

March 2020

Clemency, Pardons, and Reform: When People Released Return to Prison

Jessica Jackson

Follow this and additional works at: <https://ir.stthomas.edu/ustlj>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Judges Commons](#), [Other Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Jessica Jackson, *Clemency, Pardons, and Reform: When People Released Return to Prison*, 16 U. ST. THOMAS L.J. 373 (2020).

Available at: <https://ir.stthomas.edu/ustlj/vol16/iss3/4>

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ARTICLE

**CLEMENCY, PARDONS, AND REFORM:
WHEN PEOPLE RELEASED
RETURN TO PRISON**

JESSICA JACKSON*

I. INTRODUCTION	374
II. THE EBBS AND FLOWS OF AMERICAN CLEMENCY	375
A. By Presidents	375
B. By State Governors	377
1. The Pennsylvania Experience	377
2. Trends in Other States	380
III. THE CARCERAL VICTIMS' RIGHTS MOVEMENT AS AN OUTGROWTH OF WILLIE HORTON FEARS	381
A. The "Right to be Heard" as the Right to Protest Plea Deals as Too Lenient	384
B. Effects of the Advocacy Push for Named-Victim Laws ..	385
C. The Current Campaign for Marsy's Law	388
IV. HOW LAWYERS CAN ENGAGE WITH THE MEDIA TO INCREASE SECOND CHANCES	389
A. News Outlets Shifting Their Practices	391
B. Anti-Mass Incarceration Lawyers Pushing Back	392
C. The Power of Storytelling for Second Chances	394
V. POTENTIAL LEGAL SAFEGUARDS FOR THE GOVERNMENT'S EXERCISE OF MERCY	396
A. Remove the Pardon Attorney from the Department of Justice	396
B. Reestablish Federal Parole	397

* Chief advocacy officer at Reform Alliance and former national director for DreamCorps' #cut50. Jessica Jackson is a human rights attorney who began her career representing people on death row in their appeals. She served as national director for DreamCorps' #cut50 initiative to end mass incarceration and oversaw state and federal efforts including the passage of the First Step Act. Jessica also spent six years on the Mill Valley City Council and served as mayor of Mill Valley before stepping into her current role as chief advocacy officer at Reform Alliance, where she is committed to dramatically reducing the number of people who are unjustly under the control of the criminal justice system—starting with probation and parole.

C. Establish a “Second-Look” Sentencing Law 397
 VI. CONCLUSION 398

I. INTRODUCTION

As someone who has worked on both clemencies and criminal justice reform, I have seen firsthand how fear often takes center stage during deliberations. While considering clemency petitions, those in the executive branch frequently entertain questions like: *Is he too young?* and *Is he able-bodied enough to commit more crimes?* When being asked to pass laws that would reduce people’s prison sentences or even let them out, lawmakers often worry that someone released will commit a new crime and that it will be used against them in their next campaign.

One of the reasons for this is that the legacy of the Willie Horton campaign is alive and well within decisionmakers’ offices. Over thirty years ago, the George H. W. Bush presidential campaign introduced Willie Horton to Americans across the country in a television advertisement.¹ Bush supporters slammed presidential candidate and former Massachusetts Governor Michael Dukakis for letting Horton out on furlough while serving his sentence for murder.² Tragically, while on furlough, Horton committed several new crimes, including a rape.³ The new crimes and subsequent Bush advertisement devastated Dukakis’s bid for the White House and signaled to politicians nationally that tempering justice with mercy would not be tolerated, unless it was associated with perfect public safety outcomes.⁴

The Willie Horton fallout, however, was not just a one-off event. In the following decades, the carceral side of the victims’ rights movement replicated the tactics of the advertisement, using extremely rare outlier crimes to demand the most draconian criminal justice policies.⁵ Some of the advocates for these changes were the grieving family members of child murder victims: people who have experienced devastating tragedy.⁶ Many of these advocates courageously told compelling and heartbreaking stories, which the media sometimes used to play to the most alarmist instincts of its audience.⁷ In addition to seizing on the most sensational aspects of these devastating events, the narratives were also ripe for media manipulation and

1. Doug Criss, *This is the 30-Year-Old Willie Horton Ad Everybody is Talking About Today*, CNN (Nov. 1, 2018, 6:17 PM), <https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html>.

2. Carl M. Cannon, Commentary, *Debunking the Willie Horton Ad Controversy*, REALCLEARPOLITICS (Dec. 9, 2018), https://www.realclearpolitics.com/articles/2018/12/09/debunking_the_willie_horton_ad_controversy_138879.html.

3. *Id.*

4. Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

5. BEN NOTTERMAN, NYU LAW, CTR. ON THE ADMIN. OF CRIM. L., *WILLIE HORTON’S SHADOW: CLEMENCY IN MASSACHUSETTS 6–7* (Courtney M. Oliva ed., 2019).

6. Schwartzapfel & Keller, *supra* note 4.

7. *Id.*

consumption because they often offered a clear juxtaposition of good versus evil and a direct call for readily available punishment. This stands in stark contrast to the more nuanced arguments that called for compassion, rehabilitation, and the examination of root causes of crime, which often left the audience without clear answers or an obvious course of action. The reactive legislation that passes as a result of the political attacks and media attention is almost inevitably premised on over-simplified narratives, calls for harsher punishments, and is typically nearly impossible for advocates of proportional justice to effectively challenge.

This essay argues that reclaiming the narrative surrounding clemency is a crucial part of creating a more just society. Post-Willie Horton, mainstream media has relied on sensationalism, rather than data—trafficking in fear of exceptional outlier cases, rather than the more mundane and common success stories. Reclaiming the clemency narrative requires more engagement from legal practitioners and scholars with media in order to advance the use of statistics on recidivism and spread the success stories from people granted clemency. Involving the media cuts against the general lawyerly impulse to safeguard the interests of clients, but here, it is crucial to restoring mercy in our overall criminal justice system. A balance can be struck, and at least one recent major effort is working to accomplish just this.⁸

Section II highlights the surprising history of American clemency at both the state and federal levels. Section III examines how single, rare, but heinous crimes result in new laws that do nothing to increase public safety but instead heap additional and often cruel punishments upon a class of people for substantially less serious criminal conduct. Section IV discusses the impact that alarmist US crime reporting, including the irresponsible use of the criminological literature, has on American criminal justice policies, and how zealous and determined attorneys have recently pushed against that dominant narrative. Section V proposes a number of additional safeguards for the clemency system that will reduce the hesitancy to honor mercy in clemency determinations.

II. THE EBBS AND FLOWS OF AMERICAN CLEMENCY

A. *By Presidents*

Throughout most of the twentieth century, US presidents granted at least 20 percent of all applications for pardons and sentence commutations.⁹

8. Tim Lau, *Historic Criminal Justice Reforms Begin to Take Effect*, BRENNAN CTR. FOR JUST. (July 25, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reforms-begin-to-take-effect>.

9. John Gramlich & Kristen Bialik, *Obama Used Clemency Power More Often Than Any President Since Truman*, PEW RES. CTR.: FACT TANK (Jan. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power>.

President Franklin D. Roosevelt granted 3,796 individual clemency petitions—the most of any president since 1900.¹⁰ His successor, President Harry Truman, granted fewer petitions but applicants had a greater chance at success—Truman granted 41 percent¹¹ compared to 28 percent by Roosevelt.¹²

Beginning in the early 1980s, however, the success rate of pardons granted by presidents drastically declined. President Jimmy Carter only granted 22 percent of the petitions he received, compared to 26 percent by his predecessor, President Gerald Ford.¹³ More dramatically, President Ronald Reagan only granted 12 percent of petitions.¹⁴ Following Reagan, petitioners' success rate dropped to the single digits.¹⁵ President George W. Bush granted only 2 percent of petitions.¹⁶ And while President Barack Obama deserves praise for granting more clemency petitions than any president over the preceding 64 years, his actual rate of granting clemency was merely 5 percent.¹⁷

What happened? Presidents tailored their perceptions of clemency to general criminal justice mores in mainstream media and politics. The seeds of mass incarceration were planted in the 1960s and 1970s.¹⁸ Mass incarceration as the solution to fear solidified in the 1980s and 1990s.¹⁹ While US incarceration numbers began to rise in 1973 and have slightly decreased since 2009, the prevailing criminal justice conversation amongst presidential candidates, until this cycle,²⁰ has been that more incarceration is generally better, not worse.²¹

This persistent fear that people granted clemency will reoffend is not rooted in facts. For example, no one released by Obama's Clemency Initiative,²² so far, has been rearrested for a serious crime.²³ Less than one-third

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Gramlich & Bialik, *supra* note 9.

16. *Id.*

17. *Id.*

18. James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

19. *Id.*

20. Nat'l Res. Council, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2* (Jeremy Travis et al. eds., 2014), <https://www.nap.edu/read/18613/chapter/2>.

21. Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why.*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html>.

22. See Office of the Pardon Attorney, *Clemency Initiative*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/clemency-initiative> (updated Dec. 11, 2018).

