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Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment

Carol S. Steiker

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DUNWODY DISTINGUISHED LECTURE IN LAW

KEEPING HOPE ALIVE: CRIMINAL JUSTICE REFORM DURING
CYCLES OF POLITICAL RETRENCHMENT

*Carol S. Steiker**

Abstract

For the past decade or so, criminal justice reform in the United States has been having a moment. After decades of massive increases in incarceration rates around the country, advocates for serious rethinking of harsh criminal justice policies have begun to find more receptive audiences at the local, state, and federal levels. However, the 2016 presidential election brought into office a new administration that often embraces the perspective of earlier eras on crime and punishment. How might the momentum of criminal justice reform be maintained in this new political climate? Looking back at some of the drivers of change over the past decade offers helpful guidance for the future—not just for this moment of flux, but for the inevitable future fluctuations to come. This Article offers a catalog of six aspects of the current criminal justice reform moment that can be thought of as tools for promoting continued reform efforts. Each of these tools is of limited power by itself, and all have possible downsides. But wielded thoughtfully and in tandem, they can build sturdy vehicles for propelling forward the essential and unfinished project of criminal justice reform.

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* Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program, Harvard Law School.

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INTRODUCTION

For decades, the public conversation around criminal justice policy in the United States was dominated by calls for ever-harsher punishments to stem what seemed to be an ever-rising tide of serious crime. And it was not just talk. Starting in 1970 and continuing until at least the turn of the millennium, legislatures passed broader and more punitive criminal statutes; prosecutors charged more cases as felonies; judges imposed longer sentences; and juries returned more capital verdicts. A “War on Drugs” displaced the Great Society’s “War on Poverty.” Between 1975 and 1996, the most frequently enacted sentencing law change was the adoption of mandatory minimum penalties.¹ The penal population ballooned until the United States achieved—and continues to maintain—the highest known incarceration rate in the world.²

The tide of rising crime rates did eventually recede, though experts disagree about the major drivers of this turn.³ The tremendous decline in the rates of homicide and serious violent crime that began around 1990 reduced public anxiety and opened space for skepticism about the value of maintaining such enormous prison and jail populations. The financial crisis of 2008 led many policy makers to question the massive increases in the cost of corrections over the preceding decades. Starting around the same time, references to “mass incarceration” skyrocketed in the media.⁴ The long-standing racial and ethnic disparities in policing and criminal

1. See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 75 (2009).

2. See Roy Walmsley, *World Prison Population List (Twelfth Edition)*, WORLD PRISON BRIEF, http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [<https://perma.cc/6HC9-KFW2>].

3. See, e.g., WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 289 (1998) (crediting data-driven policing strategies such as CompStat); Steven Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 163–64 (2004) (crediting increases in the number of police, increases in the prison population, the decline of the crack epidemic, and legalized abortion); Rick Nevin, *Understanding International Crime Trends: The Legacy of Preschool Lead Exposure*, 104 ENVTL. RES. 315, 332–33 (2007) (crediting decreasing lead exposure in children).

4. See Oliver Roeder, *A Million People Were in Prison Before We Called It Mass Incarceration*, FIVETHIRTYEIGHT (Sept. 18, 2015, 10:46 AM), <https://fivethirtyeight.com/features/a-million-people-were-in-prison-before-we-called-it-mass-incarceration/> [<https://perma.cc/Y35D-FKYY>].

justice outcomes attracted greater attention, as demonstrated by the coverage of the protracted lawsuits challenging the New York City Police Department's stop-and-frisk policy, which overwhelmingly affected black and Latino residents.⁵ Around the country, new attention focused on issues ranging from policing, to drug policy, to bail practices, to prison and jail conditions, to capital punishment, among many others. In short, for the past decade or so, criminal justice reform has been having a moment.

