substantial mental abnormality at the time of the crime and therefore deserves mitigation is reasonably possible. It is a very fact-based issue that turns on the defendant's mental states. Evaluation of such states is a bread-and-butter issue in criminal (and civil) cases. Predictions are of course based on facts, but even if the facts are established, the accuracy of such predictions is weak, even if actuarial techniques or semi-structured interviews are used. The level of acceptable accuracy is of course a normative question that cannot be "read off" from Eighth Amendment jurisprudence. Despite the Supreme Court's willingness to accept admittedly inaccurate predictions in *Barefoot*,<sup>136</sup> one would hope that an extremely high level of accuracy would be required before increasing a sentence or putting a capital offender to death on the basis of a dangerousness prediction.

After *Barefoot*, there is no constitutional bar to introducing weak prediction evidence, but sentencing enhancements should be rationalized to achieve justice. To the extent one is doing evidence-based sentencing and is using

135. For a discussion of substance abuse, see JOHN MONAHAN ET AL., *RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE* 94 tbl. 5.1, 141 (2001). For psychopathy, see *id.* at 65–72; Douglas et al., *supra* note 97, at 534; Widiger, *supra* note 98, at 157–59.

136. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

reliable and valid diagnostic techniques and adequate databases, using mental disorder as a risk factor seems reasonable. As mentioned previously, actuarial methods and semi-structured interview techniques are state-of-the-art and should be required.<sup>137</sup> The difficulty is that too many claims for enhancement based on predictions do not use the best techniques and data, despite large improvements in the technology of prediction.

Our ability to make valid, fine-grained predictions about future danger is quite limited at present, so I would limit enhancement to one grade of enhancement if the defendant meets a legislatively mandated threshold of heightened risk beyond the “average” case at the core of the penalty range. I would also require that the sentencing judge should insist that the prosecution demonstrate that the risk evaluation and prediction methods it uses are state-of-the-art. Although the Constitution may require considerably less, the defendant’s freedom is at stake and justice demands that we use the best evidence before depriving it further.

**RECOMMENDATION: In noncapital cases, mental disorder may be used as an enhancement factor, but only if the most accurate methods of predicting future behavior have been used and indicate a very substantial risk; moreover, the amount of enhancement should be limited.**

Capital sentencing, the most extreme form of crime and danger prevention, like sentencing generally, raises the issue of the role of mental disorder as both a mitigating and aggravating factor. The considerations are similar, but so much more is at stake. Death is different.<sup>138</sup>

Beginning in 1978 with *Lockett v. Ohio*,<sup>139</sup> the Supreme Court has made clear that the defendant can introduce any potentially mitigating evidence at capital sentencing proceedings, whether or not it supports a statutorily authorized mitigating factor. It is universally accepted that mental disorder is a mitigating factor, and many jurisdictions specifically list mental abnormality as a mitigating factor, using language similar to the Model Penal Code’s “extreme mental or emotional disturbance” criterion or a similar partial responsibility standard.<sup>140</sup> Although only a minority of states make “dangerousness,” per se, a statutorily aggravating factor, dangerousness is incorporated implicitly or

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137. Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 39 (2011). See generally John Monahan, “Risk Assessment in Sentencing,” in Volume 4 of the present Report.

138. See generally Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

139. 438 U.S. 586 (1978).

140. MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).



explicitly in other listed factors, and, as just discussed, purely clinical mental-health testimony is used to predict future dangerousness, despite the empirical weaknesses of clinical predictions.

There are no constitutional means to exclude abnormality evidence for the purposes of mitigation. The states should nonetheless be free to exclude aggravating predictions because they are too inaccurate to be the basis for imposing the death penalty, but, as a practical, political matter, I suspect that no jurisdiction would do this. I therefore recommend again, as I have before in this chapter, two less “extreme” protective measures. First, the state should require use of the most empirically validated prediction methods rather than clinical evaluations or responses to hypothetical questions. Actuarial methods and semi-structured interview techniques are state-of-the-art and should be required. Second, the defendant must have access to an independent mental-health professional to help him prepare mitigation evidence and to defend against aggravation evidence of future dangerousness. Of course, if the defendant does not raise mental abnormality, then, consistent with *Estelle v. Smith*,<sup>141</sup> a defendant cannot be compelled to undergo a psychiatric examination whose results will be used at capital sentencing, unless the defendant consents to such use. In that case, the state would have to rely on the answers to hypothetical questions, which my proposal would bar.

#### K. COMPETENCE TO BE EXECUTED AND FORCIBLE RESTORATION OF COMPETENCE

At common law, a prisoner sentenced to death could not be executed if he was incompetent because he did not understand what penalty was being imposed or why. The Supreme Court finally held<sup>142</sup> and reaffirmed<sup>143</sup> that the common law practice has constitutional status under the Eighth Amendment. In *Ford*, the first Supreme Court case to so hold, the Court noted that the reasons for this uniform common law rule are less certain and uniform than the rule itself.<sup>144</sup> The Court then considered a number of historical rationales that might support the doctrine, but, in short, the rationale is that executing incompetent offenders is simply cruel and that society must protect the defendant and protect the dignity of society.

In *Panetti*, the Court appeared to adopt a primarily retributive rationale, suggesting that the incompetent offender could not recognize the gravity of

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141. 451 U.S. 454 (1981).

142. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

143. *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

144. *Ford*, 477 U.S. at 407.



his crime and that executing him would not allow the community to affirm its judgment that the prisoner's culpability was so serious that he deserved death.<sup>145</sup> The Court therefore rejected a narrow reading of the substantive requirements for competence to be executed. Panetti was concededly delusional, and the Court rejected a reading of *Ford* that would permit execution of an offender who simply understood or was aware, rather than *rationally* understood, the fact of execution and why he was being executed.<sup>146</sup> The *Panetti* Court wrote:

Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.<sup>147</sup>

It is clear that, unlike in *Godinez*, in which the Court rejected an allegedly higher "reasoned choice" test for competence to plead guilty and to waive counsel,<sup>148</sup> in this context a higher standard is required. Death is indeed different.

For purposes of discussion, we must assume that the defendant was competent to be tried, was properly convicted, was competent to be sentenced, and was properly sentenced to death. There is much reason to question these assumptions, despite the many procedural protections Justice Powell noted in his *Ford* concurrence.<sup>149</sup> It is possible, of course, that the offender was not suffering from substantial disorder at the earlier stages of the criminal process, and only became severely disordered in prison. Nonetheless, the most common age of onset for psychotic ideation of the type that might undermine competence, which is usually a symptom of schizophrenia, is from late adolescence to the early 30s, although late-onset cases do occur.<sup>150</sup> Therefore, many people later found incompetent to be executed were probably suffering from substantial mental problems at the time of the crime and during trial and sentencing—problems that were not sufficiently addressed or properly considered. Consequently, many such offenders should not have been sentenced

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145. *Panetti*, 551 U.S. at 958–59.

146. *Id.* at 958.

147. *Id.* at 960.

148. *Godinez v. Moran*, 509 U.S. 389, 398 (1993).

149. *Ford*, 477 U.S. at 420 (Powell, J., concurring).

150. The DSM notes that the typical onset of schizophrenia occurs between the late teens and mid-thirties, but that late onset is also possible. DSM-5, *supra* note 2, at 102.

to death in the first place because, at the least, mental abnormality should have mitigated punishment at sentencing. Dementia associated with aging might be a counter-example to the foregoing considerations, especially given the often lengthy process before prisoners are actually executed. Again, however, let us assume that the process was sufficiently fair.<sup>151</sup>

It is not clear whose interests are being protected by the bar on executing incompetent offenders. Executing incompetent prisoners might seem to support individual or state interests we endorse. For example, a prisoner who does not fully apprehend what is happening might be less fearful. The community might be indifferent to the mental state of the prisoner at the time of the execution and satisfied both that the defendant deserved death for his conduct at the time of the crime and that the state must fulfill its obligation to impose that sentence. Professor Richard Bonnie, influenced by Justice Powell, suggests that the only sound rationale for this bar is respect for the dignity of the condemned prisoner, who has a right to be treated as a subject worthy of respect and not simply as an object to vindicate the state's promise.<sup>152</sup> If the offender does not realize what is happening to him, he will not be able to exercise the few choices left to him that preserve his autonomy, agency, and dignity.<sup>153</sup> I have been persuaded by Professor Bonnie's argument, but it does leave open precisely how much rational understanding is necessary to vindicate the condemned's dignity. Because death is different, I would insist that a high standard should be imposed. A just society should ensure that it substantially increases the risk of error in favor of the prisoner.

**RECOMMENDATION: The standard for competence to be executed should be very high.**

In *Ford* and *Panetti*, the Court did not hold that the decision about competence to be executed must be made by a judge. Instead, and again following Justice Powell's *Ford* concurrence,<sup>154</sup> it is apparently sufficient if there is some type of impartial hearing officer or board who can receive arguments and evidence

151. I confess that I am deeply ambivalent about the issues in this section. I oppose capital punishment and one part of me wants to make any argument possible to abolish it. Another part, however, recognizes that it has constitutional status and I therefore try to make arguments in light of that status.

152. Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 277 (2007).

153. See *id.*

154. 477 U.S. 399, 425–27 (1986) (Powell, J., concurring).

from the prisoner.<sup>155</sup> *Panetti* made clear, however, that the offender is entitled to use his own experts to rebut the state's evidence.<sup>156</sup>

For a decision of such importance, only a judicial hearing is sufficient to protect the prisoner's rights. Any other type of decision-maker, especially if it is an individual, will appear less formally rigorous or independent and will in fact probably be less rigorous and independent. Moreover, the prisoner should be entitled to the services of a genuinely independent mental-health practitioner if the prisoner is too poor to hire his own. As a practical matter, advocates who oppose capital punishment will surely ensure that such services are provided, but it ought to be the prisoner's right.

**RECOMMENDATION: Competence to be executed should be decided by a judicial hearing.**

Suppose the concededly incompetent capital prisoner could potentially be restored to competence by taking medically appropriate psychotropic medication, but refuses to do so. The Supreme Court has not decided this issue, but it has reached both a state supreme court, *State v. Perry*, which decided that the prisoner could not be medicated unless the death penalty was commuted,<sup>157</sup> and a federal circuit court, *Singleton v. Norris*, which held that the state's interest was sufficiently strong to permit forcible medication.<sup>158</sup> This is a fearsomely difficult issue. In contrast to *Harper*,<sup>159</sup> in this case the prisoner must undergo not only the liberty deprivation of forcible medication, which is not insignificant in itself, but also the ultimate deprivation of death as a result. On the other hand, the meaning of a capital sentence is that society has decided that the prisoner no longer has a right to live.

*Singleton* held that forcible medication would be permissible if the state had a sufficiently strong interest, if the medication was the least intrusive way of restoring competence, and if it was medically appropriate.<sup>160</sup> Let us assume that the state's interest in imposing capital punishment is strong, as it surely is, and that medication is necessary to restore competence, as it will be in most cases. Dementia may again be a counter-example because there may be no treatment that can restore competence in advanced cases. The issue is how to think about whether the medication is medically appropriate. Therapy of the disorder may

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155. *Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007).

156. *Id.* at 950, 958 (requiring that the prisoner must be able to offer his own psychiatric testimony as a counterweight to the state's evidence).

157. 610 So. 2d 746, 770 (La. 1992).

158. 319 F.3d 1018, 1026 (8th Cir. 2003).

159. *Washington v. Harper*, 494 U.S. 210 (1990).

160. *Singleton*, 319 F.3d at 1027.

alleviate it, but if so, it will enable execution. As a result, it is claimed that it is not in the prisoner's medical interest to be medicated so that he may be killed.<sup>161</sup>

With respect, the petitioner's undoubted interest in continuing his life is a moral and legal issue independent of his medical interests. His medical interest is in alleviating serious illness. His personal interest in remaining alive is the same legal interest any citizen has in life, except that in this case, it is forfeited. An analogy may help make this clearer. Suppose the condemned prisoner suffers from an illness that can cause loss of contact with reality or other dementia-like states and suffering. Suppose, too, that medication to control the disorder can cease to be fully effective unless the dosage is increased. If the prisoner's illness became uncontrolled as execution neared and he lost touch with reality and was suffering, it would be medically inappropriate *not* to treat the defendant. Or suppose the prisoner suffered a stroke and was in a coma in the emergency room. Should the doctors fail to treat? I suggest that all physicians would believe it is their duty to treat the prisoner. These cases can be distinguished, of course, but is there a distinction that makes a principled difference, or is the desire to avoid capital punishment at all costs driving the argument?

In *Washington v. Glucksberg*,<sup>162</sup> the Court rejected the argument that people have a due process right to physician-assisted suicide. In the course of reaching that decision, the Court noted the state's interest in upholding the ethics of the medical profession as one ground for affirming the state's constitutional right to ban this practice.<sup>163</sup> Almost certainly the overwhelming majority of American physicians would probably oppose forcible psychotropic medication to restore trial competence unless the death penalty was commuted. Surely, however, there are a few physicians who do not oppose it and who would administer the medication either because they do not think it is wrong or because they think it is their distasteful duty, but a duty nonetheless if they work for the state.<sup>164</sup> In a sense, this case is the reverse of *Glucksberg*. There, the patient wanted treatment that most doctors oppose.<sup>165</sup> Here, the prisoner does not want treatment that most doctors think it is wrong to impose unless capital punishment is commuted. Nonetheless, the Court might uphold banning forcible medication on the ground that permitting it undermines medical ethics. States will certainly have the right to ban the practice of forcible medication to restore

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161. See *id.* at 1025–27.

162. 521 U.S. 702 (1997).

163. *Id.* at 731.

164. A state could surely permit an employee without a medical degree but with the proper training to administer the drugs.

165. *Glucksberg*, 521 U.S. at 710.

execution competence, even if the Supreme Court ultimately decides that the Constitution does not absolutely prohibit it.

If the Supreme Court does permit this practice, a particularly difficult question is whether, when an execution date is set, competence flowing from medication justified by *Harper*<sup>166</sup> should be sufficient to let execution proceed. This would permit the state to avoid the harder issue presented by using forcible medication solely to restore competence to be executed. The prisoner may continue to be a threat to his own safety or the safety of others. Nonetheless, the prisoner on death row can probably be managed without medication because the circumstances are very different from those of prisoners in the general population. I propose that as the execution date approaches, the medication should be reduced or withdrawn to determine if the prisoner is rendered incompetent to be executed. If so, then the state must confront directly whether it is willing to medicate this prisoner solely for the purpose of executing him. The state should be forced to decide this rather than to be permitted to comfort itself with an independent rationale that is much less problematic. It is not enough to demonstrate that the *Harper* medication is genuinely independently motivated and justified, and that competence restoration is simply a side benefit. It might be argued that because the prisoner's life is already forfeited, society owes no such obligation to set up potential roadblocks that compel the state to clear-sighted recognition of the immensity of its proposed action. Perhaps so, but a civilized society should demand this.

**RECOMMENDATION: Competence to be executed that is achieved by forcible medication administered under a *Harper* rationale should not be sufficient. The state should be compelled to decide whether forcible medication solely to restore competence is justifiable independent of a *Harper* rationale.**

In conclusion, resolving in general and in individual cases the immensely difficult issues presented by incompetence to be executed is another one of the many costs and controversies capital punishment produces that abolition would avoid.

#### *L. MENTALLY ABNORMAL SEXUAL-PREDATOR COMMITMENT*

A substantial minority of states have adopted a special form of involuntary civil commitment if four criteria are met: a charge or conviction of a sexual offense, the presence of a mental abnormality or a personality disorder, predicted future dangerousness, and serious difficulty controlling the sexually

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166. *Washington v. Harper*, 494 U.S. 210 (1990).

violent conduct. Although civil, these forms of commitment are usually accorded heightened procedural due process by legislation, such as the necessity of proving the criteria beyond a reasonable doubt. They may be imposed at the end of a full prison term for the sexual crime of conviction, and the term of confinement is indefinite but includes periodic review.

In *Kansas v. Hendricks*,<sup>167</sup> the Supreme Court upheld this type of commitment against a claim that it violated substantive due process. The Court noted that the requirement of a mental abnormality satisfied a classic due process justification for civil commitment because it indicated that the subject could not control his offending sexual behavior.<sup>168</sup> Thus, for this and other reasons, the Court held that the commitment was genuinely civil and not criminal punishment.<sup>169</sup> Just five years later, in *Kansas v. Crane*, the Court again addressed the criteria for these commitments to decide whether the justifying rationale of lack of control had to be proven independently.<sup>170</sup> The Court held that it did, but noted that the presence of a mental abnormality did not have to render the defendant completely unable to control his conduct.<sup>171</sup> Justice Breyer wrote for the majority:

[W]e did not give to the phrase “lack of control” a particularly narrow or technical meaning. And we recognized that in cases where lack of control is at issue, “inability to control behavior” will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.<sup>172</sup>

Sexual predators fall into the gap between criminal and civil confinement that desert-disease jurisprudence creates. Sexual offenders are routinely held fully responsible and blameworthy for their behavior because they almost always retain substantial capacity for rationality, they remain in touch with

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167. 521 U.S. 346 (1997).

168. *Id.* at 360.

169. *Id.* at 365–66. The statutes provide that these commitments may be triggered simply by a charge of a sexual offense or incompetence to stand trial for such an offense, but in practice they are imposed post-conviction and sentence.

170. 534 U.S. 407 (2002).

171. *Id.* at 411–12.

172. *Id.* at 413.

reality, and they know the applicable moral and legal rules. Consequently, even if their sexual violence is in part caused by a mental abnormality, they do not meet the usual standards for an insanity defense.<sup>173</sup> For the same reason, they do not meet the usual and implicit non-responsibility standards for civil commitment and could not be restrained civilly after they finish a prison term.<sup>174</sup> In other words, their rationality and control capacities do not indicate that they are sufficiently non-responsible to justify the preventive detention involuntary civil commitment imposes. Moreover, in most cases in which civil commitment is justified, a majority of states no longer maintain routine indefinite involuntary civil commitment but instead tend to limit the permissible length of commitment. Without these special forms of commitment, most “sexual predators” could not be preventively detained at the end of their prison term unless they committed a new crime.

I have frequently and severely criticized the statutes authorizing allegedly civil commitment for sexual predators and both *Hendricks* and *Crane*.<sup>175</sup> My argument is that the gap-filling is impermissible because the mental-abnormality criterion the Court approved is not a definition of abnormality and the control criterion is vague and cannot be put into operation. Together these two criteria do not entail that the agent is non-responsible. The differential responsibility requirement for criminal conviction and civil sexual-predator commitment is unjustified, and adequate prediction does not exist. Moreover, in practice, these commitments do not offer treatment programs designed to let the inmate progress and eventually be released. In Minnesota, for example, as of 2015, there was no genuine treatment program and no one had ever been released.<sup>176</sup>

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173. Consider the remarks of Justice Owen Dixon of Australia in *King v. Porter* (1933) 55 C.L.R. 182, 187:

[A] great number of people who come into a Criminal Court are abnormal. They would not be there if they were the normal type of average everyday people. Many of them are very peculiar in their dispositions and peculiarly tempered. That is markedly the case in sexual offences. Nevertheless, they are mentally quite able to appreciate what they are doing and quite able to appreciate the threatened punishment of the law and the wrongness of their acts, and they are held in check by the prospect of punishment.

174. The implicit non-responsibility standard is the lack of rational (or control) capacity. It is the most general rationale for why some people with mental disorder are treated specially by the law. Moreover, professionals do not prefer to treat dangerous people who are not obviously suffering from a major disorder.

175. E.g., Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL., PUB. POL'Y & L. 250 (1998); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025 (2002).

176. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1146 (D. Minn. 2015).

Rather than repeat the arguments I've made in other writings, I will simply say that the criteria in the Kansas statute that help establish non-responsibility, personality disorder, and mental abnormality, are over-inclusive, and the definition of mental abnormality is both obscure and virtually incoherent. The causal link standard that ties abnormality to loss of control is not a non-responsibility standard. The criteria for these commitments cannot conceivably limit them only to those potential predators who cannot control themselves and are, thus, not responsible for their potential sexual violence. Using such criteria, virtually every predator would be both convictable and committable.

Even if one accepted independent, functional non-responsibility criteria, however, serious control difficulty still fares poorly as a non-responsibility standard because it is so poorly understood and cannot be adequately put into operation. This standard is an invitation for conclusory, morally grounded expert opinions offered as if they were based on sound scientific or clinical standards and measurements, but they are not. Justice Breyer's suggestion that considering the nature of the diagnosis or the severity of the disorder will aid decision-makers will not help if the abnormality criterion has no meaning and if there is no necessary relation between these factors and lack of control.<sup>177</sup> Once again, lack of control must be proved independently.

The criminal justice system is the appropriate mechanism for control of responsible predators. Agents who are not responsible for their predatory sexual violence may properly be confined involuntarily, but such a massive deprivation of liberty should be inflicted only on those predators who are genuinely not responsible. Even if a state seems to impose a genuinely independent, serious-lack-of-control problem criterion, as *Crane* requires, the definition of such a problem is so inevitably amorphous that this criterion will impose no practical limit on abnormal sexual-predator commitments.<sup>178</sup> Mental-

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177. *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

178. In his dissent in *Crane*, Justice Scalia scolded the majority for the vagueness of the control standard it adopted. He conceded that the mental abnormality or personality disorder criterion and the resulting propensity for violence criterion were both coherent and, with the assistance of expert testimony, within the capacity of a normal jury to determine. But he chided the majority's control standard as being so vague that it will give trial judges "not a clue" about how to charge juries. *Id.* at 423 (Scalia, J., dissenting). He speculated that the majority offered no further elaboration because "elaboration ... which passes the laugh test is impossible." *Id.* Justice Scalia wondered whether the test was a quantitative measure of loss-of-control capacity or of how frequently the inability to control arises. In the alternative, he questioned whether the standard was "adverbial," a descriptive characterization of the inability to control one's penchant for sexual violence. *Id.* at 424. The adverbs he used as examples were "appreciably," "moderately," "substantially," and "almost totally." *Id.* According to Justice Scalia, none of these could provide any guidance. He was correct.



health professionals will have no difficulty adjusting their expert testimony to support the conclusion that virtually any sexually violent offender meets the serious-lack-of-control standard. Moreover, there is nothing in the language of *Hendricks* and *Crane* that would permit an appellate judge to overturn a jury verdict of serious loss of control, except, perhaps, in extreme, obvious cases.<sup>179</sup> Loss of control as an independent non-responsibility condition simply will not suffice on conceptual, scientific, and practical grounds.

Note that the standards for non-responsibility differ in the criminal and civil justice systems because the sexual predator is responsible for his sexual crimes but sufficiently non-responsible to warrant involuntary commitment based on the same behavior. It is paradoxical, to say the least, to claim that a sexually violent predator is sufficiently responsible to deserve the stigma and punishment of criminal incarceration, but that the predator is not sufficiently responsible to be permitted the usual freedom from involuntary civil commitment that even very predictably dangerous but responsible agents retain because we wish to maximize the liberty and dignity of all citizens. But Leroy Hendricks and Michael Crane had no realistic chance of succeeding with an insanity defense. Even if the standards for responsibility in the two systems need not be symmetrical, it is difficult to imagine what adequate conception of justice would justify blaming and punishing an agent too irresponsible to be left at large. An agent responsible enough to warrant criminal punishment is sufficiently responsible to avoid preventive detention. If a state seriously believes that any mental disability sufficiently compromises responsibility to warrant civil preventive detention, then such disability should be part of the criteria for the insanity defense. When a defendant is charged with an offense, it is an occasion when the citizen has the most to lose and therefore deserves the most consideration.

Finally, we have previously considered the difficulties with predictive accuracy concerning future behavior. There are actuarial techniques for evaluating the risk of future sexual predation, but none has better than

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179. Such cases would probably be marked by an alleged predator's history that is entirely inconsistent with a colloquial control problem and by patently deficient expert testimony. I assume, however, that such cases would be rare, especially if there were a history of sexual predation.

modest success<sup>180</sup> and clinical predictions, which will be used all too often, are notoriously unreliable.<sup>181</sup> A sexual-predator commitment is potentially for life. The context in which the prediction will be made is a maximum-security institution in which the subject has been incarcerated: first prison and then a secure hospital. The context of validation is the community. It will be difficult to predict community behavior accurately based on behavior in maximum security. Moreover, gatekeepers, including the state mental-health professionals who evaluate the alleged predator, will have a natural incentive to be conservative. The subjects are sexual criminals and thus not sympathetic people. It will seem better, and safer, from the evaluator's career standpoint, to err on the side of caution than to err by releasing someone who may commit a heinous crime. Although *Ake* does not require the provision of a mental-health professional in the civil context,<sup>182</sup> the state should provide the potential subject of a sexual-predator commitment with an independent expert to help him challenge the state's case.

**RECOMMENDATION: The state should provide an independent mental-health professional to help indigent people subject to a mentally abnormal sexual-predator commitment oppose the commitment.**

Constitutional limitations on the state's power to confine citizens based on our concern for liberty inevitably mean that the protection of social safety cannot be seamless and that security will be compromised. Some dangerous but responsible agents must remain free until they commit a crime or until they become non-responsible for their potential danger. As a result, our justifiable, appropriate fear of the harms such people may cause creates strong incentives to devise means to confine them preventively. Pure preventive detention on grounds of dangerousness alone is inconsistent with a free society, however, and we should not loosen the standards of non-responsibility to sweep into civil confinement responsible agents who should more appropriately be incapacitated by criminal sentences. As Justice Kennedy warned in his concurrence in *Hendricks*, and as all the Justices in *Crane* apparently agreed,

180. See Dana Anderson & R. Karl Hanson, *Static-99: An Actuarial Tool to Assess Risk of Sexual and Violent Recidivism Among Sexual Offenders*, in *HANDBOOK OF VIOLENCE RISK ASSESSMENT* 251, 255–260, 262 (Randy K. Otto & Kevin S. Douglas eds., 2010) (reviewing the most widely used sexual recidivism instrument and finding an average “medium to large” effect size by conventional standards, but noting that absolute recidivism rates are unknown and that there is large variability in the effect size among the studies, and recommending caution in cases in which accurate probability estimates are needed).