23. *Id.*

were released by January 20, 2017, the date President Obama left office.²⁴ Almost one-quarter of the clemency recipients were released after January 20, 2019. As of June 1, 2017, 811 of Obama's Clemency Initiative clemency recipients had been released.²⁵ Only three of them had been rearrested for a new crime as of that date.²⁶

B. By State Governors

1. The Pennsylvania Experience

The state of Pennsylvania's experience with clemency challenges the prevailing orthodoxy that people who commit only nonviolent offenses are worthy of redemption. For many decades, Pennsylvania had one of the most punitive homicide statutes in the nation, especially for second-degree murder.²⁷ The only available sentence for second-degree murder under Pennsylvania law is life without parole.²⁸ First-degree murder adds the death penalty as an option but is otherwise treated the same.²⁹ Until the Supreme Court handed down *Miller v. Alabama*³⁰ in 2012 and *Montgomery v. Louisiana*³¹ in 2016, this sentencing scheme was applicable to children under eighteen as well.³²

While parole is not applicable for second- and first-degree murder, governors used clemency in a quasi-parole fashion. For several former Pennsylvania governors, such clemency grants were not rare.³³ Governor Shafer commuted approximately twenty-three life-without-parole sentences per year from 1967 to 1970, and Governor Shapp commuted approximately thirty life-without-parole sentences per year between 1971 and 1978.³⁴ Af-

24. U.S. SENT'G COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 17 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf.

25. *Id.* at 45 n.64.

26. *Id.*

27. See 18 PA. CONS. STAT. §§ 2501–2507 (effective June 6, 1973).

28. Katie Meyer, *Pa., an Outlier in Life-Without-Parole, Faces Growing Push for Change*, WHY? (Sept. 19, 2018), <https://why.org/articles/pa-is-an-outlier-in-life-without-parole-theres-a-growing-push-to-change-that>.

29. *Id.*

30. 567 U.S. 460 (2012).

31. 136 S. Ct. 718 (2016).

32. Philadelphia was the capital of juvenile life sentences in the world. See FAIR PUNISHMENT PROJECT & PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE IN PHILADELPHIA: A TIME FOR HOPE? (2016), http://fairpunishment.org/wp-content/uploads/2016/03/FPP_JLWOP_philadelphia_r601.pdf. A long, arduous set of resentencing hearings has since followed the Supreme Court's *Montgomery* decision.

33. BEN NOTTERMAN, NYU LAW, CTR. ON THE ADMIN. OF CRIMINAL LAW, THE DEMISE OF CLEMENCY FOR LIFERS IN PENNSYLVANIA 1, 4, 6 (Courtney M. Oliva ed., 2019); Samantha Melamed, *Convincing Pennsylvania Prison Lifers to Apply for Clemency is Lt. Gov. John Fetterman's Toughest Campaign Yet*, INQUIRER (Oct. 16, 2019), <https://www.inquirer.com/news/pennsylvania-lieutenant-governor-john-fetterman-commutation-board-pardons-life-without-parole-prison-20191016.html>.

34. NOTTERMAN, *supra* note 33, at 6.

ter a pause from Governor Thornburgh, who did not believe in these commutations on principle,³⁵ local newspaper clippings from those years did not discuss these commutations in wholly negative terms, and reporters did not seek the victims' family members to rail against the process.³⁶ This suggests clemency grants were seen as normal in Pennsylvania.

What is more interesting, however, were the governors' reduction of life-without-parole sentences. Pennsylvania has indeterminate sentencing, meaning there is a minimum length that has to be served for a person to become parole-eligible and a maximum term at which point in time the prisoner will be released.³⁷ For murder, Pennsylvania governors often commuted life-without-parole sentences for murder to sentences between nine-to-life and thirty-to-life, even for particularly horrible cases.³⁸ For example, in 1963, Governor Scranton commuted the life-without-parole sentences for James Forse, Jr. and Benjamin Watts, both serving convictions of first-degree murder, which made them both eligible for parole after 16 years in prison.³⁹ In 1964, Joseph Battel, who was convicted of felony murder as a young adult, had his life sentence commuted to nine years-to-life in prison.⁴⁰ These commutations considered the amount of time already served which made the person in prison immediately parole-eligible,⁴¹ and thus, they were often released shortly thereafter.⁴² The Pennsylvania practice comported with criminological studies that have consistently found the likelihood of reoffending vastly decreased as prisoners aged.⁴³

Pennsylvania experienced its own Willie Horton scandal, however, which slowed commutations for a couple of decades. In the early 1990s, Reginald McFadden's sentence for the brutal Philadelphia murder of an eld-

35. As Governor Thornburgh told a reporter, it was his opinion that “[p]ardons and commutations should be issued in only extraordinary circumstances to prevent an injustice They are not good-conduct medals.” Rod Snyder, *Few Criminals Get Commutations Under Thornburgh*, MORNING CALL (Allentown, Pa.) (Aug. 11, 1985), <https://www.newspapers.com/newspage/275942994>.

36. Samantha Melamed, *A Record 21 Lifers Are up for Commutation in Pa. Does This Precede a New Era for the Board of Pardons?*, PHILA. INQUIRER (Sept. 10, 2019, 5:00 AM), <https://www.inquirer.com/news/pennsylvania-board-of-pardons-lieutenant-governor-john-fetterman-commutation-life-sentence-20190910.html>.

37. *Parole 101*, PA. PAROLE BOARD, <https://www.parole.pa.gov/Parole%20101> (last visited Feb. 21, 2020).

38. NOTTERMAN, *supra* note 33.

39. *Five Murderers Given Clemency*, SENTINEL (Carlisle, Pa.) (Aug. 22, 1963), <https://www.newspapers.com/newspage/344851886>.

40. *Life Terms of 3 Convicted Slayers Commuted*, MORNING CALL (Allentown, Pa.) (Oct. 1, 1964), <https://www.newspapers.com/image/275217686>.

41. *Parole 101*, *supra* note 37.

42. *The Pennsylvania Parole Process*, PA. PAROLE BOARD, <https://www.parole.pa.gov/Parole%20101/Documents/Parole%20101/FINAL%20Parole%20Process%20FLOWCHART.pdf> (last visited Feb. 21, 2020).

43. German Lopez, *Cory Booker's Latest Criminal Justice Reform Bill Takes Aim at Life Imprisonment*, VOX (July 16, 2019, 8:30 AM), <https://www.vox.com/policy-and-politics/2019/7/16/20694757/cory-booker-criminal-justice-reform-second-look-act>.

erly woman was commuted by Governor Casey.⁴⁴ McFadden was serving life-without-parole for the crime he committed at the age of sixteen.⁴⁵ Governor Casey commuted McFadden's sentence, and he was subsequently released.⁴⁶ McFadden then committed a number of crimes in 1994.⁴⁷ Since 2015, McFadden's story serves as a cautionary tale by those opposed to reform and commutations. His series of crimes continues to be covered by media as a "reign of murder, rape, and terror."⁴⁸

State lawmakers in Pennsylvania acted swiftly. The state constitution was amended to insert a requirement that people serving life sentences could only receive a commutation with unanimous consent of the Pennsylvania Board of Pardons.⁴⁹ That body consists of five people, two of whom are elected, the attorney general, and the lieutenant governor of the state.⁵⁰ But their membership is said to undermine "the political insulation normally associated with pardon boards."⁵¹ Due to McFadden's crimes, and what former Pennsylvania Attorney General and Pardon Board Member Ernie Preat described as "too much anti-prisoner sentiment" in his state, clemency has basically died off.⁵² Preat also stated, "[t]he problem with [clemency] is there's a lot of good people who probably deserve it, served enough time, [became] a good model prisoner after 25, 35, 45 years. Maybe they deserve a second chance, but they don't get it now."⁵³ Preat observed, "[n]obody wants to have that against them in their political careers. So that's why you get everybody saying, 'Ah, I'm not going to vote for the guy.'"⁵⁴

More recently, however, there is renewed energy in bringing clemency in Pennsylvania back to life because of the growing influence of the movement against mass incarceration.⁵⁵ In May 2019, Governor Wolf announced

44. Joseph Berger, *Accused Serial Killer and 92 Days of Freedom*, N.Y. TIMES (Apr. 4, 1995), <https://www.nytimes.com/1995/04/04/nyregion/accused-serial-killer-and-92-days-of-freedom.html>.

45. *Id.*

46. *Id.*

47. *Id.*

48. Steve Lieberman, *Reginald McFadden's Terror Reign: Crime Scene*, J. NEWS (White Plains, N.Y.) (Dec. 13, 2016, 10:01 AM), <https://www.lohud.com/story/news/crime/2015/02/03/reginald-mcfadden-multiple-murders-rape-rockland-crime-scene/22798247>.

49. *History of the Board of Pardons*, PA. BOARD PARDONS, <https://www.bop.pa.gov/Board-Information/Pages/History.aspx> (last visited Feb. 21, 2020).

50. *Board Members*, PA. BOARD PARDONS, <https://www.bop.pa.gov/Board-Information/Pages/Board-Members.aspx> (last visited Feb. 21, 2020).

51. NOTTERMAN, *supra* note 33, at 1.

52. Lee Cary, *The [No] Mercy Rule: Clemency and the Pennsylvania State Constitution*, COMMEDIA: NEWS (Dec. 3, 2014), <https://commmedia.psu.edu/news/story/mercy-rule-clemency-and-the-pennsylvania-state-constitution>.