But the political wheel never stops turning. The 2016 presidential election brought into office a new administration that embraces the perspective of an earlier era on many of these issues. Former Attorney General Jeff Sessions issued a charging memo instructing federal prosecutors to seek "the most severe penalties possible," replacing his predecessor Eric Holder's instructions to avoid invoking lengthy mandatory minimum sentences against certain less-culpable drug defendants.⁶ Sessions also sharply curtailed the Justice Department's use of consent decrees to reform local police departments accused of civil rights violations and other abuses.⁷ From the White House, President Donald Trump has vociferously embraced greater use of the death penalty⁸ and defended his harsh immigration policies on crime-control grounds.⁹ The President even pardoned Joe Arpaio, the former Maricopa County sheriff who was convicted of contempt for "defying a federal judge's order to stop targeting Latinos based solely on suspicion of their immigration status."¹⁰ Although the political wheel will inevitably turn

5. See Benjamin Mueller, *New York Police Dept. Agrees to Curb Stop-and-Frisk Tactics*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/nyregion/new-york-police-dept-stop-and-frisk.html> [https://perma.cc/KP7X-4Y3G].

6. See Sari Horwitz & Matt Zapotosky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html?utm_term=.0eaebcab28b4 [https://perma.cc/UST2-KCVT].

7. See Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html> [https://perma.cc/BRG5-RGUK].

8. See Jennifer Hijazi, *Trump Wants to See the Death Penalty Come "into Vogue" Again. He's Wanted That for Years*, VOX (Oct. 28, 2018, 1:42 PM), <https://www.vox.com/policy-and-politics/2018/10/28/18032438/trump-death-penalty-pittsburgh-shooting> [https://perma.cc/2NHR-EAPQ].

9. See Chiraag Bains, *Trump's Approach to Crime & Punishment*, TAKE CARE (Mar. 16, 2017), <https://takecareblog.com/blog/trump-s-approach-to-crime-and-punishment> [https://perma.cc/J98K-DYY5].

10. See Simon Romero, *Latinos Express Outrage After Trump Pardons Arpaio*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/joe-arpaio-pardon-latinos.html> [https://perma.cc/2D6R-Y5L8].

again, the Trump Administration will leave a longer-term legacy of at least two new Supreme Court Justices and a slew of lower federal court judges,¹¹ all of whom will influence the direction of criminal justice in their sentencing decisions, interpretations of federal statutes, and constitutional rulings.

How might we maintain the momentum of criminal justice reform in this new political climate? Looking back at some of the drivers of change over the past decade offers helpful guidance for the future—not just for this moment of flux, but for the inevitable future fluctuations that will come at some point to all levels (federal, state, and local) and to all branches (executive, legislative, and judicial) of government. What follows is a catalog of six aspects of the current criminal justice reform moment that can be thought of as tools for promoting continued reform efforts. Each of these tools is of limited power by itself, and all have possible downsides. But wielded thoughtfully and in tandem, they can build sturdy vehicles for propelling forward the essential and unfinished project of criminal justice reform.

Before I turn to the tool catalog, a word is in order about the definition of “criminal justice reform.” Although a central focus of current reformers is—completely appropriately—the rolling back of mass incarceration, the problems of American criminal justice are not simply problems of too much punishment. Thus, reform is not always synonymous with less law enforcement or punishment. Even as we over-incarcerate on a massive scale, there are also important pockets of disturbing under-enforcement—of laws against political corruption, corporate and white-collar crime, police abuse, violence in prisons and jails, and sexual assault. Reform, construed broadly, includes addressing over-incarceration as part of a wider rethinking of law-enforcement priorities and overall investments, through criminal justice and otherwise, in public safety and security.

And now, without further ado, I offer a catalog of tools for keeping hope alive and promoting criminal justice reform during cycles of political retrenchment.

I. BIPARTISANSHIP

During the decades that produced mass incarceration, criminal justice was a deeply partisan issue. Starting in the 1960s, the Republican Party

11. See *Federal Judges Nominated by Donald Trump*, BALLOTPEdia, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump [https://perma.cc/S64N-G8JV].