181. See Skeem & Monahan, *supra* note 137.

182. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (applying the right to the assistance of a mental health professional in the criminal justice process).

civil commitment should not be used to impose punishment or to avoid the effects of deficiencies in the criminal justice system, such as shortsighted plea bargains, which might cause the legally required but objectionably early release of dangerous criminals.<sup>183</sup> I and most other academic commentators believe, however, that this is precisely the motivation for sexual-predator commitments. They are a way of filling the desert-disease gap using punishment by other means, and they should be abolished.

**RECOMMENDATION: Mentally abnormal sexual-predator commitment laws should be repealed.**

States could, of course, achieve essentially indefinite confinement through the criminal justice system by imposing life sentences on sexual offenders. Almost certainly, there would be no constitutional objection under current proportionality jurisprudence,<sup>184</sup> and many would accept that such sentences would be deserved. Thus, perhaps we should not worry about the potentially extensive reach of various control criteria for the civil commitment of sexual predators because sexually violent offenders will remain incarcerated for very long periods in any case. But this would be an unacceptably skeptical, consequential approach to the danger sexual predation presents.<sup>185</sup> The law sets moral standards and should be clear about which agents are responsible. Moreover, if sexual dangerousness were treated virtually exclusively within the criminal justice system, legislators would be forced to confront and to defend the sentences they are willing to impose on sexual offenders, rather than sweeping this morally fraught question under the psychiatric rug.<sup>186</sup> Finally, prosecutors would be forced to straightforwardly evaluate the strength of their cases and would not be able to rely on allegedly civil commitment to remedy the effects of weak cases or shortsighted plea bargains.

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183. *Crane*, 534 U.S. at 411; *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring). Indeed, Crane himself was sentenced to a relatively brief term of imprisonment as a result of a plea bargain under circumstances that might otherwise have justified a prison term of 35 years to life. *In re Crane*, 7 P.3d 285, 287 (Kan. 2000).

184. See *Ewing v. California*, 538 U.S. 11, 20 (2003) (holding that the Eighth Amendment contains only a narrow proportionality principle applied to term-of-years sentences).

185. This objection also bears a stunning resemblance to past claims that the insanity defense should be abolished because defendants acquitted by reason of insanity are incarcerated in any case. See Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 *YALE L.J.* 853, 864–70 (1963). These claims were misguided for the same reasons that it is important to distinguish responsible from non-responsible sexual predators.

186. Cf. Robert Weisberg, “Sexual Offenses,” in the present Volume; Wayne A. Logan, “Sex Offender Registration and Notification,” in Volume 4 of the present Report.

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*M. COMMITMENT AFTER ACQUITTAL BY REASON OF INSANITY*

In all jurisdictions, a defendant acquitted by reason of insanity may be automatically civilly committed, either for an evaluation that will be followed by formal civil commitment, or by formal commitment itself without a prior evaluation.<sup>187</sup> Although not punishment for crime—the defendant has been acquitted after all—these civil commitments have been justified because the defendant is allegedly still dangerous and not responsible for the dangerousness. The terms of such possible commitments vary across jurisdictions, but in some jurisdictions the term may be indefinite with periodic review. In *Jones v. United States*,<sup>188</sup> the Supreme Court upheld both an automatic commitment for evaluation and the potentially indefinite commitment of a defendant acquitted by reason of insanity for shoplifting a leather jacket. The Court argued that, based on an insanity acquittal, it is rational to presume that the subject was still mentally disordered and dangerous.<sup>189</sup> The Court was unwilling to equate “dangerousness” with violence. It claimed that the legislative purpose to confine was the same for nonviolent and violent offenses and that the former often led to the latter.<sup>190</sup> Moreover, for this type of commitment, the Court was willing to accept a lesser burden of persuasion than “clear and convincing evidence,” which is the constitutionally imposed standard for other forms of civil commitment.<sup>191</sup> Post-insanity commitments are different, the Court claimed, because the defendant himself raised the issue of mental disorder, and so the risk of error is decreased.<sup>192</sup> Finally, the Court approved potentially indefinite confinement on the ground that such confinement did bear a rational relation to the purpose of the commitment, which is to confine dangerous, non-responsible agents. The defendant was acquitted, so the length of the confinement need not be limited by the deserved punishment. The subject is properly confined as long as the defendant remains disordered *and* dangerous and need not be released until either condition is no longer met. This might

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187. See PARRY, *supra* note 38, at 168–70.

188. 463 U.S. 354 (1983).

189. *Id.* at 365.

190. See *id.* at 365 n.14.

191. *Id.* at 367–68; see also *Addington v. Texas*, 441 U.S. 418, 431–33 (1979).

192. *Jones*, 463 U.S. at 367.

happen at any time, or never.<sup>193</sup> In *Foucha v. Louisiana*,<sup>194</sup> the Court affirmed that a post-insanity commitment must end if the subject is no longer mentally ill, even if he is still dangerous.<sup>195</sup>

I think that the Court was correct to decouple the potential length of the civil commitment from the sentence for the crime charged. The defendant has been acquitted and the usual justifications for a sentence length do not apply. Roughly, the legislature sets sentences that are proportionate to culpability and that reflect an ordinary, rational offender's dangerousness. The insanity acquittee is neither culpable nor dangerous in the ordinary manner, however. If the basis for the commitment is non-responsible dangerousness, the commitment can justifiably continue until these conditions are no longer met. Although this is true as a theoretical matter, it seems useless to have lengthy commitments for nonviolent offenders. They do not present much danger and

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193. *Id.* at 368–69.

194. 504 U.S. 71 (1992).

195. *Id.* at 81. Justice O'Connor partially concurred. She noted that an insanity acquittee had been found to have committed the *prima facie* case beyond a reasonable doubt. She then wrote cryptically, as follows:

It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness.... [A]cquittes could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent.

*Id.* at 87–88 (O'Connor, J., concurring). In addition, Justice O'Connor noted that the seriousness of the crime should also affect whether the state's interest in continued confinement would be strong enough. *See id.* at 88.

If the subject is no longer mentally disordered and therefore no longer non-responsible, it is hard to imagine what possible "medical justification" there could be for continuing civil commitment to protect the public. It is not clear from Justice O'Connor's concurrence if she would require some finding of mental abnormality—as did the statute upheld in *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997)—to make the commitment analogous to traditional civil commitment. If not, however, then five Justices of the Supreme Court, the four *Foucha* dissenters and Justice O'Connor, would have been willing to countenance pure preventive detention, at least of a person who had committed a crime without being responsible and who continued to be dangerous.

For an attempt to apply Justice O'Connor's suggestion, see *State v. Randall*, 532 N.W.2d 94, 109 (Wis. 1995) (permitting continued confinement if there were a medical justification and the subject was still dangerous, but limiting the term to the maximum sentence for the crime charged). Needless to say, I believe that this practice is simply criminal punishment by other means. The "medical justification" criterion is a transparent and fraudulent attempt to bring this type of commitment within the disease justification for preemptive confinement. The limitation on the term of the commitment to the maximum term for the crime charged is simply a salve to the legislative conscience and a signal that the continued commitment is punitive.

the risk that they will be erroneously held longer than necessary is substantial. I would have limited terms of confinement for non-violent acquittees. These could be longer than ordinary involuntary civil commitment terms because the acquittee was *prima facie* guilty of a criminal offense, which is seldom the case in involuntary civil commitment and never required.<sup>196</sup> Nonetheless, the terms of post-insanity commitment for nonviolent offenders should be short. If the subject has a clean disciplinary record in the hospital, he should be released at the end of the short term or the state can seek ordinary involuntary civil commitment. Another possibility is conditional or probationary release.<sup>197</sup> If the acquittee has an unproblematic probationary period in the community, the commitment should end. In short, the principle of least restrictive means should be applied to the treatment of insanity acquittees.

**RECOMMENDATION: Post-insanity acquittal commitments should be subject to the least-restrictive-means principle, including compelled treatment in the community.**

The Court in *Jones* never noted that the mental disorder and dangerousness had to be linked to ensure that the subject was not responsible for his dangerousness.<sup>198</sup> After all, non-responsibility for the legally relevant behavior, in this case dangerousness, is necessary to justify involuntary commitment. It is possible for a person to be independently disordered and bad, with no link between them that suggests that the defendant's dangerousness is irrational. For example, a paranoid defendant may have an excuse if he attacks another because he delusionally believes that the victim is a wrongful assailant, but there will be no excuse if he robs a bank. There probably will be such a link in most cases of insanity acquittal, but it cannot be taken for granted empirically.

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196. See PARRY, *supra* note 38, at 476–77 (discussing the criteria for commitments for dangerousness, which do not include a finding of *prima facie* guilt for a criminal offense or the equivalent thereof). Parry notes that the trend in standard involuntary civil commitments for dangerousness is away from requiring overt, recent acts and threats and towards more purely predictive criteria. In practice, however, commitment is common for threatening behavior, including verbal threats. Less serious assaults and thefts may also lead to civil commitment, although they are often processed through the criminal justice system. In my experience, seriously violent conduct is virtually always processed through the criminal justice system. Moreover, traditional civil commitment requires only the lower, clear and convincing burden of persuasion. *Addington v. Texas*, 441 U.S. 418, 431–33 (1979).

197. See CAL. PENAL CODE § 1026.2(e)–(f).

198. *Jones v. United States*, 463 U.S. 354, 363–65 (1983) (discussing the need for a showing of both mental disorder and dangerousness to justify these commitments and apparently assuming that the fact of an insanity acquittal supplies a link between the two criteria, but not explicitly requiring the causal link at the time of commitment).

More important, there is reason to doubt the Court's presumption of continuing mental disorder and dangerousness. By definition, the defendant must have been sufficiently rational to be competent to stand trial. If that state of rational capacity continues, then it is not clear that he continues to be mentally ill for the purpose of involuntary commitment. Moreover, to the extent that the mental disorder played a causal role in the practical reasoning that accompanied the offense, it is perfectly possible that the defendant is no longer dangerous either. This will be especially possible if the prosecution bears the burden of persuasion on legal insanity and the defendant needs only to cast a reasonable doubt about his sanity. Even if the defendant bears the burden of persuasion, as is commonly the case at present, the considerations just mentioned apply.

My suggestion, therefore, is that all post-acquittal commitments should be for evaluation only and should not be for full commitment. There is little need to deprive the defendant of more liberty to protect the public. Preventive commitment should occur only if the evaluation indicates that the criteria for commitment are met at present. The evaluations need not last more than a few weeks. That is more than sufficient for the state's mental-health professionals to reach a conclusion. I once again think that a subject facing potentially indefinite commitment and those facing substantial limited terms should be entitled to the services of an independent mental-health professional to help defend against the commitment. Without such help, they have essentially no chance if the state's professional recommends commitment. These forms of commitment are more onerous than ordinary involuntary commitment and fairness requires that insanity acquittees should have a chance to avoid long-term incarceration in secure forensic facilities. For the same reason, the state should have to prove the commitment criteria by the higher, clear and convincing standard that *Addington* imposed for ordinary involuntary commitment to avoid imposing too much risk of error on the individual.<sup>199</sup>

**RECOMMENDATION: An insanity acquittal should be followed by a brief evaluation period rather than by involuntary commitment to determine if the acquittee is still dangerous because his mental disorder continues. If the state then wishes to commit the acquittee, there should be a judicial hearing and the acquittee should have the right to an independent mental-health professional to assist him to contest the commitment.**

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199. *Addington*, 441 U.S. at 425–33.

*N. EXPERT TESTIMONY*

In Section III.B, I suggested that all forensic evaluations should be videotaped. This would have an immensely beneficial effect on determining the accuracy of the evaluation for the reasons given above, not least of which would be aiding cross-examination of the testifying evaluator, and I want to repeat this recommendation.

There are two questions we should ask of mental-health expert opinions and testimony. Is it clinically and scientifically sound, and is it genuinely relevant to the legal question in issue? All too often, alas, expert testimony does not meet these criteria. In particular, experts too often conflate mental health and legal criteria. For example, a “broken” brain is not an excusing or mitigating condition, *per se*, no matter how broken the brain appears to be. Expert testimony on such matters is legally relevant only if the abnormality produces acts and mental states that meet the legal criteria. The expert should be able to show precisely—no hand-waving allowed—how the expert data help answer the legal question. If it is not obviously directly relevant, the expert should be able to show the chain of inference that establishes its relevance.

In particular, we should ask whether a diagnosis ever answers a legal question independent of the underlying behavioral criteria (broadly defined as in Section I of this chapter) upon which diagnosis is based. I submit that it does not and it distracts the legal decision-maker and leads to question-begging about responsibility and competence. In almost all contested cases, there will be a conflict about the appropriate diagnosis. Rather than ask the decision-maker to decide under which shell the diagnostic pea may be found, the experts should testify only about the underlying behavior, which will be much easier to assess than whether a specific diagnosis is warranted. Because all diagnostic categories can be met by very heterogeneous behavior, the diagnosis indicates nothing very specific about the defendant’s behavior, including whether the defendant had self-control capacity. The underlying data are far more helpful.

Barring testimony about diagnosis is not the law anywhere, although Congress did strongly consider imposing this limitation as part of the Insanity Defense Reform Act. Nonetheless, it would be a salutary change because it would produce greater clarity and it would not prevent experts from offering data and opinions on the underlying data that are relevant. Moreover, when decision-makers hear “disease terms,” they tend to think that responsibility or competence is affected, but this is a mistake.



In nearly all jurisdictions, experts are allowed to offer an opinion on the “ultimate legal issue,” such as whether a defendant is competent or legally insane. In federal criminal cases, however, the Insanity Defense Reform Act of 1984 bars experts from offering an ultimate opinion on whether the defendant possessed the requisite mens rea for the crime charged or was legally insane. In my opinion, the federal rule is correct and should be widely adopted and expanded to include all ultimate-issue testimony. The ultimate issue is a legal issue, and mental-health experts have no particular expertise about legal issues. When they offer such opinions, they are doffing their white coats and simply stepping into the jury box as the 13th lay juror. It is sufficient if they present the underlying data relevant to the legal issue and let the judge or jury decide if those data meet the standard in issue.

**RECOMMENDATION: Expert witnesses at any stage of the criminal justice process should be prohibited from offering an opinion on the ultimate legal issue in question.**

#### IV. CONCLUSION

Mental disorder plays a very large role in criminal justice at every step in the process. Virtually all doctrines and practices would benefit from substantial reforms to further justice, humanitarian and systemic goals. This chapter has made an enormous number of recommendations. I hope that some begin serious discussion and come to fruition. Most importantly, however, better mental-health services, including addiction treatment, should be more widely available in the community and in the criminal justice system.

#### RECOMMENDATIONS

To reiterate, here are my policy recommendations to promote greater justice and humanity in the law’s treatment of criminal offenders who suffer from mental disorders.

1. Readers interested in the role of mental disorder in the criminal justice system should also consult the ABA Criminal Justice Mental Health Standards.
2. When predicting future behavior, the most accurate type of prediction method available should be used. If actuarial or structured clinical judgment methods are available for the type of prediction in question, they should always be preferred to purely clinical prediction.
3. Race should not be considered as a variable when predicting future behavior.
4. Non-physician health-care providers in jails and prisons, especially psychologists, psychiatric social workers, and psychiatric nurses, who have

received adequate training in prescribing psychotropic medication should be permitted to prescribe psychotropic medication and medication for substance use disorders.

5. Until rigorous data support the effectiveness of various psychological treatment methods for prisoners, including special populations such as addicts and sexual offenders, large-scale resource allocation for such methods should be limited, especially for methods focused on individual cases.
6. Jail and prison mental-health services need to be dramatically improved.
7. Mentally disordered people arrested for nonviolent or minimally violent offenses should be diverted from the criminal justice system to the mental-health system. Adequate methods for effective and efficient triggering of diversion must be devised, and adequate treatment must be provided in the community to the people diverted. Law-enforcement officers should receive special training in dealing with mentally disordered people to enhance diversion and to deal with such people humanely.
8. Competence determinations should be fully adversarial, with experts representing both sides.
9. A mental-health expert should be appointed to assist a defendant with any potential claim based on mental disorder that bears on culpability and punishment.
10. Defendants with a mental health-based claim should be entitled to a genuinely independent mental-health expert of his own choosing retained for the defense team, and the results of the evaluation should be confidential work product and not disclosed to the prosecution unless the defendant intends to use the evaluation to support a claim.
11. Clinical forensic evaluation interviews should be videotaped, and the raw scores of psychological tests should be provided to the opposing side.
12. In quasi-criminal proceedings, such as those involving the civil commitment of mentally abnormal, sexually violent predators, the person facing commitment should be entitled to a genuinely independent mental-health professional to assist him.
13. Defendants who are incompetent to stand trial should be permitted without exception to raise pretrial motions that might end the prosecution.
14. Long-term inpatient commitments to restore trial competence are unnecessary. Short-term commitments are adequate to either restore

the defendant or to determine that the defendant cannot be restored. In appropriate cases, restoration should be performed in the community.

15. Forcible medication to restore trial competence should be justified in the case of all felony prosecutions.
16. The test for competence to plead guilty and to waive counsel should be a context-dependent assessment of whether the defendant has the rational skills necessary to meet a generally low standard for competence.
17. Defendants should be permitted to introduce evidence of mental disorder without limitation to negate any subjective mens rea but should not be permitted to use such evidence to negate negligence.
18. All jurisdictions should adopt a cognitive test for legal insanity but should not adopt a control test.
19. All jurisdictions should adopt an insanity defense to ensure that justice is done in appropriate cases and no alternative will equally achieve this result.
20. Legislatures should adopt a generic verdict of “guilty but partially responsible” that would reduce the defendant’s sentence in cases in which the defendant’s rationality was substantially compromised.
21. Prisoners should be forcibly medicated under a *Harper* rationale only if the prisoner’s dangerousness is a result of his disordered state of mind.
22. Prisoners facing a *Harper* hearing should be represented by an adviser, preferably an attorney, who is independent of the prison or mental-health system in the jurisdiction.
23. In all capital and noncapital sentencing proceedings in which the defendant has a colorable mitigation claim based on mental disorder, the defendant should have the right to an independent mental-health professional retained for the defense to assist him with the claim.
24. Legislatures should adopt a mandated scheme of mitigation if the sentencing judge finds that substantial diminished rationality existed at the time of the crime. The amount of reduction could be a uniform percentage or might vary by crime to adjust for social-safety concerns, but the sentencing judge should have no power to individualize beyond the mandated reduction.
25. In noncapital cases, mental disorder may be used as an enhancement factor but only if the most accurate methods of predicting future behavior have been used and indicate a very substantial risk, but the amount of enhancement should be limited.

26. The standard for competence to be executed should be very high.
27. Competence to be executed should be decided by a judicial hearing.
28. Competence to be executed that is achieved by forcible medication administered under a *Harper* rationale should not be sufficient. The state should be compelled to decide whether forcible medication solely to restore competence is justifiable independent of a *Harper* rationale.
29. The state should provide an independent mental-health professional to help indigent people subject to a mentally abnormal sexual-predator commitment oppose the commitment.
30. Mentally abnormal sexual-predator commitment laws should be repealed.
31. Post-insanity acquittal commitments should be subject to the least restrictive means principle, including compelled treatment in the community.
32. An insanity acquittal should be followed by a brief evaluation period rather than by involuntary commitment to determine if the acquittee is still dangerous because his mental disorder continues. If the state then wishes to commit the acquittee, there should be a judicial hearing and the acquittee should have the right to an independent mental-health professional to assist him to contest the commitment.
33. Expert witnesses at any stage of the criminal justice process should be prohibited from offering an opinion on the ultimate legal issue in question.

# Juvenile Justice

Barry C. Feld\*

*During the Get Tough Era (1980s–1990s), state lawmakers shifted juvenile justice policies from a nominally offender-oriented rehabilitative system toward a more punitive and criminalized justice system. Punitive pretrial detention and delinquency dispositions had a disproportionate impact on minority youths. Despite a two-decade drop in serious crime and violence, punitive laws and policies remain in effect. Notwithstanding juvenile courts’ convergence with criminal courts, states provide delinquents with fewer and less adequate procedural safeguards than those afforded adults. Developmental psychologists and policy analysts contend that adolescents’ compromised ability to exercise rights—Miranda, competence to stand trial, waiver of counsel, denial of jury—require greater procedural safeguards to offset their limitations in a more legalistic punitive system and to avoid risks of wrongful convictions. Get Tough Era transfer laws sent more and younger youths to criminal courts for prosecution as adults, emphasized offenses over offender characteristics, and shifted discretion from judges conducting waiver hearing to prosecutors making charging decisions. Although youth crimes have declined substantially, those harsh laws remain in effect. Judges sentence transferred youths in criminal courts similarly to other adult offenders. The Supreme Court in Roper v. Simmons, Graham v. Florida, and Miller v. Alabama limited the harshest sentences imposed on youths, relied on developmental psychology and neuroscience research to bolster its conclusions, and emphasized adolescents’ diminished responsibility. However, the Court’s decisions provided affected youths limited relief and states with limited guidance to implement their rationale. States’ judicial and legislative responses inadequately acknowledge that “children are different,” and require a more consistent strategy to recognize youthfulness as a mitigating factor—a Youth Discount. The chapter concludes with policy reforms to address juvenile and criminal courts’ failure to provide justice for children.*

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## INTRODUCTION

The juvenile court lies at the intersection of youth policy and crime policy. How should the legal system respond when the kid is a criminal and the criminal is a kid? Since juvenile courts' creation more than a century ago, they have evolved through four periods—the Progressive Era (1899–1960s), the Due Process Era (1960s–70s), the Get Tough Era (1980s–90s), and contemporary reaffirmation of the Kids Are Different Era (2005–present).<sup>1</sup> In each period, juvenile justice policies have reflected different views about children and crime control and appropriate ways to address youths' misconduct. With the Supreme Court's recognition that children are not miniature adults, we have an opportunity to enact policies for a more just and effective justice system for youths.

Competing conceptions of children (immaturity and incompetence versus maturity and competence) and differing strategies of crime control (treatment or diversion versus punishment) affect the substantive goals and procedural means that juvenile courts use. Substantively, conceptions of youths' culpability and diminished responsibility affect juvenile courts' decisions to detain and sentence delinquents, transfer youths to criminal court, and sentence children as adults. Competence focuses on youths' capacity to employ rights, ability to understand and participate in the legal process, and their ability to exercise *Miranda* rights, competence to stand trial, right to counsel, and right to a jury trial.

Contemporary juvenile justice policies reflect the legacy of the Get Tough Era of the 1980s and 1990s: extensive pretrial detention, punitive delinquency sanctions, increased transfer to criminal courts, and severe sentences as adults, all of which are rife with racial disparities. Although serious youth crime and violence peaked around 1993 and dropped precipitously over the subsequent two decades, those harsh laws remain on the books in most states. The recent Supreme Court trilogy of Eighth Amendment decisions—*Roper*, *Graham*, and *Miller*—reaffirmed that “children are different,” relied on developmental psychology and neuroscience research to support its conclusions about youths' diminished criminal responsibility, and limited the most draconian sentences. However, they provided affected youths with limited relief and provided state courts and legislatures with minimal guidance how to implement their jurisprudence of youths.

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1. BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999) [hereinafter *FELD, BAD KIDS*]; BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* (2017) [hereinafter *FELD, EVOLUTION OF JUVENILE COURT*]; ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008) [hereinafter *SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE*]; NAT'L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* (2013) [hereinafter *NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE*].

This chapter is divided into two parts: delinquents in juvenile courts, and youths tried in criminal courts. Part I.A. examines substantive decisions that affect delinquents' custody status—(1) pretrial detention and (2) delinquency sanctions—their increased punitiveness, and racial disparities associated with each decision. Part I.B. examines procedural issues associated with delinquency adjudications: (1) youths' ability to exercise *Miranda* rights, (2) competence to stand trial, (3) waivers of counsel, and (4) right to a jury trial. Juvenile courts' punitiveness, procedural deficiencies, and assembly-line process compound youths' developmental limitations and heighten risks of excessive and discriminatory interventions. Part II examines transfer of youths to criminal court and their sentencing as adults. II.A. describes state laws' shift from a focus on offenders to offenses, the increased role of prosecutors to make adulthood determinations, transfer laws' failure to achieve their legislative intent, and their racially disparate impacts. II.B. examines Supreme Court decisions—*Roper*, *Graham*, and *Miller*—that somewhat mitigated the harshest sentencing policies, reaffirmed that “children are different,” and used developmental psychology and neuroscience to bolster their conclusions about youths' diminished responsibility. The chapter concludes with proposals for substantive and procedural reforms to address juvenile and criminal courts' failure to provide developmentally appropriate justice for children.

## I. DELINQUENTS IN JUVENILE COURT: CUSTODY, RACIAL DISPARITY, AND COMPETENCE

In the 1990s, punitive policies supplanted juvenile courts' earlier emphases on offenders' rehabilitation and had a disproportionate impact on children of color. This section focuses on decisions that affect youths' custody status: (1) pretrial detention—the delinquency equivalent of jail; and (2) changes in delinquency sanctions that emphasized offense-based punishment rather than offender rehabilitation.