53. *Id.*

54. *Id.*

55. Elizabeth Hardison, *Wolf Commutes 8, Brings Clemency Total to 19, the Third-Highest among Pa. Governors*, PA. CAPITAL-STAR (Dec. 6, 2019), <https://www.penncapital-star.com/criminal-justice/wolf-commutes-8-brings-clemency-total-to-19-the-third-highest-among-pa-governors>.

he was granting clemency to eight people serving life sentences, which the *Philadelphia Inquirer* noted was “more than any other [Pennsylvanian] governor in decades.”⁵⁶

2. Trends in Other States

Pennsylvania was not the only state to have a robust clemency practice. Mississippi has a long, rich history of governors granting clemency to prisoners, usually to those serving sentences for murder, who have been selected to work in the Governor’s Mansion.⁵⁷ But, as in Pennsylvania, this practice has recently come under threat.⁵⁸ State Attorney General Jim Hood successfully courted media outlets, including CNN, following his lawsuit to enjoin the release of people in prison whom Governor Haley Barbour demanded be freed.⁵⁹ Hood, who ran for governor in 2019 as a Democrat,⁶⁰ challenged the legitimacy of Barbour’s use of clemency and also stoked fears of recidivism and outrage for the victims’ families, who disagreed with Barbour’s mercy.⁶¹ Attorney General Hood bellowed that the pardons were “a slap in the face to everyone in law enforcement and [saying] Gov. Barbour should be ashamed,” and that “[t]hese families are afraid out here.”⁶²

In California, the governor has granted clemency to people convicted of serious violent crimes, though not without media pushback. Governor Gavin Newsom commuted the sentences of twenty-one people in prison on September 13, 2019.⁶³ The *Associated Press* commented that Newsom’s commutations were for people mainly serving for murder and attempted murder.⁶⁴ Governor Newsom’s office explained these people committed

56. Samantha Melamed, *Gov. Tom Wolf Releases 8 Lifers, More Than Any Other Pa. Governor in Decades*, PHILA. INQUIRER (May 6, 2019), <https://www.inquirer.com/news/commutation-life-sentences-philadelphia-pennsylvania-tom-wolf-george-trudel-20190506.html>.

57. Haley Barbour, Opinion, *Haley Barbour on His Pardons of Mississippi Prisoners*, WASH. POST (Jan. 18, 2012), https://www.washingtonpost.com/opinions/haley-barbour-on-his-pardons-of-mississippi-prisoners/2012/01/17/gIQAAtOuG9P_story.html.

58. See Ross Adams, ‘I Will Not Pardon Anyone,’ Bryant Says, WAPT (Nov. 13, 2019, 6:19 PM), <https://www.wapt.com/article/karen-irby-seeks-pardon-in-crash-that-killed-couple/29783865>.

59. *Mississippi Judge Blocks Release of Pardoned Inmates*, CNN (Jan. 11, 2012, 10:35 PM), <https://www.cnn.com/2012/01/11/justice/mississippi-pardons/index.html>.

60. Jessica Taylor, *Mississippi Governors Race Moves to Lean Republican*, COOK POL. REP. (Sept. 27, 2019), <https://cookpolitical.com/analysis/governors/mississippi-governor/mississippi-governors-race-moves-lean-republican>.

61. Campbell Robertson, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, N.Y. TIMES (Jan. 10, 2012), <https://www.nytimes.com/2012/01/11/us/gov-haley-barbour-of-mississippi-is-criticized-on-wave-of-pardons.html>.

62. *Mississippi Judge Blocks Release of Pardoned Inmates*, *supra* note 59.

63. Don Thompson, *California Governor Commutes Sentences for 21 Inmates*, U.S. NEWS & WORLD REP. (Sept. 13, 2019, 8:35 PM), <https://www.usnews.com/news/best-states/california/articles/2019-09-13/california-governor-commutes-sentences-for-21-inmates>.

64. Don Thompson, *California Governor Commutes Sentences for 21 Inmates*, AP NEWS (Sept. 13, 2019), <https://apnews.com/e639eb1e37be4c3ea7798537265250e2>.

their crimes as young adults between fifteen and twenty-six years old, the age at which the human brain is in its adolescent development stage.⁶⁵ Local media outlets in more conservative areas, however, became microphones for elected district attorneys upset with governor commutations because those commutations were against their personal mores. In Shasta County, a county of under 200,000 people,⁶⁶ and a conservative stronghold,⁶⁷ the District Attorney Stephanie Bridgett complained that she was not given enough time to protest the potential clemency of a person in prison from her county.⁶⁸ Bridgett explained, “I notified [my crime victims assistance unit] immediately to start the search for any surviving family that may still be out there,” seemingly without considering that if the victim’s family members did not find her, they might not oppose without an elected tough-on-crime prosecutor’s urging.⁶⁹

III. THE CARCERAL VICTIMS’ RIGHTS MOVEMENT AS AN OUTGROWTH OF WILLIE HORTON FEARS

Although crime rates have drastically declined in recent decades,⁷⁰ proponents of the tough-on-crime ideology have shifted their justification from extremely long prison sentences for public safety and fears of recidivism to what has been colloquially referred to as “victims’ rights.”⁷¹ While allegedly in service of a different aim,⁷² the “victims’ rights” movement’s effect and messaging is eerily similar to the infamous Willie Horton advertisement, overshadowing the immense number of people released who do not reoffend and, in fact, succeed.

How did this happen? One answer is the mainstreaming of the Carceral Victims Rights’ Movement. The National Crime Victim Law Institute,

65. *Gov. Gavin Newsom Commutes Sentences for 21 Inmates*, KTLA (Sept. 13, 2019, 6:49 PM), <https://ktla.com/2019/09/13/gov-gavin-newsom-commutes-sentences-for-21-inmates>.

66. *Quick Facts: Shasta County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/shastacountycalifornia> (last visited Feb. 21, 2020).

67. Hailey Branson-Potts, *In California’s Rural, Conservative North, There Are Big Dreams for Cleaving the State*, L.A. TIMES (Mar. 17, 2018, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-state-of-jefferson-activists-20180317-htmlstory.html>.

68. Deb Anderaos & Jafet Serrato, *Controversy over Convicted Murderer’s Clemency*, ACTION NEWS NOW (Sept. 19, 2019, 11:58 AM), <https://www.actionnewsnow.com/content/news/Controversy-over-convicted-murderers-clemency-560791061.html>.

69. Colton Chavez, *Shasta County D.A. Office Not Happy: Governor Newsom Grants Clemency to Convicted Murderer*, KRCR (Sept. 17, 2019), <https://krctv.com/news/deprecated-shasta-county/shasta-county-da-office-not-happygovernor-newsom-grants-clemency-to-convicted-murderer>.

70. Jamiles Lartey & Weihua Li, *New FBI Data: Violent Crime Still Falling*, MARSHALL PROJECT (Sept. 30, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/09/30/new-fbi-data-violent-crime-still-falling>.

71. *History of Victims’ Rights*, NAT’L CRIME VICTIM L. INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights (last visited Feb. 21, 2020).

72. Keith Love, *Bush Backers Have Horton Victims Speak*, L.A. TIMES (Oct. 8, 1988), <https://www.latimes.com/archives/la-xpm-1988-10-08-mn-2925-story.html>.

which is a nonprofit housed at the Lewis and Clark Law School in Portland, Oregon,⁷³ marks the beginning of this “Modern Crime Victims’ Rights Movement” with a Supreme Court decision from 1973.⁷⁴ In *Linda R.S. v. Richard D.*,⁷⁵ a five-to-four majority opinion by Justice Marshall stated that “a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”⁷⁶

Irked by this statement, the Modern Crime Victims’ Rights Movement then sought to change laws around the country and have been largely successful in doing so. Justice Antonin Scalia was often seen as a lion for due process for criminal defendants,⁷⁷ but apathetic about a convicted person’s interest in a proportional punishment.⁷⁸ He opined in his concurrence in *Payne v. Tennessee*⁷⁹ that “*Booth [v. Maryland]*’s stunning *ipse dixit*, that a crime’s unanticipated consequences must be deemed ‘irrelevant’ to the sentence, . . . conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victim’s rights’ movement.”⁸⁰

Naturally, the phrase “victims’ rights” has a variety of meanings, depending on who is asked and what country one is from. For example, the European Union’s webpage on victims’ rights broadly categorizes them as

respectful treatment and recognition as victims; protection from intimidation, retaliation and further harm by the accused or suspected and from harm during criminal investigations and court proceedings; support, including immediate assistance following a crime, longer-term physical and psychological assistance and practical assistance; access to justice to ensure that victims are aware of their rights and understand them, and are able to participate in proceedings; and compensation and restoration, whether through financial damages paid by the state or by the offender or through mediation or other form of restorative justice.⁸¹

73. NAT’L CRIME VICTIM L. INST., https://law.lclark.edu/centers/national_crime_victim_law_institute (last visited Feb. 21, 2020).

74. NAT’L CRIME VICTIM L. INST., *supra* note 71.

75. 410 U.S. 614 (1973).

76. *Id.*

77. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

78. Justice Scalia summed up his originalist interpretation of the Eighth Amendment, which bans cruel and unusual punishment, as banning only “modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.” *Roper v. Simmons*, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

79. 501 U.S. 808 (1991).

80. *Id.* at 834 (Scalia, J., concurring) (discussing *Booth v. Maryland*, 482 U.S. 496, 502–03 (1987), *overruled by Payne*).

81. *Protecting Victims’ Rights*, EUROPEAN COMM’N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights_en (last visited Feb. 21, 2020).

All of which even the most stringent criminal justice reform advocates would endorse.