donned the mantle of law and order as part of its “Southern Strategy,” which used crime as a racially coded wedge issue to appeal to conservative-leaning white Democrats, especially in the South.¹² In the decades that followed, Republicans at all levels of government frequently accused their Democratic opponents of being “soft on crime” in often successful efforts to capitalize on the anxiety and fear that rising crime rates engendered. The death penalty became a powerful shorthand for “tough on crime” bona fides, and elected officials in death penalty states often boasted about the numbers of those they had sent to death row as prosecutors or whose death warrants they had signed as governors.¹³ Some Democratic candidates began to pivot right on criminal justice to avoid these kinds of appeals, as then-Governor Bill Clinton did during his 1992 presidential campaign, returning home to Arkansas to preside over the execution of a brain-damaged black man who had murdered a white police officer.¹⁴ To the extent that there was any bipartisan agreement about criminal justice issues, it was on policies that promoted harsher punishments, whether in purpose or effect—such as the creation of the Federal Sentencing Guidelines in the 1980s¹⁵ or the 1994 federal crime bill.¹⁶

After the turn of the millennium, however, as crime rates entered their second decade of steep decline, the politics of fear became less powerful and new bipartisan coalitions began to emerge that supported a retreat from the punitive turn of previous decades. Evangelical Christians increasingly supported and sponsored rehabilitative services, newly branded as “reentry” programs.¹⁷ Fiscal conservatives began to call for policies that were “right on crime” or “smart on crime” rather than “tough

12. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 45–45 (2011).

13. See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 111–13 (2002).

14. See Marshall Frady, *Death in Arkansas*, NEW YORKER (Feb. 22, 1992), at 105 [<https://perma.cc/8ZUE-DP2V>].

15. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 31 (1988).

16. See Vanessa Williams, *1994 Crime Bill Haunts Clinton and Sanders as Criminal Justice Reform Rises to Top in Democratic Contest*, WASH. POST (Feb. 12, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/12/1994-crime-bill-haunts-clinton-and-sanders-as-criminal-justice-reform-rises-to-top-in-democratic-contest/?utm_term=.bfe1b4d8fa77 [<https://perma.cc/J2TX-TCF4>].

17. See generally DAVID DAGAN & STEVEN M. TELES, *PRISON BREAK: HOW CONSERVATIVES TURNED AGAINST MASS INCARCERATION* (2016) (exploring the role of evangelicals, fiscal conservatives, and anti-state libertarians in promoting conservative support for criminal justice reform).

on crime.”¹⁸ Libertarians increasingly questioned new governmental intrusions on liberty, property, and privacy permitted by transformations in technology.¹⁹ All of these positions were consistent with the core values of these groups, but it became more common to express such ideas once the political value of punitive positions to the conservative cause began to decline. To a degree unthinkable in previous decades, left–right coalitions at all levels of government began to unite on a variety of criminal justice reforms, agreeing on the fundamental premise that punishments had become too harsh and rehabilitative options too scarce. As a spokesperson for the conservative Koch Industries, which has funded many recent criminal justice reform efforts, recently commented, “Out in the real world where people live, it’s not even controversial anymore.”²⁰

Consider a few examples of recent reforms with bipartisan backing. On the federal level, Congress recently passed the First Step Act,²¹ which reduced some federal sentences, increased federal judges’ ability to deviate from mandatory minimum sentences for nonviolent drug offenders, increased federal “good time” credits, and promoted rehabilitative programs in the federal criminal justice system.²² The Act also reauthorized the Second Chance Act,²³ which was another bipartisan effort signed into law by President George W. Bush in 2008.²⁴ The reauthorization “provides \$100 million per year to establish and enhance state and local [reentry] programs.”²⁵ The First Step Act, as its title suggests, is not a transformative measure—in part because it is modest in scope, and in part because the states rather than the federal system are

18. See, e.g., *id.* at 92, 105.

19. See *id.*

20. Shailla Dewan & Carl Hulse, *Republicans and Democrats Cannot Agree on Absolutely Anything. Except This.*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/prison-reform-bill-republicans-democrats.html> [<https://perma.cc/3G9G-MSFD>].

21. Pub. L. No. 115-391, 132 Stat. 5194 (2018).

22. See Justin George, *What’s Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act> [<https://perma.cc/6U4P-3QHU>].

23. Pub. L. No. 110-199, 122 Stat. 657 (codified as amended in scattered sections of 34 U.S.C.); see 132 Stat. at 5222.

24. See Erik Eckholm, *U.S. Shifting Prison Focus to Re-entry into Society*, N.Y. TIMES (Apr. 8, 2008), <https://www.nytimes.com/2008/04/08/washington/08reentry.html> [<https://perma.cc/8ZZL-W555>] (noting that “the measure passed Congress with nearly unanimous bipartisan support”).