### A. PRETRIAL AND POST-CONVICTION CUSTODY STATUS

#### 1. Preventive detention of delinquents

Pretrial detention involves a youth's custody status pending trial.<sup>2</sup> States hold about 20% of youths referred to juvenile courts in pretrial detention facilities—

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2. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*]; BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 441–43 (4th ed. 2013) [hereinafter FELD, CASES AND MATERIALS]. For a discussion of pretrial detention, see Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in Volume 3 of the present Report.

between one-quarter and one-third of a million juveniles annually. In 2011, judges detained a larger proportion of youths arrested for person offenses (25.6%) than for property crimes (16.8%), but because police arrested so many more youths for property crimes, they confined roughly equal numbers. Rates of detention rose and peaked between 1998 and 2007, even as the absolute numbers of youths referred to juvenile courts declined. Courts detained older youths at higher rates than younger juveniles, proportionally more boys than girls, and more children of color than white youths.<sup>3</sup>

In 1984, the Supreme Court in *Schall v. Martin* upheld a statute that authorized preventive detention if a judge found there was a “serious risk” that the child “may ... commit an act which if committed by an adult would constitute a crime.”<sup>4</sup> The law did not specify the type of present offense, the likelihood or seriousness of any future crime, burden of proof, criteria, or evidence a judge should consider to make the prediction. Despite these flaws, *Schall* held that preventive detention “serves a legitimate state objective, and that the procedural protections afforded pre-trial detainees” satisfy constitutional requirements.<sup>5</sup>

Social scientists question *Schall*’s confidence in judges’ clinical prognostication ability. Research comparing statistical versus clinical prediction strongly supports the superiority of actuarial risk-assessment instruments over professional judgments.<sup>6</sup> The fallibility of prediction is compounded because judges at an initial appearance often lack the information—psychometric tests, professional evaluations, and social histories—on which clinicians would rely.

Inadequate and dangerous conditions have characterized detention facilities for decades. Get Tough Era policies exacerbated overcrowding as states detained more youths to impose short-term punishment or to house those awaiting post-adjudication placement. Studies of conditions of confinement report inadequate physical and mental health care, poor education, lack of treatment services, and excessive use of solitary confinement and physical

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3. HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 168–70 (2006); Melissa Sickmund, T.J. Sladky & Wei Kang, *Easy Access to Juvenile Court Statistics: 1985–2011*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, [www.ojjdp.gov](http://www.ojjdp.gov) (last visited Mar. 16, 2017) [hereinafter Sickmund, Sladky & Kang].

4. *Schall v. Martin*, 467 U.S. 253, 255 (1984).

5. *Id.* at 256–57.

6. The American Psychiatric Association long has disclaimed psychiatrists’ competence to predict future dangerousness because they tend to not use information reliably, to disregard base rate variability, to consider factors that are not predictive, and to assign inappropriate weights to relevant factors. See *Barefoot v. Estelle*, 463 U.S. 880, 899–02 (1983); FELD, BAD KIDS, *supra* note 1, at 140–45.



restraints.<sup>7</sup> Pretrial detention disrupts youths' lives; weakens ties to family, school, and work; stigmatizes youths; and impairs legal defenses. Judges convict and institutionalize detained youths more often than they do similar youths released pending trial.<sup>8</sup>

States detain black youths more often than similarly situated white offenders.<sup>9</sup> Detention rates for drug crimes peaked during the Get Tough Era and exacerbated racial disparities. Between 1988 and 1991—the peak of the crack-cocaine panic—judges detained about half of all black youths charged with drug offenses, a rate twice that of white youths.<sup>10</sup> While race affects detention decisions, detention adversely affects youths' subsequent case processing and compounds disparities at disposition.<sup>11</sup>

*Reform efforts:* In the late 1980s, the Annie E. Casey Foundation launched the Juvenile Detention Alternatives Initiative (JDAI), which aimed to reduce use of detention, develop alternatives to institutions, reduce overcrowding, improve conditions of confinement, and lessen racial disparities.<sup>12</sup> JDAI reforms enlist justice-system stakeholders to develop consensus rationale for detention, to adopt objective intake and risk-assessment criteria, to use alternatives to secure detention—home detention, electronic monitoring, after-school or

7. DALE G. PARENT ET AL., *CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES* (1994). Cf. Sharon Dolovich, "Prison Conditions," in Volume 4 of the present Report.

8. William Barton, *Detention*, in *OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 636, 645 (Barry C. Feld & Donna M. Bishop eds., 2012).

9. Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Process*, in *OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE* 23 (Darnell Hawkins & Kimberly Kempf-Leonard eds., 2005); Kimberly Kempf-Leonard, *Minority Youth and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 *YOUTH VIOLENCE & JUV. JUST.* 71, 87 (2007); Alex R. Piquero, *Disproportionate Minority Contact*, 18 *FUTURE OF CHILD.* 59 (2008). Between 1985 and 2011, juvenile court judges detained about one-fifth of all youths referred to them. During that period, judges on average detained 18% of white youths compared with 26% of black youths. Judges detain youths charged with person offenses at higher rates than youths charged with other crimes. On average, judges detained 22.4% of white youths charged with person offenses compared with 28.4% of black youths. Sickmund, Sladky & Kang, *supra* note 3. The racial disparities for drug crimes are especially disturbing because since the 1970s; self-report research consistently reports that black youths use and sell drugs at *lower* rates than do white youths. NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 50 (2014).

10. Sickmund, Sladky & Kang, *supra* note 3.

11. Michael J. Leiber, *Race, Pre- and Post-Detention, and Juvenile Justice Decision Making*, 59 *CRIME & DELINQ.* 396 (2013); Nancy Rodriguez, *The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Pre-Adjudication Detention Matters*, 47 *J. RES. CRIME & DELINQ.* 391 (2010).

12. *Juvenile Detention Alternatives Initiative*, ANNIE E. CASEY FOUND., <http://www.aecf.org> (last visited Apr. 26, 2017).

day reporting centers—and to expedite cases to reduce pretrial confinement.<sup>13</sup> Stakeholders develop criteria about which youths to detain based on present offense, prior record, and other factors. Although not all efforts have been equally successful, many sites have reduced the numbers of youths detained with no increases in crime or failures to appear. JDAI efforts to reduce racial disparities among detained youths have been less successful.<sup>14</sup>

*Policy recommendations:* Juvenile court judges in collaboration with other stakeholders and social scientists should develop validated risk-assessment instruments to better identify youths who pose a high risk of offending.<sup>15</sup> Statutes should presume release of all non-felony offenders and place a heavy burden—clear and convincing evidence—on the state to prove that a youth needs secure detention and that non-secure alternatives—house arrest, electronic monitoring, shelter care, day reporting—would fail. Other than youths who pose a risk of flight or who have absconded from an institution, states should reserve detention for youths charged with serious crimes—felonies, violence, or firearms—for whom, if convicted, commitment to a secure facility would likely result. States should bolster detention hearing procedures with a non-waivable right to counsel and an opportunity to meet with defense counsel prior to the hearing.

## 2. Punitive delinquency dispositions

In the 1980s and 1990s, lawmakers repudiated offender-based treatment and shifted delinquency sanctions toward offense-based punishments.<sup>16</sup> Supreme Court decisions identified factors with which to distinguish punishment and treatment: legislative purpose clause; indeterminate or determinate sentencing laws; judges' sentencing practices; institutional conditions of confinement; and intervention outcomes.<sup>17</sup> Changes in states' laws fostered a punitive convergence between juvenile and criminal courts' sentencing policies.

13. ANNIE E. CASEY FOUND., *supra* note 12; Barton, *supra* note 8; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 5.

14. William H. Feyerherm, *Detention Reform and Overrepresentation: A Successful Synergy*, 4 CORR. MGMT. Q. 44 (2000).

15. Cf. John Monahan, "Risk Assessment in Sentencing," in Volume 4 of the present Report.

16. Barry C. Feld, *Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821 (1988) [hereinafter Feld, *Punishment, Treatment*].

17. Allen v. Illinois, 478 U.S. 364 (1986); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Feld, *Punishment, Treatment*, *supra* note 16; FELD, BAD KIDS, *supra* note 1, at 251–83; Francis A. Allen, *Legal Values and the Rehabilitative Ideal*, in THE BORDERLAND OF THE CRIMINAL LAW: ESSAYS IN LAW AND CRIMINOLOGY 25, 25–27 (1964); FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 2–3 (1981).

States repeatedly amended their juvenile codes' purpose clauses to endorse punishment.<sup>18</sup> The revisions focused on accountability, responsibility, punishment, and public safety rather than, or in addition to, a child's welfare or best interests.<sup>19</sup> Accountability became synonymous with retribution, deterrence, and incapacitation, and state courts affirmed punishment as a legitimate element of juvenile courts' treatment regimes.<sup>20</sup>

Originally, juvenile courts viewed delinquency as a symptom of a child's needs and imposed indeterminate non-proportional dispositions. The shift from an interventionist to a criminalized court culminates a trend *Gault* set in motion by providing modest procedural safeguards that legitimated harsher sanctions.<sup>21</sup> Beginning in the 1980s, states amended delinquency sentencing laws to emphasize individual responsibility and justice-system accountability, and adopted determinate or mandatory minimum sentences.<sup>22</sup> The National Research Council concluded:

State legislative changes in recent years have moved the court away from its rehabilitative goals and toward punishment and accountability. Laws have made some dispositions offense-based rather than offender-based and imposed proportional sanctions to achieve retributive or deterrent goals. Strategies for imposing offense-based sentences in juvenile court include blended sentences, mandatory minimum sentences, and extended jurisdiction.<sup>23</sup>

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18. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 222–23 (1998) [hereinafter Feld, *Responses to Youth Violence*]; FELD, BAD KIDS, *supra* note 1; PATRICIA TORBET, ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT (1996).

19. Feld, *Punishment, Treatment*, *supra* note 16, at 833–47; Feld, *Responses to Youth Violence*, *supra* note 18, at 222–23.

20. Feld, *Punishment, Treatment*, *supra* note 16, at 844–47; FELD, BAD KIDS, *supra* note 1, at 252–53; ASHLEY NELLIS, A RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 47–48 (2016); Matter of Seven Minors, 664 P.2d 947, 950 (Nev. 1983); State v. Lawley, 591 P.2d 772, 773 (Wash. 1979).

21. TWENTIETH CENTURY FUND TASK FORCE ON SENT'G POL'Y TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 15–17 (1978); FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1.

22. Feld, *Responses to Youth Violence*, *supra* note 18, at 220–28; Feld, *Punishment, Treatment*, *supra* note 16, at 850–79; TORBET ET AL., *supra* note 18, at 11–16. See generally Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report; Erik Luna, “Mandatory Minimums,” in Volume 4 of the present Report.

23. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 210 (2001).

Several factors influence juvenile court judges' sentencing decisions. States define juvenile courts' delinquency jurisdiction based on violations of criminal law. The same factors that influence criminal court sentences—present offense and prior record—influence juvenile court judges' sentences as well.<sup>24</sup> Another consistent finding is that juveniles' race affects the severity of dispositions.<sup>25</sup> Several factors account for racial disparities: differences in rates of offending; differential selection; and juvenile courts' context—the interaction of urban locale with minority residency.<sup>26</sup> As a result, juvenile courts' punitive sanctions fall disproportionately heavily on African-American youths.

Delinquency case-processing entails a succession of decisions by police, court personnel, prosecutors, and judges. Compounding effects of disparities produce larger cumulative differences between white youths and children of color.<sup>27</sup> Although the greatest disparities occur at earlier, less-visible stages of the process, differences compound, prior records accumulate, and blacks and other racial minorities constitute the largest plurality of youths in institutions.

Judges' focus on present offense and prior records contributes to racial differences. Black youths commit violent crimes at higher rates than white juveniles, a fact that accounts for some disparities.<sup>28</sup> By contrast, police arrest

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24. FELD, *BAD KIDS*, *supra* note 1, at 264–67; SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 229–31.

25. FELD, *BAD KIDS*, *supra* note 1, at 267–72; NAT'L RESEARCH COUNCIL, *JUVENILE CRIME, JUVENILE JUSTICE*, *supra* note 23, at 228; Donna Bishop & Michael Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, in *OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE*, *supra* note 8. Cf. Cassia Spohn, "Race and Sentencing Disparity," in Volume 4 of the present Report.

26. Bishop & Leiber, *supra* note 25, at 453–61.

27. Black youths comprised about 16.6% of the population aged 10–17, 31.4% of juvenile arrests, 33.2% of delinquency referrals, 38.1% of juveniles detained, 40% of youths charged, and 40% of youths placed out of home. *Id.* at 446–53; NAT'L RESEARCH COUNCIL, *JUVENILE CRIME, JUVENILE JUSTICE*, *supra* note 23, at 231; EILEEN POE-YAMAGATA & MICHAEL A. JONES, *AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM* 9 (2000). For discussions of the impact of race on criminal justice, see Jeffrey Fagan, "Race and the New Policing," in Volume 2 of the present Report; Devon W. Carbado, "Race and the Fourth Amendment," in Volume 2 of the present Report; David A. Harris, "Racial Profiling," in Volume 2 of the present Report; Paul Butler, "Race and Adjudication," in Volume 3 of the present Report; and Spohn, *supra* note 25.

28. NAT'L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE*, *supra* note 1, at 214–21; Piquero, *supra* note 9, at 64.

black youths at higher rates for drug crimes, although white youths use drugs more often.<sup>29</sup> Prior records reflect previous justice-system decisions and mask some racial disparities.<sup>30</sup>

Justice-system decisions amplify differences. Police stop and arrest youths of color more frequently than they do white youths.<sup>31</sup> Probation officers attribute white youths' offenses to external circumstances and black youths' crimes to internal fault or character failings which affect their referral, detention, and sentencing recommendations.<sup>32</sup> At each stage of the process, court referral, detention, petition, and sentencing decisions amplify disparities.<sup>33</sup>

Juvenile courts' context also contributes to disparities. Urban courts are more formal and sentence all delinquents more severely than do suburban or rural courts.<sup>34</sup> They have greater access to detention facilities; detain disproportionately more minority youths; and sentence all detained youths more severely.<sup>35</sup> Because more minority youths live in cities, judges detain them at higher rates, and sentence them in more formal, punitive courts.<sup>36</sup>

Punitive laws have exacerbated racial disparities in confinement. Over the past quarter-century, the proportion of white youths removed from home declined by about 10% while that of black youths increased by 10%.

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29. Janet L. Lauritsen, *Racial and Ethnic Differences in Juvenile Offending*, in OUR CHILDREN, THEIR CHILDREN, *supra* note 9, at 95–100 (2005); NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 23, at 219–20.

30. Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 363 (1997).

31. Heightened risks of arrest include: self-fulfilling deployment of police in neighborhoods, racial profiling, aggressive stop-and-frisk practices, and youths' attitude and demeanor during encounters. Bishop & Leiber, *supra* note 25, at 461; Bishop, *supra* note 9, at 23 (2005).

32. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998); NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 257.

33. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 257; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 77; FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1.

34. Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 185–90 (1991) [hereinafter Feld, *Justice by Geography*]; BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURT 158–62 (1993) [hereinafter FELD, JUSTICE FOR CHILDREN].

35. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1337–39 (1989) [hereinafter Feld, *Right to Counsel*]; Rodriguez, *supra* note 11.

36. FELD, BAD KIDS, *supra* note 1, at 271–72; SNYDER & SICKMUND, *supra* note 3; Timothy Bray et al., *Justice by Geography: Racial Disparity and Juvenile Courts*, in OUR CHILDREN, THEIR CHILDREN, *supra* note 9.

In 1985, states removed 105,830 delinquents from their homes and placed them in residential facilities. The number of youths who received out-of-home placements increased steadily during the 1990s, peaking at 168,395 delinquents in 1997 (a 59% increase from 1985), and reflected Get Tough Era changes and judicial sensitivity to the punitive ethos. Since the peak in the late 1990s, the number of youths removed from home has declined dramatically. Although we do not know why residential placements have decreased, fiscal constraints may have driven confinement decisions.

Despite the recent decline, the racial composition of youths in confinement has changed substantially. In 1985, judges removed 68.5% of non-Hispanic and Hispanic white youths, 28.5% of black youths and 2.9% of youths of other races from their homes. By 2012, the proportion of youths removed from home who were white declined to 57.8%—a decrease of 10.7 percentage points—while the proportion of black youths increased to 39.3%—an offsetting increase of 10.8 percentage points. Despite dramatic overall reduction in youths in confinement, the racial composition of institutionalized inmates became ever darker. During the decade, the proportion of white inmates declined from 37.2% to 33.8% of all residents, the proportion of black inmates hovered around 40%, and that of other youths of color increased.<sup>37</sup>

Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDP) in 1988 to require states receiving federal juvenile justice funds to examine minority overrepresentation in detention and institutions.<sup>38</sup> It amended the JJDP in 1992 to make disproportionate minority confinement a core requirement, and again in 2002 to require states to reduce disproportionate minority contact.<sup>39</sup> States responded to the 1988 JJDP requirement, conducted evaluations, and reported disproportionate over-representation of minority youths in institutions.<sup>40</sup> Minority juveniles receive disproportionately more out-of-home placements, while whites receive more probationary dispositions.<sup>41</sup> Judges commit black youths to public institutions at rates three and four times that of white youths, and send larger proportions of white youths to private residential treatment programs. Black youths serve longer terms than do white youths committed for similar offenses.<sup>42</sup>

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37. FELD, *EVOLUTION OF JUVENILE COURT*, *supra* note 1, at 141–44.

38. NAT'L RESEARCH COUNCIL, *JUVENILE CRIME, JUVENILE JUSTICE*, *supra* note 23, at 228–29; 42 U.S.C. § 5633(a)(16) (2000).

39. NAT'L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE*, *supra* note 1, at 211–12.

40. FELD, *BAD KIDS*, *supra* note 1, at 268; NAT'L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE*, *supra* note 1, at 221.

41. POE-YAMAGATA & JONES, *supra* note 27.

42. *Id.* at 18–21; NAT'L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE*, *supra* note 1, at 221–22.

Researchers have evaluated programs in community and residential settings to determine what works, how well, and at what costs. The diversity of facilities and programs, the variability of populations they serve, and the lack of control groups make it difficult to attribute positive outcomes to intervention or to sample-selection bias. Correctional meta-analyses combine independent studies to measure effectiveness of different strategies to reduce recidivism or other outcomes. Evaluations have compared generic strategies—counseling, behavior modification, and group therapy—more sophisticated interventions and replications of brand-name programs—Functional Family Therapy and Multisystemic Therapy—and cost/benefit appraisals of different treatments.<sup>43</sup> A substantial literature exists on effectiveness of probation and other forms of non-institutional treatment.<sup>44</sup> Community-based programs are more likely to be run by private (usually nonprofit) service providers, to be smaller and less crowded, and to offer more treatment services than do publicly run institutions.<sup>45</sup>

Delbert Elliot developed the Blueprints for Prevention program that certifies programs as proven or promising. Proven programs demonstrate reductions in problem behaviors with rigorous experimental design, continuing effects after youths leave the program, and successful replication by independent providers.<sup>46</sup> Although some proven programs treat delinquents, most programs aim to prevent school-aged youths' involvement with the juvenile justice system.<sup>47</sup> Mark Lipsey's ongoing meta-analyses report that treatment strategies such as counseling and skill-building are more effective than those adopted during the Get Tough Era that emphasize surveillance, control, and discipline.<sup>48</sup> The Campbell Collaboration conducted meta-analyses of rigorous empirical evaluations of treatment programs for serious delinquents in secure institutions and concluded that cognitive-behavioral treatment reduced overall

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43. Peter W. Greenwood & Susan Turner, *Probation and Other Noninstitutional Treatment: The Evidence Is In*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 726–28; Doris Layton MacKenzie & Rachel Freeland, *Examining the Effectiveness of Juvenile Residential Programs*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 771, 790. For a discussion of rehabilitation, see Francis T. Cullen, “Correctional Rehabilitation,” in Volume 4 of the present Report.

44. See, e.g., Greenwood & Turner, *supra* note 43; MacKenzie & Freeland, *supra* note 43. Cf. Michael Tonry, “Community Punishments,” in Volume 4 of the present Report.

45. Greenwood & Turner, *supra* note 43, at 725; PETER GREENWOOD, CHANGING LIVES: DELINQUENCY PREVENTION AS CRIME-CONTROL POLICY (2006).

46. MacKenzie & Freeland, *supra* note 43, at 790–91; NELLIS, *supra* note 20, at 83–86.

47. Greenwood & Turner, *supra* note 43, at 728.

48. Mark W. Lipsey, *The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124 (2009).



and serious recidivism.<sup>49</sup> Cost-benefit studies use meta-analytic methods to evaluate program costs and benefits to the individual and community—recidivism reduction, costs to taxpayers, and losses for potential victims.<sup>50</sup> While there is a paucity of high-quality evaluations, research suggests that prevention programs—pre-school enrichment and family-based interventions outside of the juvenile justice system—provide benefits that exceed their costs and improvements in education, employment, income, mental health, and other outcomes.<sup>51</sup>

Cumulatively, evaluations conclude that states can handle most delinquents safely in community settings with cognitive-behavioral models of change. The most successful Blueprints programs—Functional Family Therapy and Multisystemic Therapy—focus on altering family interactions, improving family problem-solving skills, and strengthening parents’ ability to deal with their children’s behaviors.<sup>52</sup> But effective programs require extensive and expensive staff training, for which most state and local agencies are unwilling to pay. Despite decades of research, “only about 5% of the youths who could benefit from these improved programs now have the opportunity to do so. Juvenile justice options in many communities remain mired in the same old tired options of custodial care and community supervision.”<sup>53</sup>

*Gault* mandated procedural safeguards, in part, because of conditions in training schools.<sup>54</sup> Cases contemporaneous with *Gault* described inmates beaten by guards, hog-tied, or becoming psychotic through prolonged isolation.<sup>55</sup> Recent lawsuits challenging institutional conditions reveal gang conflict, inadequate education, mental-health and health-care services, suicide, heavy reliance on solitary confinement, and inmates’ sexual abuse and deaths at the hands of staff.<sup>56</sup>

49. Vincente Garrido & Luz Anyela Morales, *Serious (Violent and Chronic) Juvenile Offenders: A Systematic Review of Treatment Effectiveness in Secure Corrections*, in CAMPBELL COLLABORATION REVIEWS OF INTERVENTION AND POLICY EVALUATIONS (2007); MacKenzie & Freeland, *supra* note 43, at 771.

50. Brandon C. Welsh et al., *Promoting Change, Changing Lives: Effective Prevention and Intervention to Reduce Serious Offending*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 262–68 (Rolf Loeber & David P. Farrington eds., 2012).

51. *Id.* at 267–70.

52. Greenwood & Turner, *supra* note 43, at 738–40; NELLIS, *supra* note 20, at 84.

53. Greenwood & Turner, *supra* note 43, at 744.

54. *In re Gault*, 387 U.S. 1, 27 (1967).

55. Barry Krisberg, *Juvenile Corrections: An Overview*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 751–52 (2012).

56. *Id.* at 754–57.



Analysts criticize training schools as sterile and unimaginative, as inappropriate venues in which to treat juveniles, as schools for crime where children learn from more delinquent peers, and as settings in which staff and residents abuse and mistreat inmates.<sup>57</sup> During the 1960s and 1970s, investigators conducted in-depth ethnographic research in correctional facilities.<sup>58</sup> Studies in different states reported similar findings—violent environments, minimal treatment or educational programs, physical abuse by staff and inmates, make-work tasks, extensive use of solitary confinement, and the like. In the ensuing decades, little has changed. States continue to confine half of all youths in overcrowded facilities, more than three-quarters in large facilities, and more than one-quarter in institutions with 200 to 1,000 inmates.<sup>59</sup>

Over the past four decades, juvenile inmates have filed nearly 60 lawsuits that challenge conditions of confinement, assert that they violate the Eighth Amendment's prohibition on cruel and unusual punishment, and deny their Fourteenth Amendment right to treatment.<sup>60</sup> Eighth Amendment litigation is proscriptive, defines constitutionally impermissible practices, and delineates the minimum floor below which institutional conditions may not fall. Judicial opinions from around the country describe youths housed in dungeon-like facilities, beaten with paddles, drugged for social control, locked in solitary confinement, housed in overcrowded and dangerous conditions, and other punitive practices.<sup>61</sup> The Fourteenth Amendment litigation is prescriptive and asserts that the denial of criminal procedural protections imposes a substantive right to treatment and creates a duty to provide beneficial programs.<sup>62</sup>

Do institutional treatment programs reduce recidivism, enhance psychological well-being, improve educational attainments, provide vocational skills, or boost community readjustment? There are no standard measures of recidivism—rearrest, reconviction, or recommitment—and most states do not collect data on programs' effectiveness or recidivism, which complicates judges' ability to distinguish treatment from punishment.<sup>63</sup> Despite these limitations,

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57. MacKenzie & Freeland, *supra* note 43, at 775.

58. See e.g., CLEMENS BARTOLLAS, STUART J. MILLER & SIMON DINITZ, *JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX* (1976); BARRY C. FELD, *NEUTRALIZING INMATE VIOLENCE: JUVENILE OFFENDERS IN INSTITUTIONS* (1977) [hereinafter FELD, *NEUTRALIZING INMATE VIOLENCE*].

59. SNYDER & SICKMUND, *supra* note 3; MacKenzie & Freeland, *supra* note 43, at 774; PARENT ET AL., *supra* note 7.

60. FELD, *BAD KIDS*, *supra* note 1, at 274–77; Krisberg, *supra* note 55, at 753–54; NELLIS, *supra* note 20, at 113–15.