While American victims' rights organizing is not a monolith, the mainstream victims' rights push has predominantly been defined by its carcerality and punitiveness, rather than the granting of additional rights to victims.⁸² Proposed constitutional amendments such as Marsy's Law, named after billionaire Henry Broadcom's sister, undermine the fact that the reason due process protections exist for people accused of crimes is not to harm survivors but to protect people from unjust convictions resulting from the coercive power of the state.⁸³ These pushes exist in strong contrast to other advocacy movements to have victims' voices be better acknowledged and heard in the criminal justice system, such as the fight for a more robust restitution system or restorative justice. As a result, the Modern Crime Victims' Rights Movement can fairly be termed the Carceral Victims' Rights Movement.⁸⁴ In addition, its campaign pitches are regularly propped up by the media, which spends a huge amount of time retelling the gruesome details of the extreme outlier crimes that are centered by the movement to deter decarceration efforts.⁸⁵

More recently, there has been an addition to the movement of crime survivors who believe in criminal justice reform. Many of these advocates believe that the crime they, or their loved one, experienced was the result of a criminal justice system that is overly focused on punishment rather than public safety outcomes.⁸⁶ In what many consider an unlikely partnership, these advocates have linked arms with formerly incarcerated advocates and anti-incarceration activists to advocate for a system that focuses on rehabilitation and providing the system the supports needed to decrease or prevent crime, such as mental health treatment and addiction treatment. A 2016 survey by the Alliance for Safety and Justice found that about 70 percent of crime survivors prefer alternatives to prison or jail, such as community supervision or treatment.⁸⁷

82. Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER: AM. CHRONICLES (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>.

83. Sophie Quinton, 'Marsy's Law' Protections for Crime Victims Sound Great, but Could Cause Problems, PEW CHARITABLE TR.: STATELINE (Oct. 12, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys-law-protections-for-crime-victims-sound-great-but-could-cause-problems>.

84. Lepore, *supra* note 82; F.T. Green, *The Victim's Rights Movement Helps Prosecutors, Not Victims*, OUTLINE (June 10, 2019), <https://theoutline.com/post/7547/victims-rights-movement>; Yoav Mehozay, *From Offender Rehabilitation to the Aesthetic of the Victim*, 27 SOC. AND LEGAL STUD. 97 (2017).

85. Lepore, *supra* note 82.

86. *Victims' Rights*, NAT'L CTR. FOR VICTIMS CRIME, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims'-rights> (last visited Feb. 21, 2020).

87. Offices of the U.S. Att'ys, *Crime Victims' Rights Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/victims-rights-act> (last updated July 22, 2016).

A. *The “Right to be Heard” as the Right to Protest Plea Deals as Too Lenient*

“Victims’ rights” legislation has created what some believe operates now as a crime victim veto power over plea bargains under the guise of the “right to be heard.” When this new “right” is not followed, it inspires sympathy and outrage. Nearly every American is now familiar with the saga of former Secretary of Labor R. Alexander Acosta.⁸⁸ As Miami’s US district attorney, Acosta let Jeffrey Epstein, the deceased financier and accused sex trafficker of numerous underaged girls, plead guilty to two counts of soliciting prostitution in exchange for sex offender registration and a little over a year in jail on weekends.⁸⁹ Meg Garvin, the executive director of the National Crime Victim Law Institute (“NCVLI”), called the publicity and ensuing downfall of Acosta a “silver lining” to the sordid Epstein case, as “[v]ictims will be saying, ‘Maybe I should be asking more questions.’”⁹⁰ Public media has echoed Garvin’s sentiment often contending, “Well, what’s the victim’s perspective?”⁹¹

While all crime survivors deserve protection and care, there are serious questions about the subjectivity of different crime victims, and as such, whether criminal justice outcomes should be determined by individual victims’ subjective beliefs. These concerns are magnified when considering that an organization that is supposed to enforce the criminal law and the watchdog nonprofit that is supposed to enforce victims’ rights against law enforcement are funded by the same entity—the US Department of Justice.

It is also concerning that victims who empathize with people who have been convicted of crimes will not be taken seriously by prosecutors. For example, Darlene Farah, whose daughter Shelby was murdered in Jacksonville, went from avidly supporting death for her daughter’s killer to deciding his past should mitigate his punishment after investigating the killer’s background.⁹² Duval County State Attorney Angela Corey castigated and

88. Annie Karni et al., *Acosta to Resign as Labor Secretary over Jeffrey Epstein Plea Deal*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/us/politics/acosta-resigns-trump.html>.

89. John Cassidy, *Alex Acosta Had to Go, but the Jeffrey Epstein Scandal Is Really About Money and Privilege*, NEW YORKER (July 12, 2019), <https://www.newyorker.com/news/our-columnists/alex-acosta-had-to-resign-but-the-epstein-scandal-goes-well-beyond-his-role>.

90. RJ Vogt, *Ethics Case Against DA Keeps Spotlight on Victim Rights*, LAW 360 (Aug. 18, 2019, 8:02 PM), <https://www.law360.com/legalethics/articles/1187278/ethics-case-against-da-keeps-spotlight-on-victim-rights>.

91. *Id.*

92. Jeremy Berke, *Mother of 20-Year-Old Murder Victim Explains Why She Doesn’t Want the Death Penalty for Her Daughter’s Accused Killer*, BUS. INSIDER (Feb. 24, 2016, 3:01 PM), <https://www.businessinsider.com/this-mother-doesnt-want-her-daughters-killer-to-get-the-death-penalty-and-it-reveals-some-problems-with-capital-punishment-2016-2>.

shamed Farah as a bad mother.⁹³ Corey even sent her assistant prosecutor, Bernie de la Rionda, to divide the family by showing Shelby's brother the murder video in an attempt to convince him to support the death penalty.⁹⁴ Ultimately, crime survivors who do not support the sentences sought may get cast aside.

B. *Effects of the Advocacy Push for Named-Victim Laws*

The mainstream push for victims' rights has often resulted in named-victim laws. These laws often have the best intentions, but many have severe side-effects. For example, dozens of state and federal laws now honor the memory of children who died far too soon due to serious criminal acts.⁹⁵ This trend is most noteworthy in how it revolutionized sex-crime policies, particularly through Megan's Law and Jessica's Law.⁹⁶ Their predecessor, the Jacob Wetterling Crimes Against Children Registration Act of 1994, federally mandated that states create sex-offender registries.⁹⁷ Two years later, Congress enacted Megan's Law which was named after a seven-year-old girl who was raped and murdered in New Jersey.⁹⁸ Megan's Law required law enforcement to release information about people convicted of sex crimes to the public.⁹⁹ The sex-offender registry is now online, which has created immense, undifferentiated, and perpetual social stigma for all people convicted of any sex crime. This social stigma does not differentiate between convictions of indecent exposure toward an adult or the rape and murder of a toddler. Studies have indicated that this *de facto* exile of people who have committed sexual offenses, an outgrowth of the myth that sex offender recidivism is abnormally high,¹⁰⁰ actually makes sexual offense recidivism *more* likely.¹⁰¹

93. Josie Duffy Rice, *Notorious Florida Prosecutor Angela Corey Just Keeps Getting Worse and Worse*, DAILY KOS (Aug. 17, 2016, 8:09 AM), <https://www.dailykos.com/stories/2016/8/17/1560822/-Notorious-Florida-prosecutor-Angela-Corey-just-keeps-getting-worse-and-worse>.

94. Emily Bazelon, *Where the Death Penalty Still Lives*, N.Y. TIMES MAG. (Aug. 23, 2016), <https://www.nytimes.com/2016/08/28/magazine/where-the-death-penalty-still-lives.html>.

95. Rick Hampson, *'Apostrophe Laws' Named for Kid Victims on the Wane*, USA TODAY (June 12, 2013, 2:51 PM), <https://www.usatoday.com/story/news/nation/2013/06/12/apostrophe-laws-on-the-wane-/2415963>.

96. *Fla. Gets Tough New Child-Sex Law*, CBS NEWS (May 2, 2005, 3:28 PM), <https://www.cbsnews.com/news/fla-gets-tough-new-child-sex-law>.

97. H.R. 2137, 104th Cong. (as passed by House, May 7, 1996).

98. *Everything Megan's Law in New Jersey*, MAYNARD L. OFF. (Aug. 13, 2015), <https://njlawattorney.com/megans-law/everything-megans-law-in-new-jersey>.

99. *Sex Offender Registry Websites*, FBI, <https://www.fbi.gov/scams-and-safety/sex-offender-registry> (last visited Feb. 21, 2020).

100. Radley Balko, *The Big Lie About Sex Offenders*, WASH. POST (Mar. 9, 2017, 12:04 PM), <https://www.washingtonpost.com/news/the-watch/wp/2017/03/09/the-big-lie-about-sex-offenders>.

101. Steven Yoder, *New Evidence Says US Sex-Offender Policies Are Actually Causing More Crime*, QUARTZ (Dec. 21, 2016), <https://qz.com/869499/new-evidence-says-us-sex-offender-policies-dont-work-and-are-actually-causing-more-crime>.

Some advocates for named-victim laws have changed their ideology over time. Jacob Wetterling's mother, Patty, now believes the sex offender registry is too expansive and has lost sight of its original public safety purpose.¹⁰² After the person who killed Jacob was finally caught, Patty told prosecutors that she consented to a plea deal that would give him twenty years in prison for the receipt of child pornography, the maximum available federal sentence for that crime.¹⁰³ Patty did not want him charged with murder by the state of Minnesota so long as Jacob's body was recovered.¹⁰⁴ State and federal prosecutors agreed to her terms.¹⁰⁵

But many others, like Marc Klaas, have become leading voices for mass punishment and incarceration without the possibility of redemption. Klaas's daughter, Polly, was kidnapped at a slumber party when she was twelve and later strangled to death by her abductor.¹⁰⁶ Although such a crime is statistically rare, its wretchedness made it politically powerful for those who advocate for longer sentences of incarceration. The onerous three-strikes law in California was passed quickly after Polly Klaas's murder.¹⁰⁷ Marc Klaas has since become one of the most prominent and successful advocates for mass incarceration in California—and his sworn enemies are virtually anyone who commits any sort of crime.¹⁰⁸ Klaas opposed California Proposition 36 in 2012, which ended twenty-five-years-to-life prison sentences for third felony convictions for those with nonviolent prior convictions.¹⁰⁹ Klaas has also been one of the most vocal proponents for death penalty retention in his state. Klaas balked when Governor Gavin Newsom put a moratorium on executions.¹¹⁰ Klaas also opposed California

102. Jennifer Bleyer, *Patty Wetterling Questions Sex Offender Laws*, CITY PAGES (Mar. 20, 2013), <http://www.citypages.com/news/patty-wetterling-questions-sex-offender-laws-6766534>.