25. *President Trump Signs First Step Act into Law, Reauthorizing Second Chance Act*, JUST. CTR. (Dec. 21, 2018), <https://csgjusticecenter.org/jc/president-trump-signs-first-step-act-into-law-reauthorizing-second-chance-act/> [<https://perma.cc/Q34H-95UE>].

responsible for the lion's share of American incarceration. However, the Act represents a profound change from the criminal justice politics of the decades in which mass incarceration was building. It passed (as did the Second Chance Act a decade earlier) with overwhelming support from members of both parties in both houses of Congress.²⁶ One small part of the First Step Act nicely encapsulates the changed political climate—the provision that makes retroactive the reduction in the infamous 100-to-1 crack/powder sentencing disparity.²⁷ That reduction was finally achieved in the Fair Sentencing Act of 2010²⁸ after nearly two decades of repeated attempts that were thwarted by entrenched resistance.²⁹ Many of those very resisters, or their successors in political affiliation, voted to apply the change retroactively to people sentenced while the resistance was in full swing.

On the state level, a powerful example of bipartisan change is the recent re-enfranchisement of people with felony convictions by constitutional amendment here in Florida³⁰—the most far-reaching American restoration of voting rights in decades. The measure passed by a wide margin with almost two-thirds of voters in support, “drawing majorities in over 90 percent of the state’s 67 counties.”³¹ A substantial number of Republican voters supported the amendment despite good reason to believe that it would more likely benefit Democratic than Republican candidates in future elections.³² Given these widely predicted effects, it is not surprising that more Democrats than Republicans across the country support the restoration of voting rights for people with felony

26. See 161 CONG. REC. H10,346–66, H10,430–31 (daily ed. Dec. 20, 2018).

27. See Tim Lau, *Historic Criminal Justice Reforms Begin to Take Effect*, BRENNAN CTR. FOR JUST. (July 25, 2019), <https://www.brennancenter.org/blog/historic-criminal-justice-reforms-begin-to-take-effect> [<https://perma.cc/Z8JF-8SBN>].

28. Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

29. See Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27, 30 (2013).

30. See Tim Mak, *Over 1 Million Florida Felons Win Right to Vote with Amendment 4*, NPR (Nov. 7, 2018, 2:46 AM), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4> [<https://perma.cc/G7MV-2CFC>].

31. See Daniel Gotoff & Celinda Lake, *Voters Want Criminal Justice Reform. Are Politicians Listening?*, MARSHALL PROJECT (Nov. 13, 2018), <https://www.themarshallproject.org/2018/11/13/voters-want-criminal-justice-reform-are-politicians-listening> [<https://perma.cc/KJ9X-3UY8>].

32. See Nicholas Nehamas, *More than a Million Convicted Felons in Florida Won Their Voting Rights Back. Now What?*, MIAMI HERALD (Nov. 8, 2018, 8:00 AM), <https://www.miamiherald.com/news/politics-government/election/article221301400.html>.

convictions. What is surprising, however, is that the issue finds majority support in both parties. A 2018 national poll found that eighty percent of people who voted for Hillary Clinton in 2016 supported the restoration of felons' voting rights—but so did fifty-eight percent of those who voted for Donald Trump.³³

Another criminal justice reform issue that is finding rapidly increasing bipartisan support is the legalization of marijuana. A generation or two ago, at the height of the War on Drugs, this issue was a political nonstarter. Now the legalization of marijuana for recreational or medical use is expanding with tremendous speed, and not only in blue states. Purple states (those with divided governments) such as Massachusetts, Michigan, and Vermont recently approved recreational marijuana use.³⁴ And red states such as Missouri, Oklahoma, and Utah recently legalized medical marijuana use.³⁵ A total of thirty-three states and the District of Columbia have legalized the use of marijuana in some form.³⁶ The advocacy and reporting group Marijuana Moment is currently tracking more than 1,000 bills relating to marijuana in 2019,³⁷ including bills to fully legalize it in half a dozen red states.³⁸ A recent Gallup poll showed that two-thirds of Americans now support the legalization of marijuana.³⁹ As one advocate put it, “The train has left the station. Americans of all political affiliations and almost all demographics support marijuana legalization.”⁴⁰ An emblematic sign of this dramatic shift is the name of