61. FELD, *BAD KIDS*, *supra* note 1, at 275–76; Krisberg, *supra* note 55, at 754–55.

62. FELD, *CASES AND MATERIALS*, *supra* note 2, at 969–81.

63. Greenwood & Turner, *supra* note 43, at 743–44; Krisberg, *supra* note 55, at 761–62.

evaluations of training schools provide scant evidence of effective treatment.<sup>64</sup> Programs that emphasize deterrence or punishment—institutions and boot camps—may lead to increased criminal activity following release.<sup>65</sup> Correctional boot camps reflect punitive policies and emphasize physical training, drill, and discipline. Despite their popularity, they do not reduce recidivism and some studies reported increases.<sup>66</sup> Evaluations of training schools report that police rearrest half or more juveniles for a new offense within one year of release.<sup>67</sup> More than half of incarcerated youths have not completed the eighth grade and more than two-thirds do not return to school following release.

*Juvenile corrections policy: What should a responsible legislature do?* Justice-system involvement impedes youths' transition to adulthood and aggravates minority youths' social disadvantage.<sup>68</sup> Like the Hippocratic Oath, the first priority of juvenile court intercession should be harm-reduction—to avoid or minimize practices that leave a youth worse off.<sup>69</sup> Adolescence is a developmentally fraught period of rapid growth and personality change. Most delinquents will outgrow adolescent crimes without extensive treatment, and interventions should be short-term, community-based, and as minimally disruptive as possible. "The best-known cure for youth crime is growing up. And the strategic logic of diversion and minimal sanctions is waiting for maturation to transition a young man from male groups to intimate pairs and from street corners to houses and workplaces."<sup>70</sup>

More than four decades ago, Massachusetts' Department of Youth Services (DYS) closed its training schools and replaced them with community-based alternatives—group homes, mental-health facilities, and contracts for services for education, counseling, and job training.<sup>71</sup> Evaluations reported that more than three-quarters of DYS youths were not subsequently incarcerated, juvenile arrest rates decreased, and the proportion of adult prison inmates who had

64. FELD, BAD KIDS, *supra* note 1, at 279–83; Krisberg, *supra* note 55, at 762–64.

65. MacKenzie & Freeland, *supra* note 43, at 794.

66. *Id.* at 784; NELLIS, *supra* note 20, at 57–58, 84–85.

67. SNYDER & SICKMUND, *supra* note 3; Krisberg, *supra* note 55, at 763; McKenzie & Freeland, *supra* note 42, at 729.

68. Franklin E. Zimring, *Minority Overrepresentation: On Causes and Partial Cures*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 169 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

69. *Id.* at 174.

70. Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 68, at 228.

71. FELD, NEUTRALIZING INMATE VIOLENCE, *supra* note 58; JEROME MILLER, LAST ONE OVER THE WALL 177–90 (1991). See generally Tonry, *supra* note 44.

graduated from juvenile institutions declined.<sup>72</sup> More recently, Missouri has replicated and expanded on the Massachusetts experiment and used continuous case management, decentralized residential units, and staff-facilitated positive peer culture to provide a rehabilitative environment.<sup>73</sup> Although proponents claim the Missouri strategy has led to a reduction in recidivism rates, no rigorous evaluations have demonstrated its effectiveness.<sup>74</sup> Other states have adopted de-institutionalization strategies. The California Youth Authority has closed five large institutions and reduced its incarcerated population from about 10,000 juveniles to around 1,600—changes driven in part by fiscal considerations.<sup>75</sup> New York’s Office of Children and Family Services (OCFS) announced plans to close six youth correctional facilities after a study found that nearly 80% of young people released from its facilities were rearrested within three years.

*Punishment or prevention:* Delinquency prevention programs provide an alternative to control or suppression strategies and reflect the adage, “a stitch in time saves nine.” Prevention intervenes with children and youths before they engage in delinquency. Risk-focused prevention identifies factors that contribute to offending and employs programs to counteract them. Some interventions apply to communities; others apply to individuals at risk to become offenders or to their families.<sup>76</sup>

Some prevention strategies identify individual risk factors—low intelligence or delayed school progress—and provide programs to improve cognitive skills, school readiness, and social skills. The Perry Preschool project—an enhanced Head Start Program for disadvantaged black children—aimed to provide intellectual stimulation, improve critical-thinking skills, and enhance later school performance.<sup>77</sup> Cost-benefit analyses and evaluations report that larger proportions of experimental than control youths graduated from high school, received post-secondary education, had better employment records and higher income, paid taxes, had fewer arrests, and reduced public expenditures for crime and welfare.<sup>78</sup>

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72. BARRY KRISBERG ET AL., WORKING JUVENILE CORRECTIONS: EVALUATING THE MASSACHUSETTS DEPARTMENT OF YOUTH SERVICES (1989); MILLER, *supra* note 71, at 218–26.

73. NAT’L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 416.

74. *Id.* at 422–24; NELLIS, *supra* note 20, at 86–87.

75. Krisberg, *supra* note 55, at 748.

76. DAVID P. FARRINGTON & BRANDON C. WELSH, SAVING CHILDREN FROM A LIFE OF CRIME: EARLY RISK FACTORS AND EFFECTIVE INTERVENTIONS (2007); GREENWOOD, *supra* note 45; Brandon C. Welsh, *Delinquency Prevention*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 395.

77. Welsh, *supra* note 76, at 398–99.

78. *Id.* at 398.

Other delinquency prevention programs address the families in which at-risk youths live. Family-based risk factors include poor child-rearing techniques, inadequate supervision, lack of clear norms, and inconsistent or harsh discipline. Home visitation, Nurse Home Visitation, and parent management training programs can produce positive outcomes in the lives of children.<sup>79</sup> Family interventions for adjudicated delinquents that operate outside of the juvenile justice system also produce positive outcomes—multi-systemic therapy (MST), functional family therapy (FFT), and multidimensional treatment foster care (MTFC).<sup>80</sup>

David Farrington and Brandon Welsh, in *Saving Children from a Life of Crime*, provide a comprehensive review of risk factors and effective interventions to prevent delinquency. They identify individual-, family-, and community-level factors and effective programs to reduce delinquency. At each level, they report proven or promising programs to improve youths' lives and recommend risk-focused, evidence-based prevention programs.<sup>81</sup>

Peter Greenwood, in *Changing Lives: Delinquency Prevention as Crime-Control Policy*, provides a comprehensive review of prevention programs. He focuses on interventions across the developmental trajectory from infancy and early childhood, through elementary school-aged children, and into adolescence. Some prevention programs have been adequately evaluated and clearly do *not* work—for example, Drug Abuse Resistance Education (DARE).<sup>82</sup> Many prevention programs have no evidentiary support—either they have not been evaluated or evaluations have used such flawed design that researchers could draw no conclusions. Greenwood uses cost-benefit analyses to evaluate various delinquency and prevention programs. While cost-benefit analyses could rationalize delinquency policy and resource-allocation decisions, politicians do not embrace prevention programs because they lack a punitive component and do not demonstrate immediate impact.<sup>83</sup> While highly visible crimes evoke fear and elicit a punitive response, delinquency prevention takes longer to realize and has a more diffuse impact. Despite effective programs, delinquency prevention “holds a small place in the nation’s response to juvenile crime. Delinquency control strategies operated by the juvenile justice system dominate.”<sup>84</sup>

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79. GREENWOOD, *supra* note 45; Welsh et al., *supra* note 50, at 248–51.

80. GREENWOOD, *supra* note 45; Welsh et al., *supra* note 50, at 249–50.

81. FARRINGTON & WELSH, *supra* note 76.

82. GREENWOOD, *supra* note 45, at 90–96.

83. *Id.* at 167.

84. Welsh, *supra* note 76, at 409.

### 3. Conclusion

Progressive reformers created juvenile courts to divert youths from the criminal justice system and rehabilitate them in a separate system. Politicians in the Get Tough Era assaulted the idea that children are different, repudiated the court's welfare role, and rejected its premise of keeping youths out of prisons. Despite their punitive turn, changes in juvenile justice were less extreme than the mass incarceration that overtook the criminal justice system.

Although juvenile courts served their diversionary function, lawmakers sharply shifted their interventions from rehabilitation toward offense-based punitive policies. During the last third of the 20th century, lawmakers forsook even nominal commitment to treatment in favor of punishment. They changed juvenile codes' purposes from care and treatment to accountability and punishment. They amended delinquency sentencing statutes to define length and location of confinement based on offense. In practice, judges focused primarily on present offense and prior record when making dispositions. All of these punitive changes had a disproportionate impact on black youths and other children of color. Although most delinquents received probation, between 1987 and 1997, institutional confinement rose by 54%. Training schools more closely resembled prisons than clinics and seldom improved delinquents' life trajectories. Training schools are the *least* effective way to respond to youths' needs. Meta-analyses and other evaluations identify effective programs and most of them are not administered by juvenile justice personnel.

I emphasize juvenile courts' explicitly punitive turn because it implicates their procedural safeguards. The Supreme Court in *McKeiver v. Pennsylvania* denied delinquents a right to a jury, and in *In re Gault* granted only watered-down safeguards because it assumed that delinquents received treatment. But juvenile courts punish youths, and their justification for reduced safeguards evaporates. Finally, the turn toward punishment falls most heavily on black youths. At every critical decision, black youths receive more-punitive sanctions than white youths. Differences in rates of violence by race contribute to some disparity in justice administration. But many black youths experience very different childhoods than do most white youths. Public policies and private decisions created segregated urban areas and consigned children of color to live in concentrated poverty with crime-inducing consequences. Race affects decision-makers' responses to children of color—the way they see them, evaluate them, and dispose of them. It is not coincidental that the turn from

welfare to punishment and from rehabilitation to retribution occurred as blacks gained civil rights and the United States briefly flirted with integration and inclusionary rather than exclusionary racial policies.<sup>85</sup>

*B. JUVENILE COURT PROCEDURES: ADOLESCENTS'  
COMPETENCE TO EXERCISE RIGHTS*

Progressive reformers created juvenile courts to divert children from criminal courts and to treat rather than punish them. Envisioned as a welfare agency, juvenile courts rejected criminal procedural safeguards and dispensed with formalities like lawyers, juries, and rules of evidence.<sup>86</sup> In 1967, *In re Gault* began to transform the juvenile court from social welfare agency into a more formal legal institution.<sup>87</sup> In that case, the Court emphasized juvenile courts' criminal elements—youths charged with crimes facing institutional confinement, stigma of delinquency labels and records, judicial arbitrariness, and high rates of recidivism—and required proof of guilt using fair procedures. Although *Gault* did not adopt adult criminal procedural protections, it precipitated an operational convergence between juvenile and criminal courts. Subsequent decisions further emphasized delinquency proceedings' criminal character. *In re Winship* required states to prove delinquency by the criminal standard—proof beyond a reasonable doubt—rather than by the lower civil standard of proof.<sup>88</sup> *Breed v. Jones* posited a functional equivalency between juvenile and criminal trials and applied the Fifth Amendment's Double Jeopardy Clause to delinquency prosecutions.<sup>89</sup> However, *McKeiver v. Pennsylvania* posited a benevolent juvenile court, denied delinquents a constitutional right to a jury trial, and rejected procedural parity between delinquency and criminal proceedings.<sup>90</sup> Punitive changes have eroded *McKeiver's* rationale. The absence of a jury adversely affects accurate fact-finding and the presence and performance of counsel, and increases the likelihood of wrongful convictions.<sup>91</sup>

85. FELD, BAD KIDS, *supra* note 1; FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1.

86. FELD, BAD KIDS, *supra* note 1; DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004).

87. FELD, BAD KIDS, *supra* note 1; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1; Barry C. Feld, *Criminalizing Juvenile Justice*, *supra* note 2.

88. *In re Winship*, 397 U.S. 358 (1970).

89. *Breed v. Jones*, 421 U.S. 519 (1975).

90. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

91. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 275 (2007); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111 (2003) [hereinafter Feld, *Constitutional Tension*]. For a discussion of wrongful convictions, see Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in Volume 3 of the present Report.

Juvenile courts handle about half of the youths referred to them informally without filing a formal petition or proceeding to trial.<sup>92</sup> Court intake workers or prosecutors perform a triage function and conduct a rapid assessment to determine whether a youth's crime or welfare requires juvenile court attention or can be discharged or referred to others for care. Diversion minimizes formal adjudication and provides supervision or services in the community. Proponents of diversion contend that it is an efficient gate-keeping mechanism, avoids labeling minor offenders, and provides flexible access to community resources that referral after a formal process might delay. Most youths desist after one or two contacts, and diversion conserves judicial resources for those youths who distinguish themselves by recidivism.

Critics of diversion contend that it widens the net of social control and exposes youths to informal supervision whom juvenile courts otherwise might have ignored. Probation officers or prosecutors who do preliminary screening of cases make low-visibility decisions, which are not subject to judicial or appellate review. Many states do not use formal screening or assessment tools, and discretion at intake constitutes the most significant source of racial disparities in case processing.<sup>93</sup> Although the criteria and administration of diversion raise many significant policy concerns, cases handled informally do not raise the procedural issues of formal adjudication.

During the Get Tough Era, juvenile courts increasingly punished delinquents and amplified their need for protection from the state. *Gault* made delinquency hearings more formal, complex, and legalistic and required youths to participate in and make difficult decisions. Developmental psychologists question whether younger juveniles possess competence to stand trial and whether adolescents have the ability to exercise *Miranda* rights or to waive counsel. Despite clear developmental differences between youths and adults in understanding, maturity of judgment, and competence, the Court and most states do not provide additional safeguards to protect youths from their immaturity or procedural parity with criminal defendants, increasing the likelihood of erroneous outcomes.

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92. SNYDER & SICKMUND, *supra* note 3; Daniel P. Mears, *The Front End of the Juvenile Court: Intake and Informal Versus Formal Processing*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8.

93. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1; Bishop, *supra* note 9, at 39–40; Mears, *supra* note 92, at 587.



This section examines juvenile court practices and youths' competence to exercise procedural rights: *Miranda* rights, competence to stand trial, access to counsel, and jury trial. Part 1 analyzes juveniles' ability to exercise *Miranda* rights. It contrasts states' use of adult legal standards with psychological research that describes juveniles' questionable competence, heightened vulnerability during interrogation, and increased likelihood to make false confessions. Part 2 reviews legal standards and developmental research on adolescents' competence to stand trial. Part 3 examines juveniles' competence to waive counsel, the impact of waivers on delivery of legal services, and appellate courts' inability to oversee juvenile justice administration. Part 4 examines juveniles' right to a jury trial. *McKeiver's* denial of a jury undermines accurate fact-finding, makes it easier to convict delinquents than criminal defendants, and heightens the risk of wrongful convictions. States use those flawed convictions to punish delinquents, to enhance criminal sentences, and to impose collateral consequences.

### 1. Police interrogation of juveniles

The Supreme Court has decided more cases about interrogating youths than any other issue of juvenile justice.<sup>94</sup> Although it repeatedly has questioned juveniles' ability to exercise *Miranda* rights or make voluntary statements, it does not require special procedures to protect them. Rather, *Fare v. Michael C.* endorsed the adult standard—"knowing, intelligent, and voluntary under the totality of circumstances"—to gauge juveniles' *Miranda* waivers.<sup>95</sup>

Most states' laws equate juveniles with adults even though formal equality results in practical inequality. By contrast, developmental psychological research on juveniles' competence to exercise *Miranda* rights questions adolescents' ability to understand warnings or exercise them effectively. Empirical research on how youths respond to interrogation practices designed for adults highlights how developmental immaturity and susceptibility to manipulation increase juveniles' likelihood to confess falsely.

*Questioning juveniles—the law on the books:* In the decades prior to *Miranda*, the Court cautioned trial judges to examine closely how youthfulness affected voluntariness of confessions and found that youth, lengthy questioning, and absence of a lawyer or parent rendered confessions involuntary.<sup>96</sup> *Gault*

94. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Fare v. Michael C.*, 442 U.S. 707 (1979); *In re Gault*, 387 U.S. 1 (1967); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948). See generally BARRY C. FELD, *KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM* (2013) [hereinafter FELD, *KIDS, COPS, AND CONFESSIONS*].

95. *Michael C.*, 442 U.S. at 725.

96. *Gallegos*, 370 U.S. at 54; *Haley*, 332 U.S. at 599–601.



reiterated concern that youthfulness adversely affected reliability of juveniles' statements.<sup>97</sup> It ruled that delinquency proceedings based on criminal allegations that could lead to institutional confinement "must be regarded as 'criminal' for purposes of the privilege against self-incrimination."<sup>98</sup> It recognized that the Fifth Amendment contributes to accurate fact-finding *and* maintains the adversarial balance with, and protects the individual from, the state.<sup>99</sup> *Gault* assumed that youths could exercise rights and participate in the legal process.

*Fare v. Michael C.* departed from the Court's earlier concerns about youths' vulnerability and held that the legal standard used to evaluate adults' waivers—"knowing, intelligent, and voluntary under the totality of the circumstances"—governed juveniles' waivers as well.<sup>100</sup> *Michael C.* reasoned that *Miranda* provided an objective basis to evaluate waivers, denied that children's developmental differences demanded special protections, and required them to assert rights clearly.

*Miranda* provided that if police question a suspect who is in custody—arrested or "deprived of his freedom of action in any significant way"—they must administer a warning.<sup>101</sup> The Court in *J.D.B. v. North Carolina* considered whether a 13-year-old juvenile's age affected the *Miranda* custody analysis.<sup>102</sup> The Court concluded that age was an objective factor that would affect how a young person might experience restraint. *J.D.B.* recognized that juveniles could feel restrained under circumstances in which an adult might not and drew on *Roper* and *Graham's* diminished responsibility rationale to emphasize their immaturity, inexperience, and heightened vulnerability during interrogation.

Despite *J.D.B.'s* renewed concern about youths' vulnerability, the vast majority of states use the same *Miranda* framework for juveniles and adults.<sup>103</sup> *Miranda* requires only that suspects understand the words of the warning and not collateral consequences of a waiver. Most states do not require a parent or lawyer to assist juveniles. When trial judges evaluate *Miranda* waivers, they consider characteristics of the offender (age, education, IQ, and prior police contacts) and the context of interrogation (location, methods, and length of interrogation). The leading cases provide long lists of factors for trial judges to consider.<sup>104</sup> Appellate courts identify many relevant elements, but do not assign controlling weight to any one variable, and defer to trial judges' decisions

97. *Gault*, 387 U.S. at 45, 55.

98. *Id.* at 49–50.

99. *Id.* at 47 (emphasis supplied)

100. *Michael C.*, 442 U.S. at 725; FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94.

101. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

102. *J.D.B.*, 564 U.S. at 264.

103. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94.

104. *Michael C.*, 442 U.S. at 726–27; FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94.

whether a juvenile made a valid waiver.<sup>105</sup> Without decisive factors, *Michael C.* provides no meaningful check on judges' discretion to find that youths waived their rights. Judges regularly find valid waivers made by children as young as 10 or 11 years of age, with limited intelligence or significant mental disorders, with no prior police contacts, and without parental assistance.<sup>106</sup>

About 10 states presume that most juveniles lack capacity to waive *Miranda* and require a parent or other adult to assist them.<sup>107</sup> Some states require a parent for juveniles younger than 14 years, presume that those 14 or 16 years or older are incompetent to waive, or oblige police to offer older youths an opportunity to consult.<sup>108</sup> Most commentators endorse parental presence, even though many question the value of their participation. Parents' and children's interests may conflict, for example, if the juvenile assaulted or stole from a parent, victimized another sibling, or the parent is a suspect. Parents may have a financial conflict of interest if they have to pay for their child's attorney. They may have an emotional reaction to their child's current arrest or chronic trouble. They may expect their children to tell the truth, urge them to stop lying, or physically threaten them to make them confess. But many parents may not understand legal rights or consequences of waiver any better than their children.

If youths differ from adults in understanding *Miranda*, conceiving of or exercising rights, or susceptibility to pressure, then the law establishes a standard that few can meet and enables states to take advantage of their limitations. *Miranda* requires police to advise suspects of their rights, but some juveniles do not understand the words or concepts. Psychologists studied the vocabulary, concepts, and reading levels required to understand warnings and concluded that they exceed many adolescents' abilities. Key words require an eighth-grade level of education and most juveniles 13 years or younger cannot grasp their meaning.<sup>109</sup> Some concepts—the meaning of a *right*, the term

105. Feld, *Criminalizing Juvenile Justice*, *supra* note 2; FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94.

106. Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 105 (Thomas Grisso & Robert Schwartz eds., 2000); FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94.

107. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94; Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006).

108. *Matter of B.M.B.*, 955 P.2d 1302, 1312–13 (Kan. 1998); *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983); *State v. Presha*, 748 A.2d 1108, 1114 (N.J. 2000).

109. Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 135 (2008); Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL'Y & L. 63, 72–85 (2008).

*appointed* to secure counsel, and *waive*—require a high-school education and render *Miranda* incomprehensible. Many juveniles cannot define critical words in the warning. Special dumbed-down juvenile warnings are often longer and more difficult to understand. If demanding reading level or verbal complexity makes a warning unintelligible, then it cannot serve its protective function.

Psychologist Thomas Grisso has studied juveniles' exercise of *Miranda* for more than four decades. He reports that many, if not most, do not understand the warning well enough to make a valid waiver.<sup>110</sup> Although age, intelligence, and prior arrests correlated with *Miranda* comprehension, more than half of juveniles, as contrasted with less than one-quarter of adults, did not understand at least one of the four warnings, and only one-fifth of juveniles, as compared with twice as many adults, grasped all four warnings.<sup>111</sup> Juveniles 15 years of age or younger exhibited significantly poorer comprehension of *Miranda* rights, waived more readily, and confessed more frequently than did older youths. Other research reports that older youths understand *Miranda* as well as adults, but many younger juveniles do not understand the words or concepts.<sup>112</sup> Adolescents with low IQs perform more poorly than adults with low IQs, and delinquent youths typically have lower IQs than do those in the general population.<sup>113</sup> The higher prevalence of mental disorders compounds juveniles' cognitive limitations, although police seldom will be able to assess youths' impairments when they question them.

Even youths who understand *Miranda*'s words may be unable to exercise rights. Juveniles do not appreciate the function or importance of rights as well as adults and they are less competent defendants.<sup>114</sup> They have greater difficulty conceiving of a right as an absolute entitlement that they can exercise without adverse consequences.<sup>115</sup> Juveniles view rights as something that authorities allow them to do, but which they may unilaterally retract or withhold. They misconceive the lawyer's role and attorney-client confidentiality. Youths with

110. THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981) [hereinafter GRISSO, JUVENILES' WAIVERS]; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 11 (1997) [hereinafter Grisso, *Trial Defendants*]; Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152–54 (1980) [hereinafter Grisso, *Juveniles' Capacity*]; Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 335 (2003) [hereinafter Grisso, *Juveniles' Competence*].

111. Grisso, *Juveniles' Capacity*, *supra* note 110, at 1152–54.

112. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94 (reviewing research literature).

113. THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 164–67 (2004) [hereinafter GRISSO, DOUBLE JEOPARDY].

114. GRISSO, JUVENILES' WAIVERS, *supra* note 110, at 130.

115. Grisso, *Trial Defendants*, *supra* note 110, at 10–11.

poorer understanding of rights waived them at higher rates than those with better comprehension.

*Miranda* characterized custodial interrogation as inherently compelling because police dominate the setting and create psychological pressures to comply. The differing legal and social statuses of youths and adults render children questioned by authority figures more suggestible. We expect youths to answer questions posed by police, teachers, parents, and other adults; social expectations and children's lower status increase their vulnerability during interrogation. Juveniles may waive rights and admit responsibility because they believe they should obey authority, acquiesce more readily to negative pressure or critical feedback, and accede more willingly to suggestions.<sup>116</sup> They impulsively confess to end an interrogation, rather than to consider long-term consequences.<sup>117</sup>

The Court requires suspects to invoke *Miranda* rights clearly and unambiguously.<sup>118</sup> However, some groups of people—juveniles, females, or racial minorities—may speak indirectly or tentatively to avoid conflict with those in power.<sup>119</sup> *Davis v. United States* recognized that to require suspects to invoke rights clearly and unambiguously could prove problematic for some.<sup>120</sup> If a suspect thinks she has invoked her rights, but police disregard it as an ambiguous request, then she may feel overwhelmed by their indifference and succumb to further questioning.

*Police interrogation of juveniles—the law in action:* Research on police interrogation reports that about 80% of adults and 90% of juveniles waive their *Miranda* rights.<sup>121</sup> The largest empirical study of juvenile interrogation reported that 92.8% waived.<sup>122</sup> Juveniles' higher waiver rates may reflect lack of understanding or inability to invoke *Miranda* effectively.<sup>123</sup> As with adults, youths with prior felony arrests invoked their rights more often than those

116. Saul Kassin et al., *Police-Induced Confessions, Risk Factors, and Recommendations*, 34 LAW & HUM. BEHAV. 49 (2010) [hereinafter Kassin et al., *Police Induced Confessions*].

117. GRISSE, JUVENILES' WAIVERS, *supra* note 110, at 158–59; Grisso, *Juveniles' Competence*, *supra* note 110, at 357.

118. *Berghuis v. Thompkins*, 560 U.S. 370 (2010); *Davis v. United States*, 512 U.S. 452, 459 (1994).

119. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 318 (1993).

120. *Davis*, 512 U.S. at 460.

121. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94, at 93–98; RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008).

122. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94, at 93–98; Barry C. Feld, *Real Interrogation: What Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1 (2013).

123. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94, at 93–98.

with fewer or less serious police contacts. Youths who waived at prior arrests may have learned that they derived no benefit from cooperating, spent more time with lawyers, and gained greater understanding.