103. *An Introduction to Child Pornography Sentencing*, FAMILIES AGAINST MANDATORY MINIMUMS (Aug. 31, 2016), <https://famm.org/wp-content/uploads/FS-Intro-to-Child-Pornography-Sentencing-8.31.16.pdf>.

104. *Minnesota Man Describes Killing 11-Year-Old Jacob Wetterling in Chilling Detail*, GUARDIAN (Sept. 6, 2016, 3:01 PM), <https://www.theguardian.com/us-news/2016/sep/06/jacob-wetterling-killing-minnesota-danny-heinrich-admits>.

105. *Inside the Heinrich Plea Deal*, VALLEY NEWS LIVE (Sept. 29, 2016, 9:25 AM), <https://www.valleynewslive.com/content/news/Inside-the-Heinrich-plea-deal-392567361.html>.

106. Maura Dolan, *Tape of Mother's 911 Call Played as Klaas Murder Trial Opens*, L.A. TIMES (Apr. 17, 1996), <https://www.latimes.com/archives/la-xpm-1996-04-17-mn-3000-story.html>.

107. *A 12-Year-Old Girl is Kidnapped, Leading to California's "Three Strikes" Law*, HISTORY (Sept. 30, 2019), <https://www.history.com/this-day-in-history/a-12-year-old-girl-is-kidnapped>.

108. Jessica Pishko, *In Liberal California, a Crusader Against Criminal Justice Reform*, APPEAL (Aug. 19, 2019), <https://theappeal.org/in-liberal-california-a-crusader-against-criminal-justice-reform>.

109. Evan George, *Prop 36 and How California's 'Three Strikes' Law Came to Be*, KCRW (Oct. 24, 2012), <https://www.kcrw.com/news/articles/prop-36-and-how-californias-three-strikes-law-came-to-be>.

110. *Father of Polly Klaas Opposes Governor Newsom's Executive Order*, KSRO (Mar. 14, 2019), <https://www.ksro.com/2019/03/14/father-of-polly-klaas-opposes-governor-newsoms-executive-order>.

Proposition 57 in 2016,¹¹¹ which ended direct file for juveniles to adult court by nothing more than a district attorney's discretion.¹¹²

Opponents of these recent reforms channeled Willie Horton when Michael Christopher Meija was accused of shooting two police officers after being paroled on a felony robbery charge as a member of a street gang.¹¹³ Meija was not released due to any of the recent carceral reforms.¹¹⁴ In 2018, Marc Klaas joined with Sacramento County District Attorney Anne Marie Schubert and California State Assembly member Jim Cooper to announce that he helped draft a ballot initiative that, if passed, would roll back most of California's recent successes in decarceration and public safety.¹¹⁵ Standing next to Klaas, Cooper claimed, without statistical context, that people convicted of nonviolent crimes are "linked to more serious violent crimes of rape and murder."¹¹⁶ But the Klaas and Cooper initiative was unneeded, and its reforms had little-to-no significant impact on crime rates.¹¹⁷

What happened to Polly Klaas was devastating; it is literally every parent's worst nightmare. At the time, I was ten years old and lived in a neighboring county. I remember the fear in our community—parents not letting their children walk to school, kids whispering to friends about adults they passed on the street, and of course, the constant news reporting as the search for the person responsible continued. In reality, crimes like the Polly Klaas case are exceedingly rare.¹¹⁸ However, this has been diluted in the media coverage because conversations regarding these horrific crimes are dominated by emotion.¹¹⁹

111. Marc Klaas, *Prop. 57 Would Release Violent Criminals and Undermine Victims' Rights*, SACRAMENTO BEE (Oct. 24, 2016, 3:00 PM), <https://www.sacbee.com/opinion/op-ed/soapbox/article110211372.html>.

112. *Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016*, JUD. COUNCIL CAL., <https://www.courts.ca.gov/documents/W17-02.pdf> (last visited Feb. 21, 2020).

113. Michael Balsamo, *Alleged Cop Killer Wasn't Released Early Under Prison Reforms: Official*, L.A. (Feb. 22, 2017, 3:43 AM), <https://www.nbclosangeles.com/news/national-international/michael-meija-whittier-police-shooting-suspect/31281>.

114. *Id.*

115. Pishko, *supra* note 108.

116. *Id.*

117. Abbie Vansickle & Manuel Villa, *The Great California Prison Experiment*, MARSHALL PROJECT (Dec. 20, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/12/20/the-great-california-prison-experiment>.

118. Alexa Mae Asperin, *Father of Murder Victim Polly Klaas Speaks After Death Row Executions Halted*, KRON (Mar. 13, 2019, 9:50 AM), <https://www.kron4.com/news/father-of-murder-victim-polly-klaas-speaks-after-death-row-executions-halted>.

119. *'Heinous' Crimes of Abducted, Murdered Children Examined in Study*, CBC NEWS (May 25, 2016, 11:50 AM), <https://www.cbc.ca/news/canada/manitoba/canadian-centre-child-protection-abducted-murdered-study-1.3599188>.

C. *The Current Campaign for Marsy's Law*

Named victim laws are now less common than they once were. Legislators rarely find a bill on their desk that has as sweeping an effect as Megan's Law or the like.¹²⁰ However, the successful bid to enact Marsy's Law in many states represents how the victims' rights movement is a major political vehicle for old-fashioned American carceral punitivism, rather than an evidence-based governmental program to ensure that the criminal justice system treats survivors of crime with dignity and respect.

Marsy's Law is currently a national campaign with dozens of state branches, all advocating for new ballot initiatives to enshrine certain rights to crime victims in state constitutions. Provisions of Marsy's Law include reasonable expectation of protection from the defendant, having judges explicitly consider the victim and his or her family in setting bail amounts, and providing the victim and his or her family ample opportunities to influence sentencing and parole decisions.¹²¹ The proposed bill also adds new limitations to discovery for defendants.¹²²

The Marsy's Law campaign pushes the narrative that "[c]riminals have more rights than their victims in our judicial system."¹²³ Proponents of Marsy's Law employ similar language in their official television ads.¹²⁴ The Question and Answer section of the Marsy's Law website, claims that "[v]ictims' rights will not trump defendants' constitutional rights. Victims' constitutional rights create balance with defendants' constitutional rights."¹²⁵

One point of irony is that this also ignores how the biggest enemy to obtaining justice for violent crime survivors has often been law enforcement itself. For example, the biggest scandal in law enforcement today is the systematic nonfeasance and occasional malfeasance of police and prosecutors in testing rape kits.¹²⁶ Police and prosecutors historically tested individual rape kits when they personally felt that there was a strong criminal

120. Hampson, *supra* note 95.

121. Quinton, *supra* note 83.

122. Jeanne Hruska, 'Victims' Rights' Proposals Like Marsy's Law Undermine Due Process, ACLU (May 3, 2018, 10:00 AM), <https://www.aclu.org/blog/criminal-law-reform/victims-rights-proposals-marsys-law-undermine-due-process>.

123. CD Davidson-Hiers, *What is Going on in Amendment 6's "Marsy's Law"?*, FLA. PHOENIX (Sept. 14, 2018), <https://www.floridaphoenix.com/2018/09/14/what-is-going-on-in-amendment-6s-marsys-law>.

124. Cameron McKnight, *Opinion, Say No to 'Marsy's Law'*, BILLINGS GAZETTE (Oct. 22, 2016), https://billingsgazette.com/news/opinion/mailbag/say-no-to-marsy-s-law/article_51fd6c4-c23d-5097-b99d-0ce90fd9f945.html.

125. *Will Victims' Rights in Marsy's Law Trump Defendants' Rights?*, MARSY'S L., https://www.marsyslaw.us/will_victims_rights_in_marsy_s_law_trump_defendants_rights (last visited Feb. 21, 2020).

126. Kris Van Cleave, *For Some Sex Assault Victims, Ordeal Carries Price Tag*, CBS NEWS (Nov. 12, 2014, 12:04 PM), <https://www.cbsnews.com/news/for-some-sex-assault-victims-rape-kits-come-at-a-price>.

case to be levied, but a large vocal group of rape survivors maintain that this was never sufficient for justice.¹²⁷ However, focusing on this issue would require these advocates to criticize the prosecutors who drive mass incarceration, which they refuse to do.

Many prosecutors advertise their enthusiastic support for Marsy's Law, which is political,¹²⁸ considering prosecutors are seen by laypeople as the voice of victims, rather than the state.¹²⁹ Marsy's Law is passing in numerous states across the country like wildfire, despite legitimate constitutional concerns.¹³⁰ In fact, the Montana Supreme Court has already struck down the entirety of Marsy's Law after it passed.¹³¹ As did a federal judge in California, citing the extension of waiting time between parole hearings.¹³²

IV. HOW LAWYERS CAN ENGAGE WITH THE MEDIA TO INCREASE SECOND CHANCES

The US media is known for pumping out crime blotters, while plastering people's photos for merely being accused of crime.¹³³ These articles are rife with the most gruesome details of allegations and almost never remind the public that these statements are claims from accusers and law enforcement.¹³⁴

In America, there is no substantive code of ethics for crime reporting, specifically, and the First Amendment allows, *carte blanche*, editors to run

127. Emily Crockett, *Just Before Trump's Comments Leaked, Obama Signed a "Bill of Rights" for Survivors of Sexual Assault*, VOX (Oct. 8, 2016, 1:16 PM), <https://www.vox.com/identities/2016/10/7/13200350/sexual-assault-survivors-bill-of-rights-obama-shaheen>.

