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

Jessica Jackson

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ARTICLE

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

Jessica Jackson*

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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. Bush supporters slammed presidential candidate and former Massachusetts Governor Michael Dukakis for letting Horton out on furlough while serving his sentence for murder. Tragically, while on furlough, Horton committed several new crimes, including a rape. 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.

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. Some of the advocates for these changes were the grieving family members of child murder victims: people who have experienced devastating tragedy. 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. In addition to seizing on the most sensational aspects of these devastating events, the narratives were also ripe for media manipulation and

3. Id.
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


President Franklin D. Roosevelt granted 3,796 individual clemency petitions—the most of any president since 1900.\textsuperscript{10} His successor, President Harry Truman, granted fewer petitions but applicants had a greater chance at success—Truman granted 41 percent\textsuperscript{11} compared to 28 percent by Roosevelt.\textsuperscript{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.\textsuperscript{13} More dramatically, President Ronald Reagan only granted 12 percent of petitions.\textsuperscript{14} Following Reagan, petitioners’ success rate dropped to the single digits.\textsuperscript{15} President George W. Bush granted only 2 percent of petitions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} Mass incarceration as the solution to fear solidified in the 1980s and 1990s.\textsuperscript{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,\textsuperscript{20} has been that more incarceration is generally better, not worse.\textsuperscript{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,\textsuperscript{22} so far, has been rearrested for a serious crime.\textsuperscript{23} Less than one-third

\begin{itemize}
\item\textsuperscript{10} Id.
\item\textsuperscript{11} Id.
\item\textsuperscript{12} Id.
\item\textsuperscript{13} Id.
\item\textsuperscript{14} Id.
\item\textsuperscript{15} Gramlich & Bialik, supra note 9.
\item\textsuperscript{16} Id.
\item\textsuperscript{17} Id.
\item\textsuperscript{18} James Cullen, The History of Mass Incarceration, BRENNA CTR. F OR J UST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.
\item\textsuperscript{19} Id.
\item\textsuperscript{23} Id.
were released by January 20, 2017, the date President Obama left office.\textsuperscript{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.\textsuperscript{25} Only three of them had been rearrested for a new crime as of that date.\textsuperscript{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.\textsuperscript{27} The only available sentence for second-degree murder under Pennsylvania law is life without parole.\textsuperscript{28} First-degree murder adds the death penalty as an option but is otherwise treated the same.\textsuperscript{29} Until the Supreme Court handed down \textit{Miller v. Alabama}\textsuperscript{30} in 2012 and \textit{Montgomery v. Louisiana}\textsuperscript{31} in 2016, this sentencing scheme was applicable to children under eighteen as well.\textsuperscript{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.\textsuperscript{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.\textsuperscript{34} Af-

\begin{thebibliography}{9}
\bibitem{2} Id. at 45 n.64.
\bibitem{3} Id.
\bibitem{6} Id.
\bibitem{7} 567 U.S. 460 (2012).
\bibitem{8} 136 S. Ct. 718 (2016).
\bibitem{11} Notterman, \textit{supra} note 33, at 6.
\end{thebibliography}
fter a pause from Governor Thornburgh, who did not believe in these commutations on principle, 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. 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. 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. 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. 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. These commutations considered the amount of time already served which made the person in prison immediately parole-eligible, and thus, they were often released shortly thereafter. The Pennsylvania practice comport with criminological studies that have consistently found the likelihood of reoffending vastly decreased as prisoners aged.

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.


38. Noterman, supra note 33.


41. Parole 101, supra note 37.


McFadden was serving life-without-parole for the crime he committed at the age of sixteen. Governor Casey commuted McFadden’s sentence, and he was subsequently released. McFadden then committed a number of crimes in 1994. 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.”

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. That body consists of five people, two of whom are elected, the attorney general, and the lieutenant governor of the state. But their membership is said to undermine “the political insulation normally associated with pardon boards.” 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. 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.”

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. In May 2019, Governor Wolf announced

45. Id.
46. Id.
47. Id.
51. Notterman, supra note 33, at 1.
53. Id.
54. Id.
he was granting clemency to eight people serving life sentences, which the Philadelphia Inquirer noted was “more than any other [Pennsylvanian] governor in decades.”

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. But, as in Pennsylvania, this practice has recently come under threat. 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. Hood, who ran for governor in 2019 as a Democrat, 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. 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.”