33. See Benjamin Wallace-Wells, *Midterms 2018: Restoring Voting Rights to Ex-Felons Is a Rare Bipartisan Issue*, NEW YORKER (Nov. 5, 2018, 4:09 PM), <https://www.newyorker.com/news/current/midterms-2018-restoring-voting-rights-to-ex-felons-is-a-rare-bipartisan-issue> [https://perma.cc/VS97-GAPQ].

34. E.g., Jeremy Berke, *Here's Where You Can Legally Consume Marijuana in the US in 2018*, BUS. INSIDER (Nov. 7, 2018, 12:29 PM), <https://www.businessinsider.com/where-can-you-can-legally-smoke-weed-2018-1> [https://perma.cc/M5LB-VVV9].

35. See *id.*

36. See Alexandra Hutzler, *Marijuana Legalization 2019: Which States Will Consider Legal Weed in Year Experts Predict Will Be 'Real Game-Changer,'* NEWSWEEK (Jan. 1, 2019, 8:10 AM), <https://www.newsweek.com/which-states-legalization-marijuana-2019-1275736> [https://perma.cc/L49D-7HDE].

37. See *Marijuana Legislation Tracking*, MARIJUANA MOMENT, <https://www.marijuanamoment.net/bills/> [https://perma.cc/X6WG-NTPY].

38. See Kyle Jaeger, *Marijuana Legalization Bills Already Filed in Half a Dozen Red States for 2019 Sessions*, MARIJUANA MOMENT (Jan. 10, 2019), <https://www.marijuanamoment.net/marijuana-legalization-bills-already-filed-in-half-a-dozen-red-states-for-2019-sessions/> [https://perma.cc/DB2D-9ARS].

39. See Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx> [https://perma.cc/MT7G-KLYC].

40. Hutzler, *supra* note 36.

a new member of the board of advisors for the major marijuana corporation, Acreage Holdings—none other than former House Speaker John Boehner, a long-time opponent of legalization who explains that his thinking on this issue “has evolved.”⁴¹

Even the death penalty, formerly shorthand for “tough on crime” policies, has found itself increasingly embattled even in its former red-state strongholds. Capital sentencing and executions have fallen dramatically all across the country since 2000, including in Texas, the country’s leading executing state.⁴² Nebraska made history in 2015 when it became the first red state to legislatively repeal its death penalty in the past half century.⁴³ In fact, not only did the Republican-dominated legislature vote for repeal, it also overrode Republican Governor Pete Ricketts’ veto of the measure by a super-majority vote.⁴⁴ Ultimately, the death penalty was restored by ballot initiative after a campaign substantially funded by Ricketts.⁴⁵

These snapshots of bipartisanship in the broad movement for criminal justice reform should not be oversold. Attitudes about criminal justice have historically been exquisitely sensitive to fluctuations in crime rates. Should crime rates rise again, bipartisanship may fall apart if incentives to engage in the divisive politics of fear prove irresistible. Even if bipartisan energy for reform continues at its current level or even increases, its returns may well remain modest. The incrementalism of the Second Chance Act was disappointing to many who hoped for more thoroughgoing federal sentencing reform. And on a deeper level, there are inherent limits to the reach of reforms that are built around “non-violent” or “first-time” offenders. As many expert observers have noted, the majority of people in prison are there for violent crimes, and only reforms that grapple with that fact have a hope of making a meaningful

41. See Daniel Victor, *John Boehner’s Marijuana Reversal: ‘My Thinking on Cannabis Has Evolved,’* N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/politics/boehner-cannabis-marijuana.html> [https://perma.cc/9LKW-WATK].

42. See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 193–216 (2016).

43. *Nebraska Votes to Repeal the Death Penalty*, A.B.A. (June 1, 2015), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2015/summer/nebraska-votes-to-repeal-the-death-penalty/ [https://perma.cc/Q95Y-ZM83].