128. Marsy's Law for All, *Giving Crime Victims Equal Footing—Delaware County DA Katayoun Copeland*, YOUTUBE (June 6, 2019), <https://www.youtube.com/watch?v=yxp0XXH3PB0>; Marsy's Law for All, *Franklin County Prosecutor Ron O'Brien for Marsy's Law in Ohio*, YOUTUBE (Oct. 18, 2017), <https://youtu.be/zNjKfA22QRg>; Dana Gentry, *Questioned About Marsy's Law, D.A. Walks Away*, NEV. CURRENT (Oct. 18, 2018), <https://www.nevadacurrent.com/2018/10/18/questioned-about-marsys-law-d-a-walks-away>.

129. NAT'L RESEARCH COUNCIL, *WHAT'S CHANGING IN PROSECUTION?: REPORT OF A WORKSHOP 12* (Philip Heymann & Carol Petrie eds., 2001).

130. Melissa Gira Grant, *Billionaire Pushes Marsy's Law to Victory in Six States, Despite Concerns That it Threatens Defendants' Rights*, APPEAL (Nov. 7, 2018), <https://theappeal.org/billionaire-pushes-marsys-law-to-victory-in-six-states-despite-concerns-that-it-threatens-defendants-rights>.

131. Whitney Bermes, *Montana Supreme Court Strikes Down Marsy's Law*, BOZEMAN DAILY CHRON. (Nov. 1, 2017), https://www.bozemandailychronicle.com/news/crime/montana-supreme-court-strikes-down-marsy-s-law/article_8e039131-f08c-5d3b-9025-b863cd892c64.html.

132. Denny Walsh, *Appeals Court Reverses Judge's Decision Invalidating State Parole Laws*, SACRAMENTO BEE (Feb. 22, 2016, 6:34 PM), https://www.sacbee.com/news/california/article_61886167.html.

133. ROBERT REINER, *Media Made Criminality: The Representation of Crime in the Mass Media*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 376 (3rd ed. 2007).

134. Melanie McFarland, *Are Crime Shows Slowing Justice Reform? Here's the Insidious Storytelling Bias Miseducating Viewers*, SALON (Jan. 26, 2020, 8:30 PM), <https://www.salon.com/2020/01/26/crime-tv-show-bias-criminal-justice-reform-color-of-change>.

almost any content.¹³⁵ This is in stark contrast to other developed democracies. Both France and the United Kingdom have laws forbidding citizen-journalists from writing on individual criminal cases—only professional reporters are permitted in the space.¹³⁶ In Sweden, criminal defendants accused of even serious violent crimes have their names withheld from the paper until their guilt has been determined with finality.¹³⁷ Regardless of this, all three countries are considered to have more journalistic freedom overall than the United States,¹³⁸ and they all have massively decreased incarceration rates compared to the United States.¹³⁹

The internet has worsened the situation because, rather than artful or even accurate reporting, the number of clicks has become the measuring standard for journalistic value.¹⁴⁰ Simultaneously, print newspapers are dying off, so their owners are further incentivized to run sensationalistic crime reporting, as it is very popular.¹⁴¹ As such, it is an easy way to generate revenue.

Despite all of this, there have been some hopeful developments that seem like concessions to the fact that Americans are slowly but surely turning their backs on mass incarceration as a solution to social ills as well as violence. One recent article thoroughly describes how law enforcement entertainment shows, such as *Law & Order: Special Victims Unit*, began as black-and-white morality tales, where every accused is both guilty and grotesque.¹⁴² As the popular discourse around criminal justice in America has evolved to reintegrate some conceptions of mercy, *Law & Order: Special Victims Unit* has also evolved to depict this shift.¹⁴³ Not dissimilarly, Nancy Grace, the television personality whose eponymous show involved her shouting to audiences about the irredeemability and guilt of criminal sus-

135. Rory Fleming, *Why We Need a Code of Ethics in U.S. Crime Reporting*, CRIME REP. (May 8, 2019), <https://thecrimereport.org/2019/05/08/why-we-need-new-ethical-standards-in-u-s-crime-reporting>.

136. Peter Sayer, *France Bans Citizen Journalists from Reporting Violence*, MACWORLD (Mar. 6, 2007, 12:00 AM), <https://www.macworld.com/article/1056615/franceban.html>.

137. David Landes, *What's in a Name: Crime Suspects and the Swedish Press*, LOCAL (Stockholm) (Feb. 23, 2009, 10:10 AM), <https://www.thelocal.se/20090223/17716>.

138. *2019 World Press Freedom Index*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/ranking> (last visited Feb. 23, 2020).

139. Pete Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

140. Timothy B. Lee, *Print Newspapers Are Dying Faster Than You Think*, VOX (Nov. 2, 2016, 3:10 PM), <https://www.vox.com/new-money/2016/11/2/13499004/print-newspapers-dying>.

141. Robin L. Barton, *Attracting Readers vs. Sensationalizing Crime*, CRIME REP. (Apr. 5, 2011), <https://thecrimereport.org/2011/04/05/2011-04-attracting-readers-vs-sensationalizing-crime>.

142. Jessica Contrera, *Why 'Law & Order' Makes Its Fans Smarter About Crime - And 'CSI' Makes Them Dumber*, CHI. TRIB. (Oct. 22, 2015, 9:00 AM), <https://www.chicagotribune.com/entertainment/tv/ct-crime-procedural-csi-svu-20151022-story.html>.

143. Dylan Matthews, *America's Evolving Views on Crime, Explained by Law & Order: SVU*, VOX (Sept. 20, 2019, 12:52 PM), <https://www.vox.com/2016/9/24/11348334/law-and-order-svu>.

pects, has tweaked her image by hosting a new show, *Injustice with Nancy Grace*, which focuses on wrongful accusations.¹⁴⁴

These efforts, however, are insufficient to stem the retributive populism that dominates criminal justice practices throughout the nation.

A. *News Outlets Shifting Their Practices*

Bob Gabordi, the editor of *Florida Today*, announced to readers on June 4, 2018, that he would no longer routinely publish mugshots and would only publish a mugshot if it benefits a legitimate public safety purpose.¹⁴⁵ The core of his message was:

We get phone calls and messages nearly every day from people who have appeared in the mugshot gallery whose cases were subsequently dropped even before reaching court. Others go through the process to have their case expunged. They almost always are asking to have their photograph removed from the gallery.¹⁴⁶

Gabordi also detailed how this was a return to the “old way of doing things,” where police and reporters would meet in person to discuss cases and further safety concerns to the general public.¹⁴⁷ “Technology and circumstances have changed that,” he wrote, so that “[n]ow most communication is on the phone or text messages, with impersonal electronic information dumps replacing paper.”¹⁴⁸

Gabordi’s article suggests something similar to prosecutorial discretion. Reporters would hear the facts and determine whether it was worth printing and further upheaving a suspect’s life by publicizing accusations. Gabordi seemed to do this in consult with not only the police but also with his sense of public safety developed over his years on the job.¹⁴⁹

However, that is a highly principled choice to make in today’s digital economy. They generate money,¹⁵⁰ amongst a populace that includes many who have little trust in law enforcement.¹⁵¹ When put on the defense about

144. Anita Bennett, *Nancy Grace Vows to Expose Wrongful Accusations, Botched Cases in New Oxygen Series*, DEADLINE (July 6, 2019, 6:31 PM), <https://deadline.com/2019/07/nancy-grace-vows-to-expose-wrongful-accusations-in-new-oxygen-series-1202642603>.

145. Bob Gabordi, *No More Mugshot Photo Galleries: Why Florida Today is Dropping Photos of People Arrested*, FLA. TODAY (June 4, 2018, 10:44 AM), <https://www.floridatoday.com/story/opinion/columnists/bob-gabordi/2018/06/04/why-florida-today-dropping-publishing-photo-galleries-arrests/667362002>.

146. *Id.*

147. Peter Schorsch, *With Bob Gabordi, It’s One Step Forward, One Step Back*, FLAPOL (June 11, 2018), <https://floridapolitics.com/archives/265966-with-bob-gabordi-its-one-step-forward-one-step-back>.

148. Gabordi, *supra* note 145.

149. *Id.*

150. Sarah Esther Lageson, *It’s Time for the Mug-Shot Digital Economy to Die*, SLATE (Mar. 12, 2019, 8:00 AM), <https://slate.com/technology/2019/03/mug-shot-economy-cuomo-proposal.html>.

151. Harrison Keegan, *Facebook Groups Work to Expose Child Predators in Ozarks. Are They Doing Harm or Good?*, SPRINGFIELD NEWS-LEADER (Oct. 3, 2019, 11:19 AM), <https://www>

the practice, newspaper editors claim that there is a public safety interest in publicizing accused criminals or people seen as potential recidivists, regardless of facts.¹⁵² They also point to freedom of information and speech concerns.¹⁵³ Both of these defenses carry strong emotional and rhetorical weight.