Once officers secure a juvenile's waiver, they question him just like adults. They employ the same maximization and minimization strategies used with adults to overcome young suspects' resistance and to enable them to admit responsibility.<sup>124</sup> Maximization techniques intimidate suspects and impress on them the futility of denial; minimization techniques provide moral justifications or face-saving alternatives to enable them to confess.<sup>125</sup> Despite youths' greater susceptibility, police do not incorporate developmental differences into the tactics they employ.<sup>126</sup> They do not receive special training to question juveniles and use the same tactics as with adults.<sup>127</sup> Techniques designed to manipulate adults—aggressive questioning, presenting false evidence, and using leading questions—create unique dangers when employed with youths.<sup>128</sup>

Some states require a parent to assist juveniles in the interrogation room although analysts question their protective role.<sup>129</sup> Parents—as adults—may have marginally greater understanding of *Miranda* than their children, but both share misconceptions about police practices.<sup>130</sup> Parents did not provide useful legal advice, increased pressure to waive rights, and many urged their children to tell the truth. Parents may be emotionally upset or angry at their child's arrest, believe that confessing will produce a better outcome, or think they should respect authority or assume responsibility. If a parent is present, police either enlist them as allies in the interrogation or neutralize their presence and render them as passive observers.<sup>131</sup> In the vast majority of interrogations that parents attended, they did not participate after police gave their child a *Miranda*

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124. *Id.* at 110; Kassir et al., *Police Induced Confessions*, *supra* note 116, at 12.

125. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94, at 110; LEO, *supra* note 121; Saul Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 223 (2005).

126. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94; Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCHOLOGIST 286, 291 (2006).

127. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006).

128. David S. Tanenhaus & Steven A. Drizin, "Owing to the Extreme Youth of the Accused": *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 671–77 (2002).

129. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94; GRISIO, JUVENILES' WAIVERS, *supra* note 110; Jennifer L. Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH ADOLESCENCE 685 (2008).

130. Woolard et al., *supra* note 129.

131. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94, at 200–03.

warning, sometimes switched sides to become active allies of the police, and rarely played a protective role.<sup>132</sup>

*Juveniles' vulnerability and false confessions:* Research on false confessions underscores juveniles' unique vulnerability.<sup>133</sup> Younger adolescents are at greater risk to confess falsely than older ones. In one study, police obtained more than one-third (35%) of proven false confessions from suspects younger than 18.<sup>134</sup> In another study, false confessions occurred in 15% of cases, but juveniles accounted for 42% of all false confessors, and two-thirds (69%) of those ages 12 to 15 confessed to crimes they did not commit.<sup>135</sup> Significantly, research on exonerated juveniles who confess falsely involves only the small group of youths prosecuted as adults. This reflects the seriousness of their crimes, the greater pressure on police to solve them, and the longer period available to youths and their attorneys to correct the errors.

Developmental psychologists attribute juveniles' overrepresentation among false confessors to reduced cognitive ability, developmental immaturity, and increased susceptibility to manipulation. They have fewer life experiences or psychological resources with which to resist the pressures of interrogation. They are more likely to comply with authority figures, tell police what they think they want to hear, and respond to negative feedback. Their impulsive decision-making and tendency to obey authority heightens those risks, especially for younger juveniles with limited understanding. The stress and anxiety of interrogation intensify their desire to extricate themselves in the short run by waiving and confessing. The vulnerabilities of youth multiply when coupled with mental illness, mental retardation, or compliant personalities.

*Policy recommendations:* Research on false confessions underscores the unique vulnerability of younger juveniles.<sup>136</sup> *Miranda* is especially problematic for younger juveniles who may not understand its words or concepts. *Miranda* requires only shallow understanding of the words that developmental psychologists conclude most 16- and 17-year-olds possess. By contrast,

132. *Id.* at 203–06.

133. Richard A. Leo, “Interrogation and Confessions,” in Volume 2 of the present Report; Garrett, *supra* note 91; BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 945 (2004); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010).

134. Drizin & Leo, *supra* note 133, at 945.

135. Gross et al., *supra* note 133, at 545.

136. GARRETT, *supra* note 133; Drizin & Leo, *supra* note 133; Gross et al., *supra* note 133; Tepfer et al., *supra* note 133.

psychologists report that many, if not most, children 15 or younger do not understand *Miranda* or possess competence to make legal decisions.<sup>137</sup>

*Mandatory counsel for younger juveniles:* Younger juveniles' limited understanding and heightened vulnerability warrant greater procedural protections—a non-waivable right to counsel. The Supreme Court's juvenile interrogation cases—*Haley*, *Gallegos*, *Gault*, *Fare*, *Alvarado*, and *J.D.B.*—excluded statements taken from youths 15 years of age or younger and admitted those obtained from 16- and 17-year-olds. The Court's *de facto* functional line—15 and younger versus 16 and older—closely tracks what psychologists report about youths' ability to understand the warning. Courts and legislatures should adopt that functional line and provide greater protections for younger juveniles.

Psychologists advocate that juveniles younger than 16 “should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role.”<sup>138</sup> More than three decades ago, the American Bar Association endorsed mandatory, non-waivable counsel because it recognized that “[f]ew juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful.”<sup>139</sup> Juveniles should consult with an attorney, rather than to rely on parents, before they exercise or waive rights.<sup>140</sup> Requiring consultation with an attorney assures a functioning legal services delivery system and an informed and voluntary waiver. If youths 15 or younger consult with counsel, it will limit somewhat police's ability to secure confessions. However, if younger juveniles cannot understand or exercise rights without assistance, then to treat them as if they do enables the state to exploit their vulnerability. Constitutional rights exist to assure factual accuracy, promote equality, and protect individuals from governmental over-reaching. *Michael C.* emphasized lawyers' unique role in the justice system, and *Haley*, *Gallegos*, and *Gault* recognized younger juveniles' exceptional need for their assistance.

*Limiting the length of interrogation:* The vast majority of interrogations are very brief; police completed nearly all interviews in less than an hour and few take longer than two hours.<sup>141</sup> By contrast, interrogations that elicit false confessions are usually long inquiries that wear down an innocent person's

137. Grisso, *Juveniles' Capacity*, *supra* note 110; Grisso, *Juveniles' Competence*, *supra* note 110.

138. Kassir et al., *Police Induced Confessions*, *supra* note 116, at 28.

139. AM. BAR ASS'N & INST. OF JUD. ADMIN., JUVENILE JUSTICE STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 92 (1980) [hereinafter AM. BAR ASS'N].

140. Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In re Gault*, 60 RUTGERS L. REV. 125 (2007); AM. BAR ASS'N, *supra* note 139.

141. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94.



resistance—85% took at least six hours—and youthfulness exacerbates those dangers.<sup>142</sup> The Court has recognized that questioning juveniles for five or six hours rendered their statement involuntary. States should create a sliding-scale presumption that a confession is involuntary and unreliable based on length of interrogation.

*Mandatory recording of interrogation:* Within the past decade, legal scholars, psychologists, law enforcement, and justice-system personnel have reached consensus that recording interrogations reduces coercion, diminishes dangers of false confessions, and increases reliability.<sup>143</sup> About a dozen states require police to record interrogations, albeit some under limited circumstances—homicide or very young suspects.<sup>144</sup> Recording creates an objective record and provides an independent basis to resolve credibility disputes about *Miranda* warnings, waivers, or statements. It enables a judge to decide whether a statement contained facts known to a guilty perpetrator or whether police supplied them to an innocent suspect. Recording protects police from false claims of abuse, enhances professionalism, and reduces coercion. It enables police to focus on suspects' responses, to review details of an interview not captured in written notes, and to test them against subsequently discovered facts. Recording avoids distortions that occur when interviewers rely on memory or notes to summarize a statement.

Police must record all interactions with suspects (preliminary interviews and interrogations) rather than just a final statement (a post-admission narrative). Otherwise, police may conduct a pre-interrogation interview, elicit incriminating information, and then construct a final confession after the “cat is out of the bag.” Only a complete record of every interaction can protect against a final statement that ratifies an earlier coerced one or against a false confession contaminated by nonpublic facts that police supplied a suspect.

## 2. Competence to stand trial

*Gault's* procedural rights would be of no value to youths unable to exercise them. The Court long has required that a defendant must be competent to preserve the integrity of trials, to promote factual accuracy, to reduce risk of error, and to enable defendants to play a part in proceedings.<sup>145</sup> *Dusky v. United*

142. Drizin & Leo, *supra* note 133.

143. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 94; GARRETT, *supra* note 133; LEO, *supra* note 121.

144. GARRETT, *supra* note 133; LEO, *supra* note 121.

145. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 800 (2005).



*States* held that a defendant must possess “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and have] a rational as well as factual understanding of proceedings against him.”<sup>146</sup> *Drope v. Missouri* held that “a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”<sup>147</sup> The standard is functional and binary—a defendant either is or is not competent to stand trial.

The standard for competency is not onerous because the more capability it requires of moderately impaired defendants, the fewer who will meet it.<sup>148</sup> Juveniles must understand the trial process, have the ability to reason and work with counsel, and to rationally appreciate their situation. If a person understands that he is on trial for committing crimes, knows he can be sentenced if convicted, and can communicate with his attorney, a court likely would find him competent. Significant mental illness—psychotic disorders such as schizophrenia—or severe mental retardation typically render adult defendants incompetent. However, psychotic disorders typically do not emerge until late adolescence or early adulthood and the American Psychiatric Association’s *Diagnostic and Statistical Manual* cautions against diagnosing profound illnesses in younger populations.<sup>149</sup> Despite that reservation, researchers report that the prevalence of mental disorders among delinquent youths is substantially higher than in the general population—half to three-quarters exhibit one or more mental illnesses.<sup>150</sup>

Developmental psychologists contend that immaturity per se—especially for younger juveniles—produces the same deficits of understanding and inability to assist counsel that mental illness or retardation engender in incompetent adults.<sup>151</sup> Youths’ developmental limitations adversely affect their ability to pay attention, absorb and apply information, understand proceedings, make rational decisions, and work with counsel.<sup>152</sup>

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146. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

147. *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

148. Joseph B. Sanborn, *Juveniles’ Competency to Stand Trial: Wading through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 137 (2009).

149. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013).

150. GRISSE, DOUBLE JEOPARDY, *supra* note 113. For a discussion of mental illness, see Stephen J. Morse, “Mental Disorder and Criminal Justice,” in the present Volume.

151. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 151–52; Scott & Grisso, *supra* note 145, at 796.

152. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 158–60; Scott & Grisso, *supra* note 145.

Significant age-related differences appear between adolescents' and young adults' competence, judgment, and legal decision-making.<sup>153</sup> Developmental psychologists report that many juveniles younger than 14 were as severely impaired as adults found incompetent to stand trial.<sup>154</sup> Some older youths also exhibited substantial impairments.<sup>155</sup> Age and intelligence interacted and produced higher levels of incompetence among adolescents with low IQs than adults with low IQs.<sup>156</sup> The MacArthur study reported that about one-fifth of 14- to 15-year-olds were as impaired as mentally ill adults found incompetent; those with below-average intelligence were more likely than juveniles with average intelligence to be incompetent.<sup>157</sup> Even nominally competent adolescents may suffer from cognitive deficits—borderline intelligence, limited verbal ability, short attention span, or imperfect memory—that adversely affect understanding and decisions.

While incompetence in adults stems from mental disorders that may be transient or treatable with medication, it is less clear how to accelerate legal capacities in adolescents whose deficits result from developmental immaturity.<sup>158</sup> Competency restoration may be especially problematic for younger juveniles who never possessed relevant knowledge or understanding to begin with.<sup>159</sup> Moreover, adolescents deemed incompetent due to mental retardation may be especially difficult to remediate or restore to competence.<sup>160</sup>

The prevalence of mental illness among delinquents compounds their developmental incompetence. In many jurisdictions, the juvenile justice system has become the de facto mental health system as a result of inadequate mental health services for children.<sup>161</sup> Analysts estimate that half or more of male delinquents and a larger proportion of female delinquents suffer from one or more mental

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153. Grisso, *Juveniles' Competence*, *supra* note 110, at 344.

154. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 162–65; Grisso, *Juveniles' Competence*, *supra* note 110, at 356.

155. Grisso, *Juveniles' Competence*, *supra* note 110, at 344.

156. *Id.* at 356; Sanborn, *supra* note 148, at 171.

157. Grisso, *Juveniles' Competence*, *supra* note 110, at 356.

158. Jodi L. Viljoen et al., *Competence and Criminal Responsibility in Adolescent Defendants: The Roles of Mental Illness and Adolescent Development*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8; Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, 13 PSYCH., PUB. POL'Y & LAW 87 (2007).

159. Scott & Grisso, *supra* note 145, at 797.

160. Sanborn, *supra* note 148, at 145–47; Viljoen et al., *supra* note 158, at 530.

161. GRISSE, *DOUBLE JEOPARDY*, *supra* note 113, at 5.

disorders.<sup>162</sup> Youths suffering from Attention-Deficit Hyperactivity Disorder (ADHD) may have difficulty concentrating or communicating with their attorney and those suffering from depression may lack the motivation to do so.

The issue of competence to stand trial arises both for youths transferred to and tried in criminal court and for those prosecuted in juvenile court. For youths tried as adults, criminal courts apply the *Dusky/Drope* standard, but focus on mental illness rather than developmental immaturity.<sup>163</sup> For youths tried in juvenile courts, about half the states have addressed competency in statutes, court rules, or case law.<sup>164</sup> However, most statutes consider only mental illness or retardation as sources of incompetence rather than developmental immaturity per se.<sup>165</sup>

Even after states recognize juveniles' right to a competency determination in delinquency proceedings, they differ over whether to apply the *Dusky/Drope* adult standard or a juvenile-normed standard. Some courts apply the adult standard in delinquency as well as criminal prosecutions because both may result in a child's loss of liberty.<sup>166</sup> Other jurisdictions opt for a relaxed competency standard on the theory that delinquency hearings are less complex and consequences less severe.<sup>167</sup>

Advocates for a lower, watered-down standard of competence in delinquency proceedings contend that a youth who might be found incompetent to stand trial as an adult or if evaluated under an adult standard in juvenile court should still be found competent under a relaxed standard.<sup>168</sup> They insist that if delinquency sanctions are less punitive than criminal sentences and geared to promote youths' welfare, then they require fewer procedural safeguards.<sup>169</sup> However, the constitutional requirement of competence hinges on defendants' ability to participate in proceedings and the legitimacy of the trial process, and not the punishment that may ensue. Although delinquency dispositions, especially for serious crimes, may be shorter than criminal sentences, it is

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162. *Id.* at 6–13; Viljoen et al., *supra* note 158, at 529.

163. Sanborn, *supra* note 148, at 147–49; Scott & Grisso, *supra* note 145, at 804–05.

164. FELD, CASES AND MATERIALS, *supra* note 3; Sanborn, *supra* note 148, at 140–42; Scott & Grisso, *supra* note 145.

165. Sanborn, *supra* note 148, at 141–42; Viljoen et al., *supra* note 158, at 532.

166. *In re W.A.F.*, 573 A.2d 1264, 1267 (D.C. 1990); *In re D.D.N.*, 582 N.W.2d 278 (Minn. Ct. App. 1998).

167. *In re K.G.*, 808 N.E.2d 631, 639 (Ind. 2004); *In re Bailey*, 782 N.E.2d 1177, 1180 (Ohio 2002); Scott & Grisso, *supra* note 145; Sanborn, *supra* note 148, at 141–42.

168. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 168–77; Scott & Grisso, *supra* note 145, at 831–38.

169. Scott & Grisso, *supra* note 145, at 840–43.

disingenuous to claim they are not punitive. *Baldwin v. New York* held that no crime that carried an *authorized* sentence of six months or longer could be deemed a petty offense for which a defendant would not be entitled to a jury.<sup>170</sup> While proponents of a watered-down standard argue that a rule that immunizes some incompetent youths from adjudication could undermine juvenile courts' legitimacy,<sup>171</sup> trying immature youths under a relaxed standard enables the state to take advantage of their incompetence and undermines the legitimacy of the process. A finding of delinquency requires proof of guilt. Either defendants understand the proceedings and can assist counsel or they cannot; if they cannot perform those minimal tasks, then they should not be prosecuted in any court.

Juvenile courts do not routinely initiate competency evaluations even for young offenders, and many delinquents may face charges without understanding the process or the ability to work with counsel. Defense attorneys may be best positioned to detect whether a competency evaluation is warranted, but often fail to do so because of heavy caseloads, limited time spent with a client, and an inability to distinguish between immaturity and disabling incompetence.<sup>172</sup> Defense counsel tactically may not raise a juvenile's incompetence because of the delays for competency evaluation and restoration.<sup>173</sup> Justice-system personnel may lack evaluation instruments or clinical personnel who can administer them in a consistent and valid manner.<sup>174</sup>

### 3. Access to counsel

*Gideon v. Wainwright* applied the Sixth Amendment to the states to guarantee criminal defendants' right to counsel.<sup>175</sup> *Gault* relied on *Gideon*, compared a delinquency proceeding to a felony prosecution, and granted delinquents the right to counsel.<sup>176</sup> However, *Gault* used the Fourteenth Amendment Due Process Clause rather than the Sixth Amendment and did not mandate automatic appointment of counsel.<sup>177</sup> *Gault*, like *Gideon*, left to state and local governments the task to fund legal services. Over the past half-century, politicians who want to get tough on crime and avoid coddling criminals have

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170. *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970).

171. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 173.

172. Viljoen et al., *supra* note 158, at 533–34.

173. GRISIO, *DOUBLE JEOPARDY*, *supra* note 113, at 168–70.

174. *Id.* at 77–80.

175. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). See generally Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report.

176. *In re Gault*, 387 U.S. 1, 36 (1967).

177. *Id.* at 27–30; *Gideon*, 372 U.S. at 344.

shirked their responsibility to adequately fund public defenders' offices and severely undermined the quality of justice.

*Gault* required a judge to advise the child and parent of the right to have a lawyer appointed if indigent, but ruled that juveniles could waive counsel. Most states do not use special procedural safeguards—mandatory non-waivable appointment or pre-waiver consultation with a lawyer—to protect delinquents from improvident decisions.<sup>178</sup> Instead, they use the adult standard—knowing, intelligent, and voluntary—to gauge juveniles' relinquishment of counsel. As with *Miranda* waivers, formal equality results in practical inequality—lawyers represent delinquents at much lower rates than they do criminal defendants.<sup>179</sup>

Despite statutes and court rules of procedure that apply equally throughout a state, juvenile justice administration varies with urban, suburban, and rural context and produces justice by geography.<sup>180</sup> Lawyers appear more frequently in urban courts than in more informal rural courts.<sup>181</sup> In turn, more formal urban courts hold more youths in pretrial detention and sentence delinquents more severely. Finally, a lawyer's presence is an aggravating factor at disposition; judges sentence youths who appear with counsel more severely than they do those who appear without an attorney.<sup>182</sup> Several factors contribute to this finding: lawyers who appear in juvenile court may be incompetent and prejudice their clients' cases; judges may pre-determine sentences and appoint counsel when they anticipate out-of-home placements; or judges may punish delinquents for exercising procedural rights.

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178. *Gault*, 387 U.S. at 42; FELD, JUSTICE FOR CHILDREN, *supra* note 34; Feld, *Criminalizing Juvenile Justice*, *supra* note 2.

179. JUDITH B. JONES, OFF. OF JUV. JUST. & DELINQ. PREVENTION, ACCESS TO COUNSEL (2004); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES (2000); FELD, JUSTICE FOR CHILDREN, *supra* note 34; George W. Burruss & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37 (2002); Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393 (1988) [hereinafter Feld, *In re Gault Revisited*]; Feld, *Right to Counsel*, *supra* note 35.

180. FELD, JUSTICE FOR CHILDREN, *supra* note 34; Burruss & Kempf-Leonard, *supra* note 179; Feld, *Justice by Geography*, *supra* note 34, at 157–58; Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: The Conundrum of Attorneys as an Aggravating Factor in Dispositions*, 27 JUST. Q. 713 (2010) [hereinafter Feld & Schaefer, *Right to Counsel*]; Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: Law Reform to Deliver Legal Services and Reduce Justice by Geography*, 9 CRIMINOLOGY & PUB. POL'Y 327 (2010) [hereinafter Feld & Schaefer, *Law Reform*].

181. FELD, JUSTICE FOR CHILDREN, *supra* note 34; Burruss & Leonard, *supra* note 179; Feld, *Justice by Geography*, *supra* note 34.

182. Burruss & Kempf-Leonard, *supra* note 179; Feld, *Right to Counsel*, *supra* note 35; Feld, *Justice by Geography*, *supra* note 34; Feld & Schaefer, *Right to Counsel*, *supra* note 180.

*Presence of counsel in juvenile courts:* When the Court decided *Gault*, lawyers appeared in fewer than 5% of delinquency cases, in part because juvenile court judges actively discouraged juveniles from retaining counsel and the courts' informality prevented lawyers from playing an advocate's role. Although states amended their juvenile codes to comply with *Gault*, evaluations of initial compliance found that most judges did not advise juveniles of their rights and the vast majority did not appoint counsel. Studies in the 1970s and 1980s reported that many judges did not advise juveniles and most did not appoint counsel.<sup>183</sup> Research in Minnesota in the mid-1980s reported that most youths appeared without counsel, that rates of representation varied widely in urban, suburban and rural counties, and that one-third of youths whom judges removed from home and one-quarter of those in institutions were unrepresented.<sup>184</sup> A decade later, about one-quarter of juveniles removed from home were unrepresented despite law reforms to eliminate the practice.<sup>185</sup> A study of delivery of legal services in six states reported that only three of them appointed counsel for a substantial majority of juveniles.<sup>186</sup> Studies in the 1990s described juvenile court judges' continuing failure to appoint lawyers. In 1995, the General Accounting Office confirmed that rates of representation varied widely among and within states and that judges tried and sentenced many unrepresented youths.<sup>187</sup>

In the mid-1990s the American Bar Association published two reports on juveniles' legal needs. *America's Children at Risk* reported that many children appeared without counsel and that lawyers who represented youths lacked adequate training and often failed to provide effective assistance.<sup>188</sup> *A Call for Justice*, focusing on the quality of defense lawyers, again reported that many youths appeared without counsel and that many attorneys failed to appreciate the challenges of representing young clients.<sup>189</sup> Since the late 1990s, the ABA and the National Juvenile Defender Center have conducted more than 20 state-by-state assessments, reporting that many, if not most, juveniles appeared

183. FELD, JUSTICE FOR CHILDREN, *supra* note 34 (reviewing research on delivery of legal services); Feld, *Right to Counsel*, *supra* note 35.

184. Feld, *In re Gault Revisited*, *supra* note 179; Feld, *Right to Counsel*, *supra* note 35; Feld, *Justice by Geography*, *supra* note 34.

185. Feld & Schaefer, *Right to Counsel*, *supra* note 180; Feld & Schaefer, *Law Reform*, *supra* note 180.

186. Feld, *In re Gault Revisited*, *supra* note 179.

187. U.S. GEN. ACCT. OFF., JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES (1995).

188. AM. BAR ASS'N, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 60 (1993).

189. AM. BAR ASS'N, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 52-56 (1995) [hereinafter ABA, CALL FOR JUSTICE].

without counsel, and that lawyers who represented youths often encountered structural impediments to effective advocacy—heavy caseloads, inadequate resources, lack of training, and the like.<sup>190</sup>

*Waivers of counsel and guilty pleas in juvenile court:* Several factors account for why so many youths appear in juvenile courts without counsel. Public-defender services may be less available or nonexistent in non-urban areas. Judges may give cursory advisories of the right to counsel, imply that waivers are just legal technicalities, and readily find waivers to ease their administrative burdens.<sup>191</sup> If judges expect to impose non-custodial sentences, then they may dispense with counsel. Some jurisdictions charge fees to determine a youth's eligibility for a public defender and others base youths' eligibility on their parents' income. Parents may be reluctant to retain or accept an attorney if, as in many states, they may have to reimburse attorney fees if they can afford them.<sup>192</sup>

The most common explanation for why 50% to 90% of juveniles in many states are unrepresented is that they waive counsel.<sup>193</sup> Judges in most states use the adult standard to gauge juveniles' waivers of counsel and consider the same factors—age, education, IQ, prior police contacts, or court experience—as those in *Miranda* waivers. Many juveniles do not understand their rights or the role of lawyers and waive counsel without consulting with either a parent or an attorney.<sup>194</sup> Although judges are supposed to conduct a dialogue to determine whether a child can understand rights and represent herself, they frequently failed to give any counsel advisory, often neglected to create a record, and readily accepted waivers from manifestly incompetent children.<sup>195</sup> Judges who give counsel advisories often seek waivers to ease their administrative burdens, which affects how they inform juveniles of their rights and interpret their responses. As long as the law allows juveniles to waive counsel, judges can find valid waivers regardless of youths' incompetence. Juveniles' diminished

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190. *State Assessments*, NAT'L JUV. DEFENDER CTR., <http://njdc.info/our-work/juvenile-indigent-defense-assessments/> (last visited Apr. 27, 2017).

191. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 199; ABA, CALL FOR JUSTICE, *supra* note 189, at 44–45; Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002).

192. FELD, BAD KIDS, *supra* note 1, at 127–28; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 199.

193. FELD, JUSTICE FOR CHILDREN, *supra* note 34, NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 199–200; Berkheiser, *supra* note 191, at 649–50.

194. Berkheiser, *supra* note 191.

195. *In re Manuel R.*, 543 A.2d 719 (Conn. 1988); Berkheiser, *supra* note 191; Drizin & Luloff, *supra* note 91.



competence, inability to understand proceedings, and judicial incentives and encouragement to waive counsel results in larger proportions of delinquents adjudicated without lawyers than criminal defendants.