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. The Associated Press commented that Newsom’s commutations were for people mainly serving for murder and attempted murder. Governor Newsom’s office explained these people committed...
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.\textsuperscript{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,\textsuperscript{66} and a conservative stronghold,\textsuperscript{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.\textsuperscript{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.\textsuperscript{69}

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

Although crime rates have drastically declined in recent decades,\textsuperscript{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.”\textsuperscript{71} While allegedly in service of a different aim,\textsuperscript{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,

which is a nonprofit housed at the Lewis and Clark Law School in Portland, Oregon,\textsuperscript{73} marks the beginning of this “Modern Crime Victims’ Rights Movement” with a Supreme Court decision from 1973.\textsuperscript{74} In \textit{Linda R.S. v. Richard D.},\textsuperscript{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.”\textsuperscript{76}

Irrked 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,\textsuperscript{77} but apathetic about a convicted person’s interest in a proportional punishment.\textsuperscript{78} He opined in his concurrence in \textit{Payne v. Tennessee}\textsuperscript{79} that “Booth \textit{v. Maryland}’s stunning \textit{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.”\textsuperscript{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.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{73} Nat’l Crime Victim L. Inst., https://law.lclark.edu/centers/national_crime_victim_law_institute (last visited Feb. 21, 2020).
\item \textsuperscript{74} Nat’l Crime Victim L. Inst., supra note 71.
\item \textsuperscript{75} 410 U.S. 614 (1973).
\item \textsuperscript{76} Id.
\item \textsuperscript{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 \textit{v. Simmons}, 543 U.S. 551, 609 n.1 (2005) (Scalia, J., dissenting) (quoting Ford \textit{v. Wainwright}, 477 U.S. 399, 405 (1986)).
\item \textsuperscript{79} 501 U.S. 808 (1991).
\item \textsuperscript{80} Id. at 834 (Scalia, J., concurring) (discussing Booth \textit{v. Maryland}, 482 U.S. 496, 502–03 (1987), overruled by Payne).
\end{itemize}
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 carceral-ity and punitiveness, rather than the granting of additional rights to victims. 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. 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. 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.

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. 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.


85. Lepore, supra note 82.


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. 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. 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.’”

Public media has echoed Garvin’s sentiment often contending, “Well, what’s the victim’s perspective?”

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. Duval County State Attorney Angela Corey castigated and


91. Id.

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

97. H.R. 2137, 104th Cong. (as passed by House, May 7, 1996).
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. 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. Patty did not want him charged with murder by the state of Minnesota so long as Jacob’s body was recovered. State and federal prosecutors agreed to her terms.

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. 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. 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. 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. 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. Klaas also opposed California

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

114. Id.
115. Pishko, supra note 108.
116. Id.
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. 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. The proposed bill also adds new limitations to discovery for defendants.

The Marsy’s Law campaign pushes the narrative that “[c]riminals have more rights than their victims in our judicial system.” Proponents of Marsy’s Law employ similar language in their official television ads. 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.”

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. Police and prosecutors historically tested individual rape kits when they personally felt that there was a strong criminal

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120. Hampson, supra note 95.
121. Quinton, supra note 83.
case to be levied, but a large vocal group of rape survivors maintain that this was never sufficient for justice.\textsuperscript{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,\textsuperscript{128} considering prosecutors are seen by laypeople as the voice of victims, rather than the state.\textsuperscript{129} Marsy’s Law is passing in numerous states across the country like wildfire, despite legitimate constitutional concerns.\textsuperscript{130} In fact, the Montana Supreme Court has already struck down the entirety of Marsy’s Law after it passed.\textsuperscript{131} As did a federal judge in California, citing the extension of waiting time between parole hearings.\textsuperscript{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.\textsuperscript{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.\textsuperscript{134}

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

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almost any content. 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. 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. Regardless of this, all three countries are considered to have more journalistic freedom overall than the United States, and they all have massively decreased incarceration rates compared to the United States.

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. Simultaneously, print newspapers are dying off, so their owners are further incentivized to run sensationalistic crime reporting, as it is very popular. 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. 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. Not dissimilarly, Nancy Grace, the television personality whose eponymous show involved her shouting to audiences about the irredeemability and guilt of criminal sus-

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


\(^{146}\) Id.


\(^{148}\) Id., supra note 145.

\(^{149}\) Id.


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. They also point to freedom of information and speech concerns. 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. Media outlets such as The Intercept, The Nation, The Marshall Project, 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.

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
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, 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. 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.” 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. 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.

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. His tweets sometimes go viral, being shared amongst both lawyers and non-lawyers thousands of times per single tweet. 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 antivic-tim, despite the fact that the new law brings New York in line with forty-seven other states.

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

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161. Zealous, supra note 159.
162. Id.
163. Id.
165. Hechinger, supra note 160.
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 commentary 170 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.
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-bowers-partnership-with-feds-on-gun-crime-undermines-home-rule-and-will-hurt-dc.
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

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. Yet, because of mandatory minimums and sentencing guidelines, as well as the commonplace practice of plea bargains in federal court, 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. Several 2020 presidential


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. 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.” 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 2017 was tabled with little media reaction, the bill would have created a federal parole board. Prisoners serving life sentences would be eligible to apply for parole after serving only ten years in prison. 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. That said, most of the cosponsors are Democrats in particularly liberal states who identify as progressives. Not a single cosponsor was a Republican.

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-

188. Id.
189. Id.
192. Id.
ocrat who was primaried to the left by Rep. Alexandria Ocasio-Cortez (D-NY), 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. 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 palatable 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.