44. See Radley Balko, *Nebraska Gov. Pete Ricketts (and His Father) Spent \$300,000 to Save the Death Penalty. Here’s What He Could Have Bought Instead.*, WASH. POST (Sept. 2, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/09/02/nebraska-gov-pete-ricketts-and-his-father-spent-300000-to-save-the-death-penalty-heres-what-he-could-have-bought-instead/?utm_term=.89491565f1b7 [https://perma.cc/FQQ7-69P8].

45. See *id.*

and lasting dent in mass incarceration.⁴⁶ Moreover, even when significant reforms are adopted with bipartisan support, that support can fracture after the fact, creating incentives to undermine change by the imposition of procedural obstacles to implementation. For example, in Florida, the Governor and the Republican-controlled legislature have moved to inhibit the implementation of felon re-enfranchisement by requiring all court-imposed fees and fines to be paid before voting rights are restored—a measure that some have called a “poll tax.”⁴⁷ Similarly, local zoning legislation can hamper the implementation of statewide legalization of marijuana, as conflict in my home state of Massachusetts demonstrates.⁴⁸

Despite these undeniable limits to the effectiveness of bipartisanship in promoting criminal justice reform, there can be continuing and generative power in the way that bipartisan coalitions reframe public discourse around crime and punishment. The oft-repeated claims that new policies are “smart on crime” or “right on crime” have sapped much of the energy from the easy rebuke of “soft on crime” and the long-claimed virtue of “tough on crime.”⁴⁹ The surfacing of fiscal constraints in policy debates can prevent the adoption of symbolically attractive but likely expensive and ineffectual proposals (such as raising the ceiling on already stiff penalties after a highly publicized crime). And the framing of interventions in the language of redemption (such as the “Second Chance” Act) helps to resist a narrative of irredeemable offenders and the predictable response that we should “lock ‘em up and throw away the key.” The new lenses on criminal justice questions that are crafted through bipartisan reform efforts may well outlast the bipartisan coalitions that produced them and thus represent one of the most powerful reasons to keep making such efforts.

46. See John Pfaff, *Why Today's Criminal Justice Reform Efforts Won't End Mass Incarceration*, AM. MAG. (Dec. 21, 2018), <https://www.americamagazine.org/politics-society/2018/12/21/why-todays-criminal-justice-reform-efforts-wont-end-mass-incarceration> [https://perma.cc/9H62-XPQ3].

47. Katrina vanden Heuvel, *A New Poll Tax Will Suppress Florida's Voting Reform*, WASH. POST (May 14, 2019), https://www.washingtonpost.com/opinions/2019/05/14/new-poll-tax-will-suppress-floridas-voting-reform/?utm_term=.a748c33ed227 [https://perma.cc/56MJ-8RRR].

48. Burgess Powell, *Most of Massachusetts' Municipalities Have Banned Marijuana Retail*, HIGH TIMES (Mar. 27, 2018), <https://hightimes.com/news/most-massachusetts-municipalities-banned-marijuana-retail/> [https://perma.cc/DXX6-VUEH].

49. See generally KAMALA D. HARRIS & JOAN O'C. HAMILTON, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER (2009) (discussing a politically ambitious prosecutor's proud embrace of being “smart” rather than “tough” on crime).

II. FEDERALISM

The decentralized nature of American criminal justice can sometimes be an impediment to reform efforts. Change that can be legislated from the center in many of our peer countries must face legislative battles in fifty states, the District of Columbia, and Congress. The abolition of the death penalty is a case in point. While an unprecedented number of American states have recently repealed or invalidated their capital statutes or formally declared moratoria on executions (a total of thirteen states in the past fifteen years), nationwide abolition cannot reasonably be expected through legislative means, either on the federal or state level.⁵⁰ “American federalism cedes primary authority over criminal justice matters to individual states,”⁵¹ and abolition of the death penalty is a political nonstarter in many retentionist states, such as Texas and Alabama. For that reason, unlike most of the other developed Western democracies, the United States will likely be able to achieve nationwide abolition of the death penalty only through judicial constitutional invalidation rather than through legislation.⁵²