At the same time, criminal justice reform and law enforcement accountability are becoming a much more mainstream issue, and news media, especially national outlets, have responded accordingly. In 2017, *Slate* teamed up with Harvard Law School's Fair Punishment Project to publish forty-three articles, often made up of investigations critical of local law enforcement behavior in counties that disproportionately drive mass incarceration.¹⁵⁴ Media outlets such as *The Intercept*,¹⁵⁵ *The Nation*,¹⁵⁶ *The Marshall Project*,¹⁵⁷ and others are more regularly printing stories along these lines and do not exhibit the general editorial fear of offending law enforcement. Local papers have not quite caught up, but some local newsrooms have also bolstered their investigative reporting on notoriously punitive police, prosecution, and prison agencies.¹⁵⁸

B. *Anti-Mass Incarceration Lawyers Pushing Back*

Part of the reason progress has been both recent and slow is that lawyers are trained to avoid engaging with the media. For a criminal defense lawyer, speaking to reporters about one's case is seen as taking a gamble for clients at best, a great way to get retaliated against by the district attorney's or US attorney's office in the middle, and disbarred at worst.

Young lawyers are taught the Rules of Professional Conduct on this point which is intended as prophylaxis. Law schools understandably do not

.news-leader.com/in-depth/news/crime/2019/10/02/facebook-groups-work-expose-pedophiles-ozarks/3818253002.

152. Dennis Robaugh, 'Then I See the Delight in Your Eyes Turn to Fear', PATCH (Oct. 16, 2017, 4:48 PM), <https://patch.com/us/across-america/then-i-see-delight-your-eyes-turn-fear>.

153. Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321 (2013).

154. *Recently in Trials and Error*, SLATE, <https://slate.com/news-and-politics/trials-and-error> (last visited Feb. 21, 2020).

155. Akela Lacy, *Pennsylvania Attorney General's Staff Pushed Philadelphia Inquirer to be More Critical of Larry Krasner: Emails*, INTERCEPT (Oct. 8, 2019, 9:58 AM), <https://theintercept.com/2019/10/08/josh-shapiro-philadelphia-inquirer-larry-krasner-josh-shapiro>.

156. Jessica Pishko, *Is Angela Corey the Cruellest Prosecutor in America?*, NATION (Aug. 16, 2016), <https://www.thenation.com/article/archive/is-angela-corey-the-cruellest-prosecutor-in-america>.

157. See Abbie Vansickle, *The New Price of a Plea Bargain in California*, MARSHALL PROJECT (July 2, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/07/02/the-new-price-of-a-plea-bargain-in-california>. However, *The Marshall Project's* general editorial bent leans toward humanizing people who have committed crimes, which is also a crucial part of changing the narratives around mass incarceration.

158. Robert Lewis & David DeBolt, *How California Police Officers Get Lighter Sentences for Abuse—and Keep Their Jobs*, SACRAMENTO BEE (Nov. 10, 2019, 6:00 AM), <https://www.sacbee.com/news/investigations/article237088804.html>.

want their former students getting disciplined by state bars. But for lawyers who want to practice with an eye toward social change, rubbing up closer to the rules is necessary.

Engaging with the media is not simply a theoretical exercise. One exciting new initiative from the Brooklyn Defender Services, called *Zealo.us*,¹⁵⁹ bills itself as “[m]edia training and movement building for public defenders” who wish to challenge our culture of mass incarceration and transform the legal system.¹⁶⁰ *Zealo.us* launched September 2019, when “defenders from around the country convened to learn to leverage traditional and social media, technology, storytelling, language, policy advocacy, collaboration, and campaigns to drive transformative change.”¹⁶¹ The website for the initiative explains that *Zealo.us* is training public defenders because public defenders regularly see the banal evil of the cases that churn through courts and are better equipped to engage the media on these issues than their clients due to privilege and a clean record.¹⁶² The initiative lists among its speakers and facilitators some of the most important writers on criminal justice today, such as Emily Bazelon at *New York Times Magazine*, Radley Balko at the *Washington Post*, and Josie Duffy Rice at *The Appeal*, as well as television celebrities like Soledad O’Brien, and high-profile activists like Samuel Sinyangwe of Campaign Zero and Rabia Chaudry of the podcast *Serial*.¹⁶³

This work appears to be an outgrowth of the Twitter presence of Scott Hechinger, Senior Staff Attorney and Director of Policy at Brooklyn Defender Services. Hechinger regularly highlights in a populist fashion the daily outrages of unaffordable bail amounts being set for his clients to an audience of over 70,000 people.¹⁶⁴ His tweets sometimes go viral, being shared amongst both lawyers and non-lawyers thousands of times per single tweet.¹⁶⁵ He also discusses policy intricacies that lawyers are not used to sharing, such as how New York’s district attorneys are weaponizing the media to paint the state’s new discovery laws as patently unfair and antictim, despite the fact that the new law brings New York in line with forty-seven other states.¹⁶⁶

Part of Hechinger’s success as a minor social media star, however, is uniting criminal justice reform advocacy with the most basic partisan polit-

159. ZEALOUS, <https://zealo.us> (last visited Feb. 21, 2020).

160. Scott Hechinger (@ScottHech), TWITTER (Oct. 5, 2019, 11:51 AM), <https://twitter.com/ScottHech/status/1180525996447019009>.

161. ZEALOUS, *supra* note 159.

162. *Id.*

163. *Id.*

164. Scott Hechinger (@ScottHech), TWITTER, <https://twitter.com/ScottHech> (last visited Feb. 21, 2020).

165. Hechinger, *supra* note 160.

166. Scott Hechinger (@ScottHech), TWITTER (Oct. 6, 2019, 9:24 PM), <https://twitter.com/ScottHech/status/1181032595817152514>.

ics, which makes many lawyers uncomfortable.¹⁶⁷ Additionally, lawyers outside of New York have questioned, sometimes aggressively, whether Hechinger's description of alleged clients' stories borders on a violation of the Rules of Professional Conduct.¹⁶⁸ He frequently broadcasts arguably identifying information about his clients in order to show that people involved with the criminal justice system are often people who are down on their luck and not "bad people."¹⁶⁹

Opinion seems to be split amongst defense lawyers. James K. Ziegler, an indigent defense lawyer in DC Superior Court, is one of Hechinger's direct biggest critics, though he has deleted some of his earlier commentary¹⁷⁰ after receiving pushback from both lawyers and nonlawyers.¹⁷¹ In contrast, G. Paul Marx, the district public defender for Acadia, Vermillion, and Lafayette Parishes in Louisiana,¹⁷² supports Hechinger's work, writing on Twitter that, "other than the emotional aspects it seems to me the info is all public record stuff-charge, mitigation offered, DA argument, Judge decision and impact on client. It's a strong insight into our difficulties and most important the client's. I would suggest checking with the client."¹⁷³ Brook Reinhard, the executive director of the Public Defender Services of Lane County, Oregon, also wrote in a January 21, 2019, tweet that he "did an (Oregon) ethics CLE on this topic a few months ago . . . the critical aspect is informed consent. Clients need to know it's their choice whether you share stories."¹⁷⁴

C. *The Power of Storytelling for Second Chances*

The idea that criminality is a fixed and immutable state, rather than a transient stage in one's life, is baked into the fabric of American life. Hence, addressing this issue is crucial to changing the conversation about

167. Hechinger, *supra* note 160.

168. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2019).

169. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

170. Scott Hechinger (@ScottHech), TWITTER (Jan. 21, 2019, 10:30 AM), <https://twitter.com/ScottHech/status/1087386852934500352>. Interestingly, Ziegler also seems to believe that changing narratives about redemption and rehabilitation is necessary to ending mass incarceration. The difference between Ziegler and Hechinger is tactical, with Ziegler preferring to not bring too much of his clients' personal lives into articles that he writes to push for a more humane system. *See, e.g.*, James Ziegler, Opinion, *Bowser's Partnership with Feds on Gun Crime Undermines Home Rule and Will Hurt DC*, D.C. LINE (Feb. 8, 2019), <https://thedcline.org/2019/02/08/james-zeigler-bowsers-partnership-with-feds-on-gun-crime-undermines-home-rule-and-will-hurt-dc>.

171. Peri (@peri_ayla), TWITTER (Jan. 21, 2019, 10:54 AM), https://twitter.com/peri_ayla/status/1087392911900106752.

172. *About Our Office*, LA. PUB. DEFENDER BOARD: 15TH JUD. DISTRICT, <https://15jdpdo.org/about> (last visited Feb. 21, 2020).

173. G Paul Marx (@gpmarx_g), TWITTER (Jan. 21, 2019, 12:43 PM), https://twitter.com/gpmarx_g/status/1087420322276618241.

174. Brook Reinhard (@OregonCrimLaw), TWITTER (Jan. 21, 2019, 11:13 AM), <https://twitter.com/OregonCrimLaw/status/1087397773584916485>.

mass incarceration, and, more specifically, clemency. Telling some of the countless success stories that follow people's release from incarceration through clemency is one of the most effective ways to do so.

Nation of Second Chances ("NSC") is a particularly strong example of the impact that storytelling has on clemency. NSC follows the lives of multiple people who received commutations as a result of President Obama's Clemency Initiative, which documents the regular postrelease success of those receiving clemency.¹⁷⁵

There have also been individual success stories that have gained traction with the help of a sincere bipartisan coalition. Alice Marie Johnson, who was once serving life-without-parole for a federal drug conspiracy offense, has flourished since President Donald J. Trump's commutation of her sentence.¹⁷⁶ Kim Kardashian, who helped get President Trump's attention to Johnson's case, has continued to be a great friend to Johnson, inviting her to be a model for her new shapewear line.¹⁷⁷ Now, Kardashian is putting the spotlight on other prisoners serving disproportionately long sentences with a new documentary that will air on Oxygen.¹⁷⁸ Johnson has flourished as a second chance advocate and speaker since her release from prison, and the media has followed her story with much excitement.¹⁷⁹

The Charles Koch Foundation has also done its part in highlighting those who have come home thanks to clemency after serving many years in prison. One of the people the Koch Foundation has praised is Jason Hernandez, who is creating a Clemency Toolkit for prisoners and their families seeking to better understand the process and how to better their chances of a successful application.¹⁸⁰

175. Jon Perri, *About*, NATION OF SECOND CHANCES, <https://www.nationofsecondchances.org/about> (last visited Feb. 21, 2020).