*Pleas without bargains:* Like adult criminal defendants, nearly all delinquents plead guilty and proceed to sentencing.<sup>196</sup> Even though pleading guilty is the most critical decision a delinquent makes, states use adult waiver standards to evaluate their pleas.<sup>197</sup> Judges and lawyers often speak with juveniles in complicated legal language and fail to explain long-term consequences of pleading guilty.<sup>198</sup> A valid guilty plea requires a judge to conduct a colloquy on the record in which an offender admits the facts of the offense, acknowledges the rights being relinquished, and demonstrates that she understands the charges and potential consequences. Because appellate courts seldom review juveniles' waivers of counsel, pleas made without counsel receive even less judicial scrutiny.<sup>199</sup> Guilty pleas by factually innocent youths occur because attorneys fail to investigate cases, assume their clients' guilt especially if they have already confessed, and avoid adversarial litigation, discovery requests, and pretrial motions that conflict with juvenile courts' cooperative ideology. Juveniles' emphasis on short-term over long-term consequences and dependence on adult authority figures increases their likelihood to enter false guilty pleas.

*Counsel as an aggravating factor in sentencing:* Historically, juvenile court judges discouraged adversarial litigants and impeded effective advocacy. Lawyers in juvenile courts may put their clients at a disadvantage when judges sentence them.<sup>200</sup> Research that controls for legal variables—present offense, prior record, pretrial detention, and the like—consistently reports that judges removed from home and incarcerated delinquents who appeared with counsel more frequently than unrepresented youths. Law reforms to improve delivery of legal services actually increased the aggravating effect of representation on dispositions.<sup>201</sup>

196. FELD, JUSTICE FOR CHILDREN, *supra* note 34; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 201–02. See generally Jenia I. Turner, "Plea Bargaining," in Volume 3 of the present Report.

197. Joseph B. Sanborn, *Pleading Guilty in Juvenile Court: Minimal Ado about Something Very Important to Young Defendants*, 9 JUST. Q. 127 (1992) [hereinafter Sanborn, *Pleading Guilty*]; Lacey Cole Singleton, *Say 'Pleas': Juveniles' Competence to Enter Plea Agreements*, 9 J.L. & FAM. STUD. 439 (2007).

198. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 201–02.

199. Berkheiser, *supra* note 191; Sanborn, *Pleading Guilty*, *supra* note 197.

200. Burrus & Kempf-Leonard, *supra* note 179; Feld, *In re Gault Revisited*, *supra* note 179, at 418–19; Feld, *Right to Counsel*, *supra* note 35, at 1330; Feld & Schaefer, *Right to Counsel*, *supra* note 180.

201. Feld & Schaefer, *Right to Counsel*, *supra* note 180; Feld & Schaefer, *Law Reform*, *supra* note 180.



Several factors contribute to lawyers' negative impact at disposition. Juveniles may not believe lawyers' explanations of confidential communications and withhold important information to their detriment. In addition, the lawyers assigned to juvenile court may be incompetent and prejudice their clients' cases. Public defenders' offices often send their least capable or newest attorneys to juvenile court to gain trial experience. Lack of adequate funding for defender services may preclude investigations, increasing the risk of wrongful convictions.<sup>202</sup> Defense attorneys seldom investigate cases or interview their clients prior to trial because of heavy caseloads and limited organizational support.<sup>203</sup> Court-appointed lawyers may place a greater premium on maintaining good relations with judges who assign their cases than vigorously defending their revolving clients. Juvenile courts' *parens patriae* ideology—a legal doctrine that grants the state the right to exercise control over children whose parents fail to meet their responsibilities—discourages zealous advocacy and engenders adverse consequences for attorneys who “rock the boat,” or their clients.<sup>204</sup> Most significantly, many defense attorneys work under conditions that create structural impediments to quality representation.<sup>205</sup> Assessments in dozens of states report derisory working conditions—crushing caseloads, low compensation, scant support services, inexperienced attorneys, and inadequate supervision—that detract from or preclude effective representation.<sup>206</sup> Ineffective assistance of counsel, for whatever reasons, is a significant factor in one-quarter of wrongful convictions.

Another explanation of lawyers' negative impact on dispositions is that judges may appoint them when they anticipate more-severe sentences. The Court in *Scott v. Illinois* prohibited “incarceration without representation” and limited indigent adult misdemeanor's right to appointed counsel to cases in which judges ordered defendants' actual confinement.<sup>207</sup> In most states, the same judge presides at a youth's arraignment, detention hearing, adjudication, and disposition and may appoint counsel if she anticipates a more severe sentence. Judges typically appoint counsel, if at all, at the arraignment, detention

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202. Drizin & Luloff, *supra* note 91.

203. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 200.

204. *Id.* at 201; Drizin & Luloff, *supra* note 195.

205. ABA, CALL FOR JUSTICE, *supra* note 189; POE-YAMAGATA & JONES, *supra* note 27.

206. NAT'L JUVENILE DEFENDER CTR., *supra* note 190; POE-YAMAGATA & JONES, *supra* note 27; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 58.

207. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); Feld & Schaefer, *Right to Counsel*, *supra* note 180.

hearing, or on the day of trial. Court practices that appoint lawyers who meet their clients for the first time on the day of trial create a system conducive to inadequate representation and wrongful convictions.

Finally, judges may sentence delinquents who appear with counsel more severely than those who waive because the lawyer's presence insulates them from appellate reversal. Juvenile court judges may sanction youths whose lawyers invoke formal procedures, disrupt routine procedures, or question their discretion in ways similar to adult defendant's trial penalty—the harsher sentences imposed on those who demand a jury trial rather than plead guilty.

*Appellate review:* *Gault* rejected the juvenile defendant's request for a constitutional right to appellate review because it had not found that criminal defendants enjoyed such a right. However, states invariably provided adult defendants with a statutory right to appellate review.<sup>208</sup> By avoiding the constitutional issue, the Court undermined the other rights that it granted delinquents because the only way to enforce its rules would have been through rigorous appellate review of juvenile court judges' decisions.<sup>209</sup> Regardless of how poorly lawyers perform, appellate courts seldom can correct juvenile courts' errors. Juvenile defenders appeal adverse decisions far less frequently than lawyers representing adult criminal defendants and often lack a record with which to challenge an invalid waiver of counsel or trial errors.<sup>210</sup> Juvenile court culture may discourage appeals as an impediment to a youth assuming responsibility. The vast majority of delinquents enter guilty pleas, which waive the right to appeal, further precluding review. Moreover, juveniles who waived counsel at trial will be less aware of or able to pursue an appeal.

*Conclusion:* The formal procedures of juvenile and criminal courts have converged in the decades since *Gault*. Differences in age and competence would suggest that youths should receive more safeguards than adults to protect them from punitive delinquency adjudications and their own limitations. States do not provide juveniles with additional safeguards to protect them from their own immaturity—mandatory non-waivable appointment of counsel or pre-waiver consultation with a lawyer. Instead, they use adult legal standards that most youths are unlikely to meet. A justice system that recognizes youths' developmental limitations would provide, at a minimum, no pretrial waivers of *Miranda* rights or counsel without prior consultation with counsel. As *Michael*

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208. See generally Nancy J. King, "Criminal Appeals," in Volume 3 of the present Report.

209. CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 158 (1998).

210. Donald J. Harris, *Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 DICKINSON L. REV. 209 (1998); Berkheiser, *supra* note 191.

C. repeatedly emphasized, lawyers play a unique role in the legal process and only they can effectively invoke the procedural safeguards that are every citizen's right. A rule that requires mandatory non-waivable appointment of counsel would impose substantial costs and burdens on the delivery of legal services in most states. But after *Gault*, all juveniles are entitled to appointed counsel. Waiver doctrines to relieve states' fiscal or administrative burdens are scant justifications to deny fundamental rights.

States use the adult standard to gauge juveniles' waivers of counsel, even though many youths cannot meet it. High rates of waiver undermine the legitimacy of the juvenile justice system because assistance of counsel is the prerequisite to exercise of other rights.<sup>211</sup> Youths require safeguards that only lawyers can provide to protect against erroneous and punitive state intervention. The direct consequence of delinquency convictions—institutional confinement—and use of prior convictions to sentence recidivists more harshly, to waive youths to criminal court, and to enhance criminal sentences make assistance of counsel imperative. Only mandatory non-waivable counsel can prevent erroneous convictions and collateral use of adjudications that compound injustice. Lawyers can only represent delinquents effectively if they have adequate support and resources and specialized training to represent children.

#### 4. Jury trial: fact-finding, government oppression, and collateral consequences

States treat juveniles just like adults when formal equality produces practical inequality. Conversely, they use juvenile court procedures that provide *less* effective protection when called upon to provide delinquents with adult safeguards. *Duncan v. Louisiana* gave adult defendants the right to a jury trial to assure accurate fact-finding *and* to prevent governmental oppression.<sup>212</sup> By contrast, *McKeiver v. Pennsylvania* denied delinquents protections the Court deemed fundamental to criminal trials.<sup>213</sup> The presence of lay citizens functions as a check on the state, provides protection against vindictive prosecutors or biased judges, upholds the criminal standard of proof, and enhances the transparency and accountability of the justice system. Despite those salutary functions, *McKeiver* insisted that delinquency proceedings were not yet criminal prosecutions despite their manifold criminal aspects.<sup>214</sup>

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211. Drizin & Luloff, *supra* note 91; Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553 (1998).

212. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

213. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

214. *Id.* at 541.

The *McKeiver* plurality reasoned that a judge could find facts as accurately as a jury, rejected concerns that informality could compromise fact-finding, invoked the imagery of a paternalistic judge, and disregarded delinquents' need for protection from punitive state over-reaching.<sup>215</sup> The Court feared that jury trials would interfere with juvenile courts' informality, flexibility, and confidentiality, make juvenile and criminal courts procedurally indistinguishable, and lead to abandonment of the juvenile court.

The *McKeiver* dissenters insisted that when the state charged a delinquent with a crime for which it could incarcerate her, she should enjoy the same jury right as an adult.<sup>216</sup> For them, *Gault's* rationale—criminal charges and the possibility of confinement—required comparable procedural safeguards. The dissenters feared that juvenile courts' informality would contaminate fact-finding. Although the vast majority of delinquents, like criminal defendants, plead guilty, the possibility of a jury trial provides an important check on prosecutorial over-charging, on judges' evidentiary rulings, and the standard of proof beyond a reasonable doubt. Despite the prevalence of guilty pleas, lawyers are supposed to evaluate cases as if they were to go to trial and practice in the shadow of the jury. The possibility of a jury trial increases the visibility and accountability of justice administration and the performance of lawyers and judges. The jury's checking function may be even more important in highly discretionary, low-visibility juvenile courts that deal with dependent youths who cannot effectively protect themselves.

A few states give juveniles a right to a jury trial as a matter of state law, but the vast majority do not.<sup>217</sup> During the Get Tough Era, states revised their juvenile codes' purpose, opened delinquency trials to the public, fostered a punitive convergence with criminal courts, imposed collateral consequences for delinquency convictions, and eroded the rationale for fewer procedural safeguards. Despite the explicit shift from treatment to punishment, most state courts continue to deny juveniles a jury.<sup>218</sup>

Constitutional procedural protections serve dual functions: assure accurate fact-finding *and* protect against governmental oppression. *McKeiver's* denial of a jury fails on both counts. First, judges and juries find facts differently and when they differ, judges are more likely to convict than a panel of laypeople.

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215. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23; Feld, *Constitutional Tension*, *supra* note 91.

216. *McKeiver*, 403 U.S. at 559; Feld, *Constitutional Tension*, *supra* note 91, at 1145.

217. Feld, *Constitutional Tension*, *supra* note 91.

218. *State ex rel. D.J.*, 817 So. 2d 26 (La. 2002); *In Interest of J.F.*, 714 A.2d 467 (Pa. Super. Ct. 1998); *In Interest of Hezzie R.*, 580 N.W.2d 660 (Wis. 1998).

Second, punitive sanctions increase the need to protect delinquents from direct and collateral consequences of convictions. Providing delinquents with a second-rate criminal court denies them fundamental fairness, undermines the legitimacy of the process, and increases the likelihood of wrongful convictions.

*Accurate fact-finding:* *Winship* reasoned that the seriousness of proceedings and the consequences for a defendant—juvenile or adult—required proof beyond a reasonable doubt. *McKeiver* assumed that judges could find facts as accurately as juries. Its rejection of jury trials undermines factual accuracy and increases the likelihood that outcomes will differ in delinquency and criminal trials. Although juries and judges agree about defendants' guilt or innocence in about four-fifths of criminal cases, when they differ, juries acquit more often than do judges.<sup>219</sup>

Fact-finding by judges and juries differs because juvenile court judges may preside over hundreds of cases a year while a juror may participate in only one or two cases in a lifetime.<sup>220</sup> Several factors contribute to jurors' greater propensity to acquit than judges. The presence of jurors affects the ways in which lawyers present their cases. As judges hear many cases, they may become less meticulous when they weigh evidence and apply less stringently the reasonable doubt standard than do jurors.<sup>221</sup> Judges hear testimony from police and probation officers on a recurring basis and form settled opinions about their credibility.<sup>222</sup> Similarly, judges may have formed an opinion about a youth's credibility, character, or the case from hearing earlier charges against her or presiding at a detention hearing.

Delinquency proceedings' informality compounds differences between judge and jury fact-finding and further disadvantages delinquents. A judge does not discuss either the law or the evidence before reaching a conclusion, and lack of diverse opinions increases the variability of outcomes. Judges in criminal cases instruct jurors about the applicable law. By contrast, a judge in a bench trial does not state the law, which makes it more difficult for an appellate court to determine whether she correctly understood or applied it. *Ballew v. Georgia* recognized the superiority of group decision-making over individual judgments—some group members remember facts that others forget, and

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219. PETER W. GREENWOOD ET AL., *YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA* 30–31 (1983); HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 185–90, 209–13 (1966).

220. KALVEN & ZEISEL, *supra* note 219, at 58–59; Janet E. Ainsworth, *Re-imagining Childhood and Re-constructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1123 (1991).

221. Guggenheim & Hertz, *supra* note 211, at 564.

222. *Id.* at 568–74.

deliberations air competing views and promote more accurate decisions.<sup>223</sup> By contrast, judges administer the courtroom, make evidentiary rulings, take notes, and conduct sidebars with lawyers, all of which divert their attention during proceedings.

The greater flexibility and informality of closed juvenile proceedings compound the differences between judge and jury when it comes to reasonable doubt. When a judge presides at a youth's detention hearing, she receives information about the offense, criminal history, and social background, which may contaminate impartial fact-finding. Exposure to non-guilt-related evidence increases the likelihood that a judge subsequently will convict and institutionalize the defendant. Some differences between judges and juries reflect the latter's use of a higher threshold of proof beyond a reasonable doubt.<sup>224</sup>

The youthfulness of a defendant is a factor that elicits jury sympathy and accounts for some differences between judge and jury decisions.<sup>225</sup> By contrast, juvenile court judges may be more predisposed to find jurisdiction to help a troubled youth. Finally, without a jury, judges adjudicate many delinquents without an attorney, which prejudices fact-finding and increases the likelihood of erroneous convictions.

*Suppression hearing and evidentiary contamination:* In bench trials, judges typically conduct suppression hearings immediately before or during trial, a practice that exposes them to inadmissible evidence and prejudicial information.<sup>226</sup> A judge may know about a youth's prior delinquency from presiding at a detention hearing, prior adjudication, or trial of co-offenders. Similarly, a judge who suppresses an inadmissible confession or illegally seized evidence may still be influenced by it. The presumption that exposure to inadmissible evidence will not affect a judge is especially problematic where the same judge typically handles a youth's case at several different stages. An adult defendant can avoid these risks by opting for a jury trial, but delinquents have no way to avoid the cumulative risks of prejudice in a bench trial. Critics of juvenile courts' fact-finding conclude that "judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt."<sup>227</sup> As

223. *Ballew v. Georgia*, 435 U.S. 223, 232–39 (1978); Guggenheim & Hertz, *supra* note 211, at 578.

224. KALVEN & ZEISEL, *supra* note 219, at 185–90.

225. *Id.* at 210.

226. Feld, *Criminalizing Juvenile Justice*, *supra* note 2, at 231–41; Guggenheim & Hertz, *supra* note 211, at 571.

227. Guggenheim & Hertz, *supra* note 211, at 564.

a result, states adjudicate delinquents in cases in which they could not have obtained convictions with adequate procedural safeguards. The differences between the factual reliability of delinquency adjudications and criminal convictions raise questions about the use of juveniles' records to enhance criminal sentences.

*Preventing governmental oppression and get-tough policies:* *McKeiver* uncritically assumed that juvenile courts treated delinquents rather than punished them, but it did not review any record to support that assumption. The Court did not analyze the indicators of treatment or punishment—juvenile code purpose clauses, sentencing statutes, judges' sentencing practices, conditions of confinement, or intervention outcomes—when it denied delinquents a jury.

The Court long has recognized that juries serve a special role to prevent governmental oppression and protect citizens facing punishment. In our system of checks and balances, lay citizen jurors represent the ultimate restraint on abuses of governmental power, which is why it is the only procedural safeguard listed in three different places in the Constitution. *Duncan v. Louisiana*, decided three years before *McKeiver*, held that the Sixth Amendment guaranteed a jury right in state criminal proceedings to assure accurate fact-finding *and* to prevent governmental oppression. *Duncan* emphasized that juries inject community values into the law, increase visibility of justice administration, and check abuses by prosecutors and judges.<sup>228</sup> The year after *Duncan*, *Baldwin v. New York* again emphasized the jury's role to prevent government oppression by interposing lay citizens between the State and the defendant.<sup>229</sup> *Baldwin* is especially critical for juvenile justice because an adult charged with any offense that carries a *potential* sentence of confinement of six months or longer enjoys a right to a jury trial.

*McKeiver* feared that granting delinquents jury trials would also lead to public trials. However, as a result of Get Tough Era reforms to increase the visibility, accountability, and punishment powers of juvenile courts, about half the states authorized public access to all delinquency proceedings or to felony prosecutions.<sup>230</sup> States limited confidentiality protections to hold youths accountable and put the public on notice of who pose risks to the community.<sup>231</sup>

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228. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

229. *Baldwin v. New York*, 399 U.S. 66, 72 (1970).

230. TORBET ET AL., *supra* note 18.

231. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 81.



*Punitive juvenile justice:* The vast majority of states deny delinquents the right to a jury and youths have challenged *McKeiver*'s half-century old rationale in light of punitive changes. Most state appellate courts have rejected their claims with deeply flawed, uncritical analyses, which often conflate treatment with punishment.<sup>232</sup> Few courts engage in the careful analysis—purpose clauses, sentencing statutes, judicial practices, conditions of confinement—required to distinguish treatment from punishment.<sup>233</sup> States rejected juveniles' challenges to punitive changes—open hearings, mandatory sentences, delinquency convictions to enhance criminal sentence—by emphasizing differences in the severity of penalties imposed on delinquents and criminal defendants convicted of the same crime.<sup>234</sup> However, once a penalty crosses *Baldwin*'s six-month *authorized sentence* threshold, further severity is irrelevant. By contrast, the Kansas Supreme Court in *In re L.M.* concluded that legislative changes eroded the benevolent *parens patriae* character of juvenile courts, transformed it into a system for prosecuting juveniles charged with committing crimes, and gave them a state constitutional right to a jury.<sup>235</sup>

*Delinquency convictions to enhance criminal sentences: Apprendi v. New Jersey* ruled that “any fact that increases the penalty for a crime beyond the statutory maximum, *other than the fact of a prior conviction*, must be submitted to a jury and proved beyond a reasonable doubt.”<sup>236</sup> The Court exempted the “*fact of a prior conviction*” because criminal defendants enjoyed the right to a jury trial and proof beyond a reasonable doubt, which assured reliability of prior convictions.<sup>237</sup> *Apprendi* emphasized the jury's role to uphold *Winship*'s standard of proof beyond a reasonable doubt. While *McKeiver* approved jury-free delinquency proceedings to impose rehabilitative dispositions, they would *not* be adequate to punish a youth.

Juvenile courts historically restricted access to records to avoid stigmatizing youths. But criminal courts need to know which juveniles' delinquent careers continue into adulthood to incapacitate them, punish them, or protect public safety.<sup>238</sup> Historically, criminal courts lacked access to delinquency records

232. Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-McKeiver World*, 91 NEB. L. REV. 1, 50–51 (2012).

233. In Interest of J.F., 714 A.2d 467 (Pa. Super. Ct. 1998); In Interest of Hezzie R., 580 N.W.2d 660 (Wis. 1998).

234. State *ex rel.* D.J., 817 So. 2d 26 (La. 2002).

235. In re L.M., 186 P.3d 164 (Kan. 2008).

236. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

237. Feld, *Constitutional Tension*, *supra* note 91, at 1132–34.

238. FELD, BAD KIDS, *supra* note 1, at 233–35; James B. Jacobs, *Juvenile Criminal Record Confidentiality*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 68, at 149, 155.



because of juvenile courts' confidentiality, practice of sealing or expunging delinquency records, physical separation of juvenile and criminal court staff and records, and difficulty of maintaining systems to track offenders and compile histories across both systems. Despite a tradition of confidentiality, states have long used some delinquency convictions. Some states use juvenile records on a discretionary basis.<sup>239</sup> Many state and federal sentencing guidelines include some delinquency convictions in defendants' criminal history score, although they vary in how they weight delinquency convictions.<sup>240</sup>

As a matter of policy, states should not equate delinquency and criminal convictions for sentence enhancements. Despite causing the same physical injury or property loss as older actors, juveniles' reduced culpability makes their choices less blameworthy and should diminish their weight. Moreover, their use to enhance criminal sentences raises questions about the procedures used to obtain those convictions. Juvenile courts in many states adjudicate half or more delinquent without counsel. The vast majority of states deny juveniles the right to a jury trial. Because some judges in bench trials may apply *Winship's* reasonable-doubt standard less stringently, more youths are convicted than would be with adequate safeguards.

Federal circuits are divided over whether *Apprendi* allows judges to use delinquency convictions to enhance criminal sentences.<sup>241</sup> State appellate court rulings reflect the federal split of opinion about the reliability of delinquency convictions and the requirement for a jury right.<sup>242</sup> Until the Court clarifies *Apprendi*, defendants in some states or federal circuits will serve longer sentences than those in other jurisdictions based on flawed delinquency convictions.

The use of delinquency convictions to enhance criminal sentences further aggravates endemic racial disparities in justice administration. At each stage of the juvenile justice system, racial disparities compound and cumulate, creating more extensive delinquency records, and contributing to disproportionate minority confinement. Richard Frase's magisterial analysis of racial disparities

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239. *United States v. Davis*, 48 F.3d 277, 280 (7th Cir. 1995); *United States v. McDonald*, 991 F.2d 866, 872 (D.C. Cir. 1993).

240. For example, California's three-strikes law counts juvenile felony convictions as strikes for sentence enhancements. Feld, *Constitutional Tension*, *supra* note 91, at 1187–88.

241. *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002); *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001); Feld, *Constitutional Tension*, *supra* note 91, at 1196–22.

242. *State v. Hitt*, 42 P.3d 732 (Kan. 2002); *State v. Brown*, 879 So. 2d 1276 (La. 2004); Feld, *Constitutional Tension*, *supra* note 91, at 1203–14.

in criminal sentencing in Minnesota concludes that “seemingly legitimate sentencing factors such as criminal-history scoring can have strong disparate impacts on non-white defendants.”<sup>243</sup>

*Collateral consequences of delinquency convictions:* In addition to direct penalties—confinement and enhanced sentences as juveniles or as adults—extensive collateral consequences follow from delinquency convictions. Although state policies vary, they may follow youths for decades and affect future housing, education, and employment opportunities.<sup>244</sup> States may enter juveniles’ fingerprints, photographs, and DNA into databases accessible to law enforcement and other agencies.<sup>245</sup> Some reforms opened delinquency trials and records to the public and media reports on the Internet create a permanent and easily accessed record. Criminal justice agencies, schools, child-care providers, the military, and others may have access to juvenile court records automatically or by petition.<sup>246</sup> Expungement of delinquency records is not automatic and requires court proceedings. Delinquency convictions may affect youths’ ability to obtain professional licensure, to receive government aid, to join the military, to obtain or keep legal immigration status, or to live in public housing.<sup>247</sup>

*Sex-offender registration:* The response to juvenile sex offenders is among the most onerous collateral consequences of delinquency adjudication.<sup>248</sup> The federal Adam Walsh Child Protection and Safety Act—also known as the Sex Offender Registration and Notification Act (SORNA)—requires states to implement registration and notification standards for individuals convicted as adults or juveniles for certain sex offenses.<sup>249</sup> Some states require lifetime registration, neighborhood notification, and limit where registered offenders can live, work, or attend school.<sup>250</sup>

243. Richard Frase, *What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?*, 38 CRIME & JUST. 201, 265 (2009).

244. NAT’L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 3; NELLIS, *supra* note 20, at 61. See generally Gabriel J. Chin, “Collateral Consequences,” in Volume 4 of the present Report.

245. FELD, CASES AND MATERIALS, *supra* note 3, at 369–76.

246. Jacobs, *supra* note 238, at 161; NELLIS, *supra* note 20, at 63–65.

247. NAT’L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 127; NELLIS, *supra* note 20, at 61.

248. FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004) [hereinafter ZIMRING, AN AMERICAN TRAVESTY]; NELLIS, *supra* note 20, at 69–73. See generally Wayne A. Logan, “Sex Offender Registration and Notification,” in Volume 4 of the present Report.