176. Jeremy Diamond & Kaitlan Collins, *Trump Commutes Sentence of Alice Marie Johnson*, CNN (June 6, 2018, 5:53 PM), <https://www.cnn.com/2018/06/06/politics/alice-marie-johnson-commuted-sentence/index.html>.

177. Stephen LaConte, *Kim Kardashian Just Hired Alice Marie Johnson As Her Newest Shapewear Model*, BUZZFEED (Aug. 30, 2019, 1:08 PM), <https://www.buzzfeed.com/stephenlaconte/kim-kardashian-alice-marie-johnson-skims-shapewear-model>.

178. *'The Justice Project: Kim Kardashian West is Making a Documentary About Prison Reform*, FOX6 NOW (July 28, 2019, 6:11 PM), <https://fox6now.com/2019/07/28/the-justice-project-kim-kardashian-west-is-making-a-documentary-about-prison-reform>.

179. *As Alice Marie Johnson Finds Freedom, the CAN-DO Foundation Seeks More Success Stories*, KOMO (June 6, 2018), <https://komonews.com/news/newsradio/i-want-to-thank-president-donald-john-trump-alice-marie-johnson-granted-freedom>.

180. Stacey Kennelly Nester, *Jason Hernandez, Buried No More: Life After Clemency*, CHARLES KOCH FOUND. (Dec. 12, 2018, 12:32 PM), <https://www.charleskochfoundation.org/story/jason-hernandez-buried-no-more>.

V. POTENTIAL LEGAL SAFEGUARDS FOR THE GOVERNMENT'S EXERCISE OF MERCY

Second chances have become furiously politicized, with every politician in charge of clemency decisions knowing the other side will use mercy as fodder for attack advertisements if even a single person released early reoffends, especially if it is a crime of violence. To make clemency more robust in our high-speed media age, there must be a way to appropriately insulate these decisions from the fact-deficient world of politics while maintaining their legitimacy for the public.

A. *Remove the Pardon Attorney from the Department of Justice*

Clemency is restricted in large part because the US pardon attorney's office is housed within the doors of the Department of Justice ("DOJ"), which, in matters of criminal justice, is a prosecution agency. Prosecutors (like most of us) do not like to admit that they were wrong in the past, including in their decisions the severity of punishment that seemed sensible at the time. Federal line prosecutors, through their professional organization, the National Association of Assistant United States Attorneys, have banded together against even the most incremental criminal justice reforms.¹⁸¹ Yet, because of mandatory minimums and sentencing guidelines,¹⁸² as well as the commonplace practice of plea bargains in federal court,¹⁸³ prosecutors ultimately have more sway in determining the ultimate sentence than judges themselves.

Several esteemed law professors, including some featured in this publication, have discussed this for many years.¹⁸⁴ Several 2020 presidential

181. Note that the First Step Act's achievements were seen as so moderate by many reformers that it was maligned as reform in name only. See Larry Leiser, *Statement on the FIRST STEP Act*, H.R. 5682, NAT'L ASS'N ASSISTANT U.S. ATT'YS (May 10, 2018), <https://www.naaua.org/site/index.php/resources/press-releases/153-may-2018-statement-on-first-step-act/file>; see also Vivian Nixon, *The Doublespeak of the FIRST STEP Act*, THE HILL (Dec. 17, 2018 12:35 PM), <https://thehill.com/blogs/congress-blog/judicial/421687-the-doublethink-of-the-first-step-act>; Natasha Lennard, *The First Step Act Is Not Sweeping Criminal Justice Reform—and the Risk Is That It Becomes the Only Step*, THE INTERCEPT (Dec. 19, 2018, 8:18 AM), <https://theintercept.com/2018/12/19/first-step-act-criminal-justice-reform-bill/>.

182. Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380>.

183. Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, OUTLINE (Aug. 7, 2017, 3:05 PM), <https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials>.

184. Rachel Barkow, Mark Holden & Mark Osler, *The Clemency System Is Broken. Trump Can Fix It*, ATLANTIC (Jan. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enough-we-need-clemency-reform/580300/>; Mark Osler, Opinion, *Obama's Clemency Problem*, N.Y. TIMES, (Apr. 1, 2016), <https://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html>; Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387 (2017); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

candidates have even caught on to this issue. For example, now former candidate, Senator Amy Klobuchar (D-MN), who was once the elected local prosecutor of Hennepin County, Minnesota, has promised to remove the pardon attorney's office from DOJ, if elected.¹⁸⁵ Senator Elizabeth Warren (D-MA) explicitly stated in her *Medium* post detailing her criminal justice reform plan that, if victorious, she would have "remove[d] the clemency process from DOJ, instead empowering a clemency board to make recommendations directly to the White House."¹⁸⁶ The pitfall of simply removing the pardon attorney from the purview of DOJ is that it still does not protect presidents from the Willie Horton effect.

B. Reestablish Federal Parole

Dozens of United States legislators agree that reestablishing federal parole is the direction the US justice system should take. While the Justice Is Not For Sale Act of 2017¹⁸⁷ was tabled with little media reaction, the bill would have created a federal parole board.¹⁸⁸ Prisoners serving life sentences would be eligible to apply for parole after serving only ten years in prison.¹⁸⁹ There are even drafted provisions for automatic parole after formerly denied prisoners served a certain percentage of their sentences, *including* for prisoners serving lengthy consecutive sentences or stacked life sentences.

C. Establish a "Second-Look" Sentencing Law

In the 1990s, when both incarceration and crime rates were peaking, such a bill getting fifty-two cosponsors in the House would have been seen as madness.¹⁹⁰ That said, most of the cosponsors are Democrats in particularly liberal states who identify as progressives.¹⁹¹ Not a single cosponsor was a Republican.¹⁹²

Upon a closer look, however, there are signs that the act was not just a form of left-wing political protest. Several Democratic mainstays are on the list of cosponsors, including former Rep. Joseph Crowley, a moderate Dem-

185. German Lopez, *Amy Klobuchar Has a Plan to Reverse War on Drugs – and Doesn't Need Congress to Do It*, *Vox* (Apr. 30, 2019, 8:00 AM), <https://www.vox.com/future-perfect/2019/4/30/18484809/amy-klobuchar-clemency-pardon-criminal-justice-reform>.

186. Elizabeth Warren (@teamwarren), *Rethinking Public Safety to Reduce Mass Incarceration and Strengthen Communities*, *MEDIUM* (Aug. 20, 2019), <https://medium.com/@teamwarren/rethinking-public-safety-to-reduce-mass-incarceration-and-strengthen-communities-90e8591c6255>.

187. Justice is Not for Sale Act of 2017, H.R. 3227, 115th Cong. (2017).

188. *Id.*

189. *Id.*

190. *Id.* Bernie Sanders (I-VT) filed his own version of the bill in 2015. See Justice is Not for Sale Act of 2015, S. 2054, 114th Cong. (2015).

191. Second Look Act of 2019, S. 2146, 116th Cong. (2019).

192. *Id.*

ocrat¹⁹³ who was primaryed to the left by Rep. Alexandria Ocasio-Cortez (D-NY),¹⁹⁴ and Rep. Joe Kennedy, III (D-MA), a former Massachusetts prosecutor who has gotten significant pushback from criminal justice reform circles for his long-term opposition to the legalization of marijuana.¹⁹⁵ But the lack of bipartisan support would doom such a bill, if it could even get on the voting floor.

VI. CONCLUSION

When someone shown mercy subsequently fails to meet the grantor of mercy's expectations by harming a new victim or society, it is one of the most difficult issues for believers in a more humane justice system to grapple with. At the federal government level, where presidents and presidential candidates have to remain palpable for the voters both in California and the Dakotas, risk averse decision-making, especially where there is potentially little to gain politically, is the norm. That said, changing contemporary narratives around crime and justice—and in particular more storytelling on how the vast majority of executive clemency reintegrate into society without committing more crime—can heighten a president's willingness to utilize mercy in a bolder and broader way.

193. Joseph Crowley, *BALLOTEDIA*, https://ballotpedia.org/Joseph_Crowley (last visited Feb. 21, 2020) (citing *Rep. Joseph "Joe" Crowley*, *GOVTRACK*, https://www.govtrack.us/congress/members/joseph_crowley/400087).

194. David Freedlander, *The Democrats' Culture Divide*, *POLITICO* (Nov./Dec. 2018), <https://www.politico.com/magazine/story/2018/10/30/democratic-party-culture-divide-wars-working-class-blue-collar-221913>.

195. Nik DeCosta-Klipa, *Joe Kennedy III Explains Why He's One of the Few Democrats Not So Hot About Pot*, *BOSTON.COM* (Mar. 8, 2018), <https://www.boston.com/news/politics/2018/03/08/joe-kennedy-iii-marijuana>. Kennedy has since changed his opinion, likely due to negative pressure from his voter base. Christopher Gavin, *Congressman Joe Kennedy III, Once Opposed, Now Supports Legalizing Marijuana Federally*, *BOSTON.COM* (Nov. 20, 2018), <https://www.boston.com/news/politics/2018/11/20/congressman-joe-kennedy-iii-now-supports-marijuana-legalization>.