249. 42 U.S.C. § 16901 et seq.; NELLIS, *supra* note 20, at 70–71.

250. ZIMRING, AN AMERICAN TRAVESTY, *supra* note 248; Michael F. Caldwell, *Juvenile Sexual Offenders*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 68, at 55–80.

*Reforming court procedures to prevent wrongful convictions:* The procedural as well as substantive convergence between juvenile and criminal courts since *Gault* has placed greater demands on juveniles' competence to exercise rights. Despite increased punitiveness and formality, most states do not provide delinquents equal or functional procedural protections. Juveniles waive *Miranda* rights and counsel under adult legal standards that many are not competent to understand or meet. Denial of juries affects the use of delinquency convictions both initially and for long-term collateral consequences.

State legislatures that define juvenile courts should recognize that "children are different," and provide greater assistance. Lawmakers passed punitive laws and simultaneously eroded juvenile courts' meager protections—closed and confidential proceedings, limited collateral use of delinquency convictions, and the like. Legislators failed to appropriate adequate funds for legal services and fostered crippled public defenders incapable of providing effective assistance of counsel. A half-century after *Gault*, many juveniles in many states are still waiting for a lawyer to advocate on their behalf.

## II. JUVENILES IN CRIMINAL COURT

### A. TRANSFER TO CRIMINAL COURT

During the Get Tough Era, lawmakers changed the theory and practice of transfer and increased the numbers of youths tried as adults. States use one or more often overlapping transfer strategies: judicial waiver, legislative offense exclusion, and prosecutorial direct-file.<sup>251</sup> In about a dozen states, juvenile courts' jurisdiction ends at 15 or 16, rather than 17 years of age, resulting in about 200,000 youths being tried in criminal court each year. In addition, states annually transfer another 50,000 youths via judicial waiver (7,500), prosecutorial direct-file (27,000), and the remainder with prosecutor-determined excluded offenses.<sup>252</sup> We lack precise numbers because states only collect data on judicial transfers which account for the fewest number of youths waived.

Legislators shifted control of transfer decisions from judges to prosecutors to avoid the former's relative autonomy from political pressures.<sup>253</sup> Laws lowered the age for transfer, increased the numbers of excluded offenses, and

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251. Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 801–22 [hereinafter Feld & Bishop]; SNYDER & SICKMUND, *supra* note 3, at 85–89.

252. Feld & Bishop, *supra* note 251, at 815.

253. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 204–09, 214–18; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 38.

strengthened prosecutors' charging powers.<sup>254</sup> Despite the prevalence of judicial waiver statutes, prosecutors' excluded offenses or direct-file charging decisions determine the adult status of 85% of youths.<sup>255</sup>

The vast majority of states have judicial waiver laws that specify the ages and offenses for which a judge may conduct a transfer hearing.<sup>256</sup> *Kent v. United States* required judges to conduct a procedurally fair hearing (counsel, access to probation reports, and written findings for appellate review) because the loss of juvenile courts' benefits (access to treatment, confidentiality, limited collateral consequences, and the like) was a critical action.<sup>257</sup> *Breed v. Jones* applied the Fifth Amendment double-jeopardy prohibition to delinquency adjudications and required states to decide whether to prosecute a youth in juvenile or criminal court before proceeding to trial.<sup>258</sup> *Kent* appended a list of criteria for judges to consider and state courts and statutes incorporated those criteria.<sup>259</sup> Judges have broad discretion to interpret those factors and studies of judicial waiver document inconsistent rulings, justice by geography, and over-representation of racial minorities.<sup>260</sup> For decades, studies reported racial disparities in judicial transfer decisions.<sup>261</sup> Judges transfer minority youths more often than white youths, especially for violent and drug crimes.<sup>262</sup> In the 75 largest counties in the United States, racial minorities comprised more than two-thirds of juveniles tried in criminal court and the vast majority of those sentenced to prison.<sup>263</sup>

254. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, in THE CHANGING BORDERS OF JUVENILE JUSTICE 93, 124–29 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion*].

255. JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? 5 (2000); AMNESTY INT'L & HUM. RTS. WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 19 (2005) [hereinafter AMNESTY INT'L].

256. Feld & Bishop, *supra* note 251, at 803–05.

257. *Kent v. United States*, 383 U.S. 541, 560–61 (1966).

258. *Breed v. Jones*, 421 U.S. 519, 541 (1975).

259. *Kent*, 383 U.S. at 566–67.

260. Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 J.L. & INEQUALITY 73 (1995); Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996).

261. U.S. GEN. ACCT. OFF., JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 59 (1995); AMNESTY INT'L, *supra* note 255.

262. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 216; POE-YAMAGATA & JONES, *supra* note 27, at 12–14.

263. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 220.

A dozen states set their juvenile courts' age jurisdiction at 15 or 16 years, rather than 17, which results in the largest numbers of youths tried as adults. In addition, some states' laws exclude youths 16 or older charged with murder, while others exclude more extensive lists of offenses.<sup>264</sup> During the Get Tough Era, many states expanded offense exclusion—crimes against the person, property, drugs, or weapons offenses—to evade *Kent's* hearing requirement.<sup>265</sup> Appellate courts uniformly reject youths' claims that prosecuting them for an excluded offense denies *Kent's* procedural safeguards.<sup>266</sup>

In more than a dozen states, juvenile and criminal courts share concurrent jurisdiction over some ages and offenses (older youths and serious crimes) and prosecutors decide (direct file) in which forum to charge a youth.<sup>267</sup> Under offense exclusion, the crime charged determines the venue; direct-file laws allow prosecutors to select either system to try the crime. Direct file elevates prosecutors' power at judges' expense and creates a model more typical of criminal courts. Most direct-file laws provide no criteria to guide prosecutors' choice of forum. The prosecutors lack access to personal, social, or clinical information about a youth that a judge would consider and base their decisions primarily on police reports. Locally elected prosecutors exploit crime issues like Get Tough legislators, introduce justice by geography and racial disparities, and exercise their discretion as subjectively as do judges but without appellate review. Nationally, prosecutors determine the criminal status of 85% of youths tried as adults and act as gatekeepers to the juvenile justice system, a role previously reserved for judges who have more experience, information, and fewer political motivations.<sup>268</sup>

Another Get Tough Era innovation was blended sentences that provide judges with juvenile/criminal sentencing options.<sup>269</sup> Because juvenile courts lose jurisdiction when youths reach the age of majority or other dispositional age limit, judges may be unable to sentence appropriately older offenders convicted of serious crimes. States increase judges' sentencing powers by allowing juvenile courts to impose extended delinquency sentences with a stayed criminal sentence, or by giving criminal courts authority to use a

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264. Feld & Bishop, *supra* note 251, at 809–10.

265. *Id.*

266. *United States v. Bland*, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

267. Feld, *Legislative Exclusion*, *supra* note 254, at 98–101; Feld & Bishop, *supra* note 251, at 811–12.

268. NAT'L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE*, *supra* note 1, at 135.

269. Feld & Bishop, *supra* note 251, at 806; Marcy Rasmussen Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, 'Blended Sentencing,' and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997 (2001).

delinquency disposition in lieu of imprisonment. Regardless of approach, blended sentencing laws require criminal procedural safeguards, including the right to a jury trial, to enable a judge to punish and thereby gain greater flexibility to treat. Although states adopted blended sentences as an alternative to transfer, they had a net-widening effect, and juvenile court judges frequently impose them on less serious offenders whom they previously handled as delinquents.<sup>270</sup> Judges imposed blended sentences on younger, less-serious offenders, subsequently revoked their probation, primarily for technical violations, and doubled the number of youths sent to prison. Prosecutors used the threat of transfer to coerce youths to plead to blended sentences, to waive procedural rights, to increase punishment imposed in juvenile courts, and to risk exposure to criminal sanctions.<sup>271</sup>

*Juveniles in prison:* Criminal court judges sentence transferred youths like adults, which increases their likelihood of subsequent offending.<sup>272</sup> While all inmates potentially face abuse, adolescents' size, physical strength, lesser social skills, and lack of sophistication increase their risk for physical, sexual, and psychological victimization.<sup>273</sup> To prevent victimization, some states place vulnerable youths in solitary confinement for 23 hours a day.<sup>274</sup> Prisons are developmentally inappropriate places for youths to form an identity, acquire social skills, or make a successful transition to adulthood. Imprisoning them exacts different and greater developmental opportunity costs than those experienced by adults.<sup>275</sup> It disrupts normal development—completing education, finding a job, forming relationships, and creating social bonds that promote desistance—and ground lost may never be regained.

*Policy justifications for waiver—unarticulated and unrealized:* States will prosecute some youths in criminal court as a matter of public safety and political reality. The Get Tough Era targeted violent and drug crimes, increasing the likelihood and severity of criminal sentences, and judges incarcerate transferred youths more often and for longer sentences than youths retained in juvenile courts. Although three-quarters of youths in criminal court convicted of violent felonies went to prison, overall nearly half of all youths are not

270. Podkopacz & Feld, *supra* note 269.

271. *Id.*

272. Edward P. Mulvey & Carol A. Schubert, *Youth in Prison and Beyond*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 843, 845–846.

273. *Id.* at 846–48; Michele Deitch & Neelum Arya, *Waivers and Transfers of Juveniles to Adult Court: Treating Juveniles Like Adult Criminals*, in JUVENILE JUSTICE SOURCEBOOK 241, 252 (Wesley T. Church, David W. Spring & Albert R. Roberts eds., 2014). Cf. Dolovich, *supra* note 7.

274. Deitch & Arya, *supra* note 273, at 252–53.

275. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 135.

convicted or placed on probation, fewer than 25% are sentenced to prison, and 95% are released from custody by their 25th birthday.<sup>276</sup>

Although legislators assumed that threat of transfer and criminal punishment would deter youths, studies of juvenile crime rates before and after passage of punitive laws found no general deterrent effect.<sup>277</sup> Studies of special deterrence report that transferred youths had higher recidivism rates than did those sentenced as delinquents.<sup>278</sup> Studies compared outcomes of youths transferred to criminal courts with those who remained in juvenile courts and concluded that youths tried as adults had higher and faster recidivism rates, especially for violent crimes, than their delinquent counterparts.<sup>279</sup>

Although judges do not imprison all transferred youths, they sometimes treat youthfulness as an aggravating rather than a mitigating factor when they do. More youths convicted of murder received life-without-parole sentences than did adults sentenced for murder.<sup>280</sup> Compared with young adult offenders, juveniles convicted of the same crimes received longer sentences.<sup>281</sup>

Punitive transfer laws targeted violent crimes, which black youths commit more often.<sup>282</sup> Even prior to the Get Tough Era, studies reported racial disparities in judicial transfer decisions. Subsequently, judges transferred youths of color

276. Carol A. Schubert et al., *Predicting Outcomes for Youth Transferred to Adult Court*, 34 LAW & HUM. BEHAV. 460, 467–68 (2010); Deitch & Arya, *supra* note 273, at 251.

277. Benjamin Steiner et al., *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post 1979*, 23 JUST. Q. 34 (2006); Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451 (2006); NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 122.

278. RICHARD E. REDDING, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? (2008); JEFFREY FAGAN, AARON KUPCHICK & AKIVA LIBERMAN, BE CAREFUL WHAT YOU WISH FOR: THE COMPARATIVE IMPACTS OF JUVENILE VERSUS CRIMINAL COURT SANCTIONS ON RECIDIVISM AMONG ADOLESCENT FELONY OFFENDERS (Columbia Law Sch. Working Paper No. 03–62, July 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=491202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=491202).

279. CTR. FOR DISEASE CONTROL, EFFECTS ON VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM 13 (2007); NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 175–76.

280. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1; SNYDER & SICKMUND, *supra* note 3; Benjamin Steiner, *The Effects of Juvenile Transfer to Criminal Court on Incarceration Decisions*, 26 JUST. Q. 77 (2009).

281. SNYDER & SICKMUND, *supra* note 3; Megan Kurlychek & Brian D. Johnson, *Juvenility and Punishment: Sentencing Juveniles in Adult Criminal Court*, 48 CRIMINOLOGY 725 (2010); Megan Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 CRIMINOLOGY 485 (2004).

282. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 216; POE-YAMAGATA & JONES, *supra* note 27, at 12–14.



more often than white youths charged with similar violent and drug crimes.<sup>283</sup> The vast majority of juveniles transferred to criminal court and sentenced to prison are youths of color, primarily blacks.<sup>284</sup>

*Waiver policy: What should a rational legislature do?* Expansive transfer policies further no legitimate penal goals. Equating younger and older offenders ignores developmental differences and disproportionately punishes less blameworthy adolescents. Transfer does not deter youths, because their immature judgment, short-term time perspective, and preference for immediate gains lessen the threat of sanctions.<sup>285</sup> Youths tried as adults reoffend more quickly and more seriously, thereby increasing the risk to public safety and negating any short-term crime reduction due to incapacitation.<sup>286</sup>

The vast majority of juvenile justice scholars agree that *if some youths must be transferred*, then it should occur via a judicial waiver hearing and be used rarely.<sup>287</sup> A state should waive only those youths whose serious *and* persistent offenses require minimum lengths of confinement that greatly exceed the maximum sanctions available in juvenile court. A retributive policy would limit severe sanctions to youths charged with homicide, rape, robbery, or assault with a firearm or substantial injury. However, severely punishing *all* youths who commit serious crimes would be counterproductive, because youths arrested for an initial violent offense desist at similar rates to other delinquents. Chronic offenders may require sentences longer than those available in juvenile court because of persistent criminality and exhaustion of juvenile court resources.

A legislature should prescribe a minimum age of eligibility for criminal prosecution. Developmental psychological and neuroscience research reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise procedural rights for youths 15 or younger. The minimum age for transfer should be 16.

283. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 204–09, 214–18; POE-YAMAGATA & JONES, *supra* note 27, at 17; FELD, *Responses to Youth Violence*, *supra* note 18, at 194.

284. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 23, at 220.

285. Cf. Daniel S. Nagin, "Deterrence," in Volume 4 of the present Report.

286. Cf. Shawn D. Bushway, "Incapacitation," in Volume 4 of the present Report.

287. FELD, BAD KIDS, *supra* note 1; FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1; FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998); Donna Bishop, *Injustice and Irrationality in Contemporary Youth Policy*, 3 CRIMINOLOGY & PUB. POL'Y 633 (2004) [hereinafter Bishop, *Injustice*]; Jeffrey A. Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 FUTURE OF CHILD. 81 (2008).



A juvenile court hearing guided by offense criteria and clinical considerations and subject to rigorous appellate review is the only sensible way to make transfer decisions.<sup>288</sup> Criteria should focus on offenses, prior record, offender culpability, criminal participation, clinical evaluations, and aggravating and mitigating factors, which, taken together, distinguish youths who deserve sentences substantially longer than juvenile courts can impose from those who do not. Appellate courts should closely review waiver decisions and develop substantive principles to define a consistent boundary of adulthood. Although waiver hearings are less efficient than prosecutors' charging decisions, it should be difficult to transfer youths—juvenile courts exist to keep them out of the criminal justice system. An adversarial hearing at which prosecution and defense present evidence about offense, culpability, and treatment prognoses will produce better decisions than will politically motivated prosecutors acting without clinical information.

*B. SENTENCING YOUTHS AS ADULTS: "CHILDREN ARE DIFFERENT"*

The Supreme Court developed its jurisprudence of youth—"children are different"—in response to punitive laws that ignored adolescents' reduced culpability. In a trilogy of cases beginning in 2005, the Court applied the Eighth Amendment prohibition on cruel and unusual punishment to juveniles. *Roper v. Simmons* prohibited states from executing offenders for murder committed prior to 18 years of age.<sup>289</sup> The Justices concluded that youths' immature judgment and lack of self-control, susceptibility to negative peers, and transitory personalities reduced their culpability and precluded the most severe sentence. *Graham v. Florida* extended *Roper's* diminished responsibility rationale and prohibited states from imposing life without parole (LWOP) sentences for non-homicide offenses.<sup>290</sup> It repudiated the Court's Eighth Amendment doctrine that "death is different."<sup>291</sup> *Miller v. Alabama* extended *Roper* and *Graham's* diminished responsibility rationale and barred mandatory LWOP sentences for youths convicted of murder.<sup>292</sup> *Miller* required judges to make individualized culpability assessments and to weigh youthfulness as a mitigating factor.

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288. Feld, *Responses to Youth Violence*, *supra* note 18; FELD, BAD KIDS, *supra* note 1; ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 287; Bishop, *Injustice*, *supra* note 287; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1.

289. *Roper v. Simmons*, 543 U.S. 551 (2005). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, "Capital Punishment," in Volume 4 of the present Report.

290. *Graham v. Florida*, 560 U.S. 48, 67–68 (2010).

291. *Id.* at 74 (Kennedy, J., majority); 102–03 (Thomas, J., dissenting).

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

Despite the Court's repeated assertions that "children are different," *Graham* provided non-homicide offenders very limited relief—"some meaningful opportunity to obtain release"—without requiring either rehabilitative services or eventual freedom. *Miller* required a judge to make an individualized assessment of a juvenile murderer's culpability but did not preclude an LWOP sentence. State courts and legislatures have struggled to implement juveniles' diminished responsibility when sentencing them as adults.

The increased numbers and immaturity of many juveniles sentenced as adults impelled the Court to review states' criminal sentencing laws. *Roper* held that youths are categorically less criminally responsible than adults. *Graham* rejected the Court's "death is different" jurisprudence and reformulated the Court's proportionality analyses to account for the doubly diminished responsibility of juveniles who did not kill. *Miller* barred mandatory LWOP sentences for juveniles who murder and relied on death-penalty precedents to require individualized assessments and to weigh youths' diminished responsibility. State courts and legislatures have struggled unsuccessfully to implement the Court's "children are different" jurisprudence because the opinions' broad language provides scant guidance on several critical questions. This section proposes a Youth Discount—shorter sentences for younger offenders—to formally recognize youthfulness as a mitigating factor.

As noted above, states annually try upward of 200,000 chronological juveniles as adults. The fallacious predictions of an impending bloodbath by super-predators propelled punitive policies.<sup>293</sup> States lowered the age for transfer, increased the number of excluded offenses, and shifted discretion from judges to prosecutors. These changes in transfer laws exacerbated racial disparities. Racial stereotypes taint culpability assessments and reduce youthfulness's mitigating role.<sup>294</sup> Children of color constitute the majority of juveniles tried in criminal court and three-quarters of those who enter prison.<sup>295</sup> For adults, states' criminal laws lengthened sentences, adopted mandatory minimums, and imposed mandatory life without parole for homicide and other crimes.<sup>296</sup>

293. WILLIAM BENNET & JOHN DIJULIO, *BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 21–34 (1996); ZIMRING, *AMERICAN YOUTH VIOLENCE*, *supra* note 287.

294. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juveniles Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 561 (1998); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 488–95 (2004); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 850–51 (2010).

295. AMNESTY INT'L, *supra* note 255, at 6; POE-YAMAGATA & JONES, *supra* note 27, at 34.

296. MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011); MICHAEL TONRY, *SENTENCING MATTERS* (1996); Luna, *supra* note 22.

They apply equally to juveniles as to adults; judges sentenced them as if they were adults and sent them to the same prisons.

1. *Roper v. Simmons*: Death penalty for juveniles

The Eighth Amendment prohibits states from inflicting cruel and unusual punishments.<sup>297</sup> Prior to *Roper v. Simmons*, the Court thrice considered whether it prohibited states from executing juveniles convicted of murder.<sup>298</sup> In 1989, *Stanford v. Kentucky* upheld the death penalty for 16- or 17-year-olds convicted of murder and allowed juries to assess their personal culpability.<sup>299</sup> In 2005, *Roper* overruled *Stanford* and prohibited states from executing youths for crimes committed prior to 18.<sup>300</sup>

*Roper* gave three reasons why states could not punish juveniles as severely as adults. First, their immature judgment and limited self-control causes them to act impulsively and without adequate appreciation of consequences.<sup>301</sup> Second, their susceptibility to negative peers and inability to escape crime-inducing environments reduces their responsibility.<sup>302</sup> Third, their transitory personality provides less reliable evidence of enduring blameworthiness.<sup>303</sup> Because juveniles' character is transitional, the Court concluded that there is a great likelihood that they can be reformed.<sup>304</sup> For *Roper*, youths' diminished responsibility undermined retributive justifications for the death penalty.<sup>305</sup> Similarly, the Court concluded that impulsiveness and limited self-control weakened any deterrent effect.<sup>306</sup> *Roper* imposed a categorical ban rather than to allow juries to evaluate youths' culpability individually because the "*unacceptable likelihood* exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe

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297. U.S. CONST. amend. VIII.

298. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

299. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

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

301. *Id.* at 569.

302. *Id.* at 569–70.

303. *Id.* at 570.

304. *Id.*

305. *Id.* at 571.

306. *Id.*

than death.”<sup>307</sup> Because a brutal murder could overwhelm the mitigating role of youthfulness, *Roper* used age as a categorical proxy for reduced culpability.

*Roper* reasoned that immature judgment, susceptibility to peer and environmental influences, and transitional personalities reduced adolescents’ criminal responsibility. *Roper*—and subsequently *Graham* and *Miller*—analyzed youths’ reduced culpability within a retributive sentencing framework—proportionality and deserved punishment. Retributive sentencing proportions punishment to a crime’s seriousness.<sup>308</sup> A crime’s seriousness is defined by two elements—harm and culpability—which determine how much punishment an actor deserves. An offender’s age has no bearing on the harm caused—children and adults can cause the same injuries. But proportionality requires consideration of an offender’s culpability, and immaturity reduces youths’ blameworthiness.<sup>309</sup> Youths’ inability to fully appreciate wrongfulness or control themselves lessens, but does not excuse, responsibility for causing harms. They may have the minimum capacity to be criminally liable—ability to distinguish right from wrong—but deserve less punishment.<sup>310</sup>

Developmental psychology focuses on how children and adolescents’ thinking and behaving change with age.<sup>311</sup> By mid-adolescence, most youths reason similarly to adults, for example, when they make informed-consent medical decisions.<sup>312</sup> But the ability to make reasonable decisions with complete information under laboratory conditions differs from the ability to act responsibly under stress with incomplete information. Emotions influence

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307. *Id.* at 572–73; Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 J.L. & INEQUALITY 263 (2013) [hereinafter Feld, *Adolescent Criminal Responsibility*]; Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107 (2013) [hereinafter Feld, *Youth Discount*].

308. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 589–91 (2005); see also Jeffrie G. Murphy, “Retribution,” in Volume 4 of the present Report.

309. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 822 (2003) [hereinafter Scott & Steinberg, *Blaming Youth*]; Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271 (Thomas Grisso & Robert Schwartz eds., 2000) [hereinafter Zimring, *Penal Proportionality*]; SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 123–24.

310. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 121–22; Zimring, *Penal Proportionality*, *supra* note 309, at 278.

311. NAT’L RESEARCH COUNCIL, *THE SCIENCE OF ADOLESCENT RISK-TAKING: WORKSHOP REPORT 48–49* (2011) [hereinafter NAT’L RESEARCH COUNCIL, *ADOLESCENT RISK-TAKING*].

312. NAT’L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE*, *supra* note 1, at 95.

youths' judgment and compromise their decision-making and self-control.<sup>313</sup> Youths are more heavily influenced by the reward centers of the brain, contributing to riskier decisions.<sup>314</sup>

In response to states' adoption of punitive laws, in 1995 the John D. and Catherine T. MacArthur Foundation sponsored the Adolescent Development and Juvenile Justice (ADJJ) Research Network. Over the next decade, the ADJJ Network conducted research on adolescent decision-making, judgment, and adjudicative competence.<sup>315</sup> The research distinguishes between cognitive abilities and judgment and self-control—controlled thinking versus impulsive behaving.<sup>316</sup> Cognitive capacities involve understanding (the ability to comprehend information) and reasoning (the ability to use information logically). Self-control requires the ability to think before acting, to choose between alternatives, and to interrupt a course in motion.<sup>317</sup> Although 16-year-olds' understanding and reasoning approximate adults', their ability to exercise mature judgment and control impulses takes several more years to emerge.<sup>318</sup>

Youths differ from adults in risk perception, appreciation of consequences, impulsivity and self-control, sensation-seeking, and compliance with peers.<sup>319</sup> The regions of the brain that control reward-seeking and emotional arousal develop earlier than do those that regulate executive functions and impulse control.<sup>320</sup> Adolescents underestimate the amount and likelihood of risks, emphasize immediate outcomes, focus on anticipated gains rather than possible losses to a greater extent than adults, and consider fewer options.<sup>321</sup> They weigh costs and benefits differently, apply dissimilar subjective values to outcomes,

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313. *Id.* at 91; NAT'L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 39; LINDA P. SPEAR, THE BEHAVIORAL NEUROSCIENCE OF ADOLESCENCE 139–40 (2010); Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001).

314. Dahl, *supra* note 313, at 62; NAT'L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 40.

315. MACARTHUR FOUND., DEVELOPMENT AND CRIMINAL BLAMEWORTHINESS (2006); NELLIS, *supra* note 20, at 79–82.

316. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 131–39; Jennifer L. Woolard, *Adolescent Development, Delinquency, and Juvenile Justice*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 107–8 (2012).

317. Woolard, *supra* note 316, at 108.

318. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 36–37; LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 69 (2014); Scott & Steinberg, *Blaming Youth*, *supra* note 309, at 813.

319. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 2; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 37–44.

320. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 48.

321. SPEAR, *supra* note 313, at 137–39; Woolard, *supra* note 316, at 109–10.

and more heavily discount negative future consequences than more immediate rewards.<sup>322</sup> They have less experience and knowledge to inform decisions about consequences. They prefer an immediate albeit smaller reward than do adults who can better delay gratification.<sup>323</sup> In a risk-benefit calculus, youths may view *not* engaging in risky behaviors differently than adults.<sup>324</sup> Researchers attribute youths' impetuous decisions to a heightened appetite for emotional arousal and intense experiences, which peaks around 16 or 17.<sup>325</sup>

*Neuroscience and adolescent brain development:* Neuroscience research reports that the human brain continues to mature until the early to mid-20s. Adolescents on average do not have adults' neuro-biological capacity to exercise mature judgment or control impulses.<sup>326</sup> The relationship between two brain regions—the prefrontal cortex (PFC) and the limbic system—underlies youths' propensity for risky behavior.<sup>327</sup> The PFC is responsible for judgment and impulse control. The amygdala and limbic system regulate emotional arousal and reward-seeking behavior.<sup>328</sup> The PFC performs executive functions—reasoning, planning, and impulse control.<sup>329</sup> These top-down capabilities develop gradually and enable individuals to exercise greater self-control.<sup>330</sup>

322. NAT'L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 54–56.

323. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 91, 93.

324. NAT'L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 50; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1; Scott & Steinberg, *Blaming Youth*, *supra* note 309.

325. NAT'L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 42; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 91–92; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 45; SPEAR, *supra* note 313, at 140–41; Barry C. Feld, B.J. Casey & Yasmin Hurd, *Adolescent Competence and Culpability: Implications of Neuroscience for Juvenile Justice Administration*, in A PRIMER ON CRIMINAL LAW AND NEUROSCIENCE 179 (Stephen J. Morse & Adina L. Roskies eds., 2013); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 163 (1997) [hereinafter Scott & Grisso, *Evolution of Adolescence*].

326. SPEAR, *supra* note 313; NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE, *supra* note 1, at 96–100.

327. Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010) [hereinafter Steinberg, *Dual Systems*]; Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78 (2008) [hereinafter Steinberg, *Social Neuroscience*].

328. Feld, Casey & Hurd, *supra* note 325; Scott & Steinberg, *Blaming Youth*, *supra* note 309, at 816.

329. SPEAR, *supra* note 313, at 102–09; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000).

330. NAT'L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 37.

During adolescence, two processes—myelination and synaptic pruning—enhance the PFC’s functions.<sup>331</sup> Myelin is a white fatty substance that forms a sheath around neural axons, facilitates more efficient neuro-transmission, and makes communication between different brain regions faster and more reliable.<sup>332</sup> Synaptic pruning involves selective elimination of unused neural connections, promotes greater efficiency, speeds neural signals, and strengthens the brain’s ability to process information.<sup>333</sup>

The limbic system controls emotions, reward-seeking, and instinctual behavior—the fight-or-flight response.<sup>334</sup> The PFC and limbic systems mature at different rates and adolescents rely more heavily on the limbic system—bottom-up emotional processing rather than the top-down cognitive regulatory system.<sup>335</sup> The developmental lag between the PFC regulatory system and the reward- and pleasure-seeking limbic system contributes to impetuous behavior driven more by emotions rather than reason.<sup>336</sup> The imbalance between the impulse-control and reward-seeking systems contributes to youths’ poor judgment, impetuous behavior, and criminal involvement.<sup>337</sup>

Roper attributed juveniles’ diminished responsibility to greater susceptibility to peer influences. As their orientation shifts toward peers, youths’ quest for acceptance and affiliation makes them more susceptible to influences than they will be as adults.<sup>338</sup> Peers increase youths’ propensity to take risks, because their presence stimulates the brain’s reward centers.<sup>339</sup>

Neuroscience research about brain development bolsters social scientists’ observations about adolescents’ impulsive behavior and impaired self-control. Despite impressive advances, neuroscientists have not established a direct

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331. STEINBERG, AGE OF OPPORTUNITY, *supra* note 318, at 31–33.

332. SPEAR, *supra* note 313, at 64.

333. NAT’L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 37; SPEAR, *supra* note 313, at 75–76; STEINBERG, AGE OF OPPORTUNITY, *supra* note 318, at 26; Feld, Casey & Hurd, *supra* note 325, at 189–91.

334. SPEAR, *supra* note 313, at 68–69; STEINBERG, AGE OF OPPORTUNITY, *supra* note 318, at 72–74.

335. SPEAR, *supra* note 313, at 180; Feld, Casey & Hurd, *supra* note 325, at 191–93.

336. NAT’L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 38; STEINBERG, AGE OF OPPORTUNITY, *supra* note 318, at 74; Dahl, *supra* note 313, at 64; Steinberg, *Social Neuroscience*, *supra* note 327; Steinberg, *Dual Systems*, *supra* note 327, at 161–62.

337. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 48; Feld, Casey & Hurd, *supra* note 325, at 193–94; Steinberg, *Social Neuroscience*, *supra* note 327; Steinberg, *Dual Systems*, *supra* note 327, at 162.

338. NAT’L RESEARCH COUNCIL, ADOLESCENT RISK-TAKING, *supra* note 311, at 50; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 35, 50–51; SPEAR, *supra* note 313, at 155–57.

339. STEINBERG, AGE OF OPPORTUNITY, *supra* note 318, at 77, 98; Scott & Steinberg, *Blaming Youth*, *supra* note 309, at 815.



link between brain maturation and behavior or found ways to individualize assessments of developmental differences.<sup>340</sup>

## 2. *Graham v. Florida*: LWOP for non-homicide juvenile offenders

Prior to *Graham v. Florida*, the Court long had asserted that “death is different.”<sup>341</sup> *Graham* extended *Roper*’s diminished responsibility rationale to non-homicide offenders who received LWOP sentences. *Graham* raised “a categorical challenge to a term of years sentence”—a life-without-parole sentence applied to the category of juveniles.<sup>342</sup> *Graham* repudiated the Court’s “death is different” distinction, extended *Roper*’s reduced culpability rationale to term-of-year sentences, and “declare[d] an entire class of offenders immune from a noncapital sentence.”<sup>343</sup> *Graham* rested on three features—offender, offense, and sentence. It reiterated *Roper*’s rationale that juveniles’ reduced culpability warranted less severe penalties than those imposed on adults convicted of the same crime. Unlike *Roper*, *Graham* explicitly based young offenders’ diminished responsibility on developmental and neuroscience research.<sup>344</sup>

Focusing on the offense, *Graham* invoked the Court’s felony-murder death-penalty decisions and concluded that even the most serious non-homicide crimes “cannot be compared to murder in their ‘severity and irrevocability.’”<sup>345</sup> The combination of diminished responsibility and a non-homicide crime made an LWOP sentence grossly disproportional.<sup>346</sup>

Finally, the Court equated an LWOP sentence for a juvenile with the death penalty.<sup>347</sup> *Graham* found no penal rationale—retribution, deterrence, incapacitation, or rehabilitation—justified the penultimate sanction for non-homicide juvenile offenders. While incapacitation might reduce future offending, judges could not reliably predict at sentencing whether a juvenile

340. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 46; STEINBERG, *AGE OF OPPORTUNITY*, *supra* note 318, at 4; Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 769 (2011); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 405–06 (2006); Stephen J. Morse, *New Neuroscience, Old Problems*, in *NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE* 157 (Brent Garland ed., 2004).

341. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

342. *Graham v. Florida*, 560 U.S. 48, 60–63 (2010).

343. *Id.* at 102.

344. *Id.* at 67–68.

345. *Id.* at 50; *Kennedy v. Louisiana*, 554 U.S. 407, 428 (2008); *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

346. *Graham*, 560 U.S. at 48, 69.

347. *Id.* at 70.



would pose a future danger to society. Most states denied vocational training or rehabilitative services to youths sentenced to LWOP in favor of those who might return to the community.

Although *Graham* adopted a categorical rule, it only required states to provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>348</sup> It did not prescribe states’ responsibility to provide resources with which to change or specify when youths might become eligible for parole. Parole consideration would not guarantee young offenders’ release, and some might remain confined for life.<sup>349</sup> Although *Graham* barred LWOP for juveniles convicted of non-homicide crimes, many more youths are serving de facto life sentences—aggregated mandatory minimums or consecutive terms totaling 50 to 100 years or more—than those formally sentenced to LWOP. Some state courts have found that very long sentences imposed on a juvenile convicted of several non-homicide offenses did not provide a meaningful opportunity to obtain release.<sup>350</sup> By contrast, other courts read *Graham* narrowly, limit its holding to formal LWOP sentences, and uphold consecutive terms that exceed youths’ life expectancy.<sup>351</sup>

### 3. *Miller v. Alabama*: Mandatory LWOP for juveniles convicted of murder

When the Court decided *Miller v. Alabama*, 42 states permitted judges to impose LWOP sentences on any offender—adult or juvenile—convicted of murder.<sup>352</sup> In 29 states, LWOP sentences were mandatory for those convicted of murder, precluded consideration of actors’ culpability or degree of participation, and equated juveniles’ criminal responsibility with adults. Courts regularly upheld mandatory LWOP and extremely long sentences imposed on children as young as 12 or 13.<sup>353</sup> One in six juveniles who received an LWOP sentence was 15 or younger; for more than half, it was their first-ever conviction.<sup>354</sup> Although states may not execute a felony murderer who did not kill or intend to kill, one-quarter to one-half of juveniles who received LWOP sentences were convicted as accessories to a felony murder.<sup>355</sup> Although the Supreme Court

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348. *Id.* at 75.

349. *Id.* at 82.

350. *People v. Caballero*, 282 P.3d 291, 296 (Cal. 2012); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013).

351. *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012).

352. AMNESTY INT’L, *supra* note 255, at 25 n.44.

353. *Id.* at 1; Feld, *Adolescent Criminal Responsibility*, *supra* note 307; Feld, *Youth Discount*, *supra* note 307.

354. AMNESTY INT’L, *supra* note 255, at 1–6.

355. *Id.* at 27–28; HUM. RTS. WATCH, *WHEN I DIE ... THEY’LL SEND ME HOME: YOUTH SENTENCED TO LIFE IN PRISON WITHOUT PAROLE IN CALIFORNIA—AN UPDATE 4* (2012).

viewed youthfulness as a mitigating factor, many trial judges treated it as an aggravating factor and sentenced young murderers more severely than adults convicted of murder.<sup>356</sup>

*Miller v. Alabama* extended *Roper* and *Graham* and banned *mandatory* LWOP for youths convicted of murder.<sup>357</sup> *Graham* equated a non-homicide LWOP sentence with the death penalty. *Miller* invoked death-penalty cases that barred *mandatory* capital sentences and required an individualized culpability assessment before a judge could impose LWOP on a juvenile murderer.<sup>358</sup> *Miller* emphasized that “children are constitutionally different from adults for purposes of sentencing” and “mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.”<sup>359</sup> The Court asserted that once judges considered a youth’s diminished responsibility individually, very few cases would warrant LWOP.<sup>360</sup>

The Court’s recognition that children are different reflected a belated corrective to states’ punitive excesses, but its Eighth Amendment authority to regulate their sentencing policies is very limited. *Graham* and *Miller* raised as many questions as they answered. Several years after *Miller* held mandatory LWOP unconstitutional, the Court in *Montgomery v. Louisiana* resolved lower courts’ conflicting decisions about *Miller*’s retroactive application to more than 2,500 youths sentenced prior to the decision, and ruled that youths who received a mandatory LWOP prior to *Miller* would be eligible for resentencing or parole consideration.<sup>361</sup>

*Miller* gave lawmakers and judges minimal guidance to make culpability assessments. The factors it described—age, immaturity, impetuosity, family and home environment, circumstances of and degree of participation in the

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356. AMNESTY INT’L, *supra* note 255, at 33; HUM. RTS. WATCH, *supra* note 355, at 4; Kurlychek & Johnson, *supra* note 281; Tanenhaus & Drizin, *supra* note 128, at 665; Kurlychek & Johnson, *Juvenility and Punishment*, *supra* note 281; Kurlychek & Johnson, *The Juvenile Penalty*, *supra* note 281.

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

358. *Sumner v. Shuman*, 483 U.S. 66 (1987); *Woodson v. North Carolina*, 428 U.S. 280 (1976); Feld, *Adolescent Criminal Responsibility*, *supra* note 307; Feld, *Youth Discount*, *supra* note 307.

359. *Miller*, 567 U.S. at 471, 476.

360. *Id.* at 479.

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

offense, youthful incompetence, and amenability to treatment—give expression to judges' subjective discretion.<sup>362</sup> State courts' interpretations and legislatures' responses to *Miller* vary substantially.<sup>363</sup>

*Miller* required 29 states to revise mandatory LWOP statutes to provide for individualized assessments. Some states adopted *Miller* factors for judges to consider. A few states abolished juvenile LWOP sentences entirely; others replaced them with minimum sentences ranging from 25 years to life with periodic reviews, or determinate sentences of 40 years to life.<sup>364</sup> Other states provide age-tiered minimum sentences for parole consideration—25 years for youths 14 or younger convicted of murder; 35 years for those 15 or older. None of these changes approximate the American Law Institute's Model Penal Code recommendations that juveniles should be eligible for parole consideration after 10 years.

State courts are divided on whether *Miller* applies to mandatory sentences other than murder that preclude consideration of youthful mitigation. Several post-*Miller* courts have approved 25-year mandatory minimum sentences without any individualized culpability assessments, whereas others have found all mandatory minimum sentences violated the state constitution.<sup>365</sup>

*Miller's* prohibition of mandatory LWOP may affect transfer provisions—offense exclusion and prosecutorial direct file—that do not provide individualized assessments. Both result in automatic adulthood without any knowledge of a juvenile's circumstances, opportunity to present mitigating evidence, or appellate review.

*Youth Discount:* There is a straightforward alternative to the confusion and contradiction reviewed above. States should formally incorporate youthfulness as a mitigating factor in sentencing statutes. Youthful mitigation does not excuse criminality, and it holds juveniles accountable for their crimes—but it proportions punishment to their diminished responsibility.<sup>366</sup> *Roper* and

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362. *Miller*, 567 U.S. at 477–80.

363. *People v. Chavez*, 228 Cal. App. 4th 18, 34 (2014); *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014); *People v. Carp*, 852 N.W.2d 801 (Mich. 2014); *Commonwealth v. Knox*, 50 A.3d 749, 769 (Pa. Super. 2012); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787 (2016).

364. SENT'G PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE (2014); Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PENN. J. CONST. L. 929, 975–76 (2015).

365. *State v. Lyle*, 854 N.W.2d 378, 409–10 (Iowa 2014).

366. AMNESTY INT'L, *supra* note 255, at 113; FELD, BAD KIDS, *supra* note 1; ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 287; Feld, *Youth Discount*, *supra* note 307; Scott & Grisso, *Evolution of Adolescence*, *supra* note 325; *Lyle*, 854 N.W.2d at 398; *State v. Null*, 836 N.W.2d 41, 75 (Iowa 2013).

*Graham* adopted a categorical prohibition because the Court feared that a judge or jury could not properly consider youthful mitigation when confronted with a heinous crime.<sup>367</sup>

There are two reasons to prefer a categorical rule over individualized discretion. First, judges and legislators cannot define or identify what constitutes adult-like culpability. Culpability is not an objectively measurable thing, but a subjective judgment about criminal responsibility. Development is highly variable—a few youths may achieve competencies prior to 18 years of age, while many others may not attain maturity even as adults. Despite individual developmental differences, clinicians lack tools with which to assess youths' impulsivity, foresight, and preference for risk, or a metric by which to relate maturity of judgment with criminal responsibility.<sup>368</sup> The inability to define, measure, or diagnose immaturity or validly to identify a few responsible youths introduces a systematic bias to over-punish less-culpable juveniles.<sup>369</sup> The law uses age-based categorical lines to approximate the level of maturity required for particular activities—voting, driving, and consuming alcohol—and restricts youths without individualized assessments of maturity.

The second reason to adopt a categorical rule of youthful mitigation is judges' or juries' inability to fairly weigh the abstraction of diminished responsibility against the aggravating reality of a horrific crime. *Roper* rightly feared that jurors could not distinguish between a person's diminished responsibility for causing a harm and the harm itself, and that the heinousness of a crime would trump reduced culpability in jurors' minds.<sup>370</sup> When courts sentence minority offenders, unconscious racial stereotypes compound the difficulties of assessing immaturity. Treating youthfulness categorically is a more efficient way to address immaturity when every juvenile can claim some degree of diminished responsibility.

The abstract meaning of culpability, the inability to measure or compare moral agency of youths, administrative complexity of individualization, and the tendency to overweigh harm require a clear-cut alternative. A categorical Youth Discount would give all adolescents fractional reductions in sentence

367. *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

368. FELD, EVOLUTION OF JUVENILE COURT, *supra* note 1; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 140.

369. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1; James C. Howell, Barry C. Feld, & Daniel P. Mears, *Young Offenders and an Effective Justice System Response*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION, *supra* note 50, at 200, 229; Scott & Steinberg, *Blaming Youth*, *supra* note 309.

370. *Roper*, 543 U.S. at 553–54.

lengths based on age as a proxy for reduced culpability.<sup>371</sup> While age may be an incomplete proxy for maturity or culpability, no better bases exist on which to distinguish among young offenders. *Miller* recognized that same-length sentences exact a greater penal bite from younger offenders than older ones.<sup>372</sup> Imprisonment per se is more developmentally disruptive and onerous for adolescents than adults.<sup>373</sup>

A statutory Youth Discount would require judges to give substantial reductions to youths based on a sliding scale of diminished responsibility, with the largest reductions to the youngest offenders.<sup>374</sup> If tried as an adult, a 14-year-old would receive a sentence substantially shorter than those an adult would receive—perhaps 10% or 20% of the adult length. A 16-year-old would receive a maximum sentence no more than one-third or half the adult length. Deeper discounts for younger offenders correspond with their greater developmental differences in judgment and self-control. A judge can more easily apply a Youth Discount in states that use sentencing guidelines under which present offense and prior record dictate presumptive sentences. In less structured sentencing systems, a judge would have to determine the going rate or appropriate sentence for an adult convicted of that offense and then reduce it by the Youth Discount.

The Youth Discount's diminished responsibility rationale would preclude mandatory, LWOP, or de facto life sentences for young offenders.<sup>375</sup> Although some legislators may find it difficult to resist penal demagoguery, states can achieve all of their legitimate penal goals by sentencing youths to a maximum of no more than 20 or 25 years for even the most serious crimes as recommended by the American Law Institute's *Model Penal Code*.<sup>376</sup> Several

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371. FELD, BAD KIDS, *supra* note 1; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1, at 139; Feld, *Adolescent Criminal Responsibility*, *supra* note 307; Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9 (2008); Feld, *Youth Discount*, *supra* note 307; Howell, Feld & Mears, *supra* note 369.

372. *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012).

373. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) [hereinafter Feld, *Abolish Juvenile Court*]; Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?*, 3 PUNISHMENT & SOC'Y 221, 227 (2001).

374. Feld, *Abolish Juvenile Court*, *supra* note 373; Scott & Steinberg, *Blaming Youth*, *supra* note 309; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1.

375. AMNESTY INT'L, *supra* note 255; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1; Howell, Feld & Mears, *supra* note 369.

376. MODEL PENAL CODE: SENTENCING § 6.11A(g) (Am. Law Inst., Proposed Final Draft, approved May 24, 2017).

juvenile justice analysts and policy groups have endorsed the Youth Discount as a straightforward way to proportionally reduce sentences for younger offenders.<sup>377</sup> A National Institute of Justice study group concluded that youths' diminished responsibility required mitigated sanctions for youths sentenced as adults.<sup>378</sup> The American Bar Association condemned juvenile LWOP sentences, proposing that statutes formally recognize youthfulness as a mitigating factor, and provide for earlier parole release consideration.

## RECOMMENDATIONS

The time is right to reform juvenile courts' jurisdiction, jurisprudence, and procedures.

1. **Higher age limits for juvenile court jurisdiction.** Although most states' juvenile court jurisdiction extends to youths under 18 years of age, North Carolina sets the boundary at 16, and 10 states set it at 17. Developmental psychology and neuroscience research strengthens the case to raise the age of jurisdiction to 18 in every state. Indeed, it would be appropriate to extend to young adults who are 18 to 21 years old some of the protections associated with juvenile courts—shorter sentences like a Youth Discount, rehabilitative treatment in separate facilities, protected records, and the like. Many European countries' criminal laws provide separate young-adult sentencing provisions and institutions to afford greater leniency and use of rehabilitative measures.<sup>379</sup>
2. **Greater use of diversion and prevention programs.** Most youths involved with the juvenile justice system will outgrow their youthful indiscretion without significant interventions. We can facilitate desistance by reinforcing the two-track system—one informal, one formal—proposed by the President's Crime Commission a half-century ago. For youths who require services, diversion to community resources provides a more efficient and flexible alternative to adjudication and disposition. If states explicitly forgo home removal, then juvenile courts can use summary processes to make non-custodial dispositions. *Scott v. Illinois* prohibits incarceration without representation. *Alabama v. Shelton* prohibits revocation and confinement of an unrepresented defendant who violated

377. SCOTT & STEINBERG, *RETHINKING JUVENILE JUSTICE*, *supra* note 1, at 246; Tanenhaus & Drizin, *supra* note 128, at 697–98.

378. Howell, Feld, & Mears, *supra* note 369, at 213.

379. Rolf Loeber et al., *Overview, Conclusions, and Key Recommendations*, in *FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION*, *supra* note 50, at 315, 350–51.

probation.<sup>380</sup> *Baldwin v. New York* affords a jury to any person facing the prospect of six months' incarceration. By foregoing home removal or incarceration, states can administer a streamlined justice system for most youths. Diversion raises its own issues because low-visibility decisions contribute to racial disparities at the front end.<sup>381</sup> States can adopt formal criteria, risk-assessment instruments, data collection, and ongoing monitoring to rationalize decisions and reduce disparities. Finally, an ounce of prevention is worth a pound of cure. Prevention programs that target at-risk youths, families, and communities have demonstrated effectiveness, provide cost/benefit returns, and would reduce the number of youths referred to juvenile courts in the first instance.

3. **Increase procedural safeguards, including the right to a jury.** For youths facing detention and confinement, juvenile courts *are* criminal courts and require criminal procedural safeguards, including the right to a jury. Increasing protections and costs of formal adjudication provide financial and administrative incentives to divert more youths. Although delinquency sanctions are shorter than those imposed by criminal courts, it is disingenuous to claim that they do not pursue deterrent, incapacitative, and retributive goals. Apart from those who pose a risk of flight, states should reserve secure detention for youths whose offense and prior record indicate that they likely would be removed from home if convicted. Risk-assessment instruments, other JDAI strategies, and effective assistance of counsel could reduce pretrial detention and disproportionate minority confinement. Juvenile court interventions should keep youths in their communities and avoid out-of-home placements and secure confinement to the greatest extent possible and use evidence-based programs to rehabilitate and reintegrate them.

The procedural safeguards of juvenile courts should be greatly enhanced to compensate for adolescents' developmental immaturity: automatic competency assessment for children younger than 14, mandatory presence of counsel during interrogation for those younger than 16, and mandatory non-waivable counsel for youths in court proceedings. Any system of

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380. *Alabama v. Shelton*, 535 U.S. 654, 657–58 (2002).

381. Daniel P. Mears, *The Front End of the Juvenile Court: Intake and Informal Versus Formal Processing*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 8, at 573.



justice will fail without a robust public-defender system to enable youths to exercise rights. Delinquents should enjoy the right to a jury trial to assure reliability of convictions and to increase the visibility and accountability of judges, prosecutors, and defense lawyers. States should strengthen appellate oversight of delinquency proceedings. Records of youths should be easily sealed or expunged to reduce impediments to education and employment. Collateral consequences of delinquency convictions should be eliminated.

4. **Require judicial waiver hearings, guided by specific criteria, to determine which youths should be tried as adults and a Youth Discount for those convicted and sentenced as adults.** For those few youths whom policymakers believe should be tried as adults, a judicial waiver hearing guided by offense criteria and clinical considerations and subject to rigorous appellate review is the only sensible way to make transfer decisions.<sup>382</sup> Criteria should focus on serious offenses and extensive prior records, criminal participation, clinical evaluations, and aggravating and mitigating factors, which, taken together, distinguish the few youths who might deserve sentences substantially longer than the maximum sanctions that juvenile courts can impose. Appellate courts should closely review waiver decisions and develop substantive principles to define a consistent boundary of adulthood. A legislature should prescribe a minimum age of eligibility for criminal prosecution. Developmental psychological and neuroscience research reports a sharp drop-off in judgment, self-control, and appreciation of consequences as well as in competence to exercise rights for youths 15 or younger. The minimum age for transfer should be 16. Sentences of youths convicted as adults should be substantially reduced—a Youth Discount—to reflect their diminished culpability. Once judges properly consider youths' generic developmental limitations and diminished responsibility, there would be very few youths or crimes for which prosecution as an adult would be appropriate.<sup>383</sup>

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382. FELD, BAD KIDS, *supra* note 1; SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 1; ZIMRING, AMERICAN YOUTH VIOLENCE, *supra* note 287; Bishop, *Injustice*, *supra* note 287; Feld, *Responses to Youth Violence*, *supra* note 18.

383. Cf. *Miller v. Alabama*, 567 U.S. 460, 479 (2012).



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## CONCLUSION

It will take political courage for legislators to enact laws that recognize the diminished responsibility of serious young offenders. It will take even greater political courage when an opponent may charge a lawmaker with being “soft on crime.” The Get Tough Era produced punitive delinquency sanctions, and unjust and counterproductive waiver and criminal sentencing laws, all of which had a disproportional impact on black youths and other children of color. The legislators who enacted them are obliged to undo the damage and adopt sensible policies that reflect our greater understanding of adolescent development: “children are different.”





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