But federalism can also be a boon to reform efforts, especially when the central government is reluctant, hostile, or simply politically deadlocked. Federalism virtually ensures that there will always be *some* jurisdiction hospitable to reform efforts of some kind. Moreover, the disaggregation of authority over criminal justice goes beyond the binary federal–state divide. Within states, authority is further disaggregated among branches of government and between the states and their local governments. In addition to the familiar tripartite division of authority among state legislators, judges, and chief executives, states vest substantial authority in statewide corrections departments,⁵³ while state jails tend to be controlled by locally elected sheriffs.⁵⁴ Moreover, the vast majority of states have separate elections for the post of state attorney

50. STEIKER & STEIKER, *supra* note 42, at 256–57.

51. *Id.*

52. *See id.* at 255–89 (arguing that the Supreme Court’s proportionality doctrine provides a “blueprint” for a constitutional challenge to the death penalty).

53. *See, e.g.*, FLA. STAT. § 945.04(1) (2019) (“The Department of Corrections shall be responsible for the inmates and for the operation of, and shall have supervisory and protective care, custody, and control of, all buildings, grounds, property of, and matters connected with, the correctional system.”).

54. *See, e.g.*, WIS. STAT. § 59.27(1) (2018) (“The sheriff of a county shall . . . [t]ake the charge and custody of the jail maintained by the county and the persons in the jail, and keep the persons in the jail personally or by a deputy or jailer.”).

general and for locally elected district attorneys.⁵⁵ Policing is also disaggregated, divided between state troopers and locally accountable police forces. As a result of this radically fragmented criminal justice authority, there are myriad sites for reform efforts within individual states.

At the state legislative level, “blue” states are able to enact criminal justice reform that reaches further than the First Step Act that Congress was able to pass for the federal system through bipartisan dealmaking. For example, New York state legislators passed a set of “sweeping reforms” as part of the state budgeting process in 2019 that included the elimination of cash bail for the vast majority of criminal defendants, among other changes that were more protective of defendants’ rights.⁵⁶ In Massachusetts, the state with the lowest incarceration rate in the country,⁵⁷ the Democratic legislature worked with the moderate Republican Governor to pass an omnibus criminal justice reform bill in 2018 that included reform of criminal fees and the bail process, elimination of many mandatory minimum drug sentences, and increased use of diversion and restorative justice processes, among other changes.⁵⁸ State governors can sometimes effect change acting alone, in addition to their powers to initiate, sign, or veto legislation or to appoint state judges and other officials. For example, in 2019, Governor Gavin Newsom of California announced a moratorium on executions while he is in office, closing the state’s execution chamber in San Quentin and withdrawing the state’s execution protocol.⁵⁹ Newsom’s action followed recent moratoria imposed by the governors of Ohio, Oregon, and Pennsylvania (as well as the former governor of Colorado) that put the death penalty

55. In Alaska, Delaware, and Rhode Island, the attorney general is the chief prosecutor for the entire state. See CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS BULLETIN, NCJ 193441, PROSECUTORS IN STATE COURTS, 2001, at 11 (2002), <https://www.bjs.gov/content/pub/pdf/psc01.pdf> [<https://perma.cc/M8U7-7TZX>].

56. Dan M. Clark, *Cuomo, Lawmakers Announce Deal on State Budget, Criminal Justice Reforms*, LAW.COM: N.Y.L.J. (Mar. 31, 2019, 8:14 AM), <https://www.law.com/newyorklawjournal/2019/03/31/cuomo-lawmakers-announce-deal-on-state-budget-criminal-justice-reforms/> [<https://perma.cc/4CH7-8K37>].

57. See Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/4W9W-SZZT>].

58. See Michael Crowley, *Massachusetts Sets an Example for Bipartisan Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (May 1, 2018), <https://www.brennancenter.org/blog/massachusetts-sets-example-bipartisan-criminal-justice-reform> [<https://perma.cc/F49Z-AAME>].

59. See Ronald J. Tabak, *Capital Punishment*, in THE STATE OF CRIMINAL JUSTICE 2019, at 231, 247 (2019).

on hold in those states.⁶⁰ Executions, as well as clemency and pardons, fall within the almost complete control of state chief executives, although in most other criminal justice contexts, the governor's power is less unilateral.

The power of state courts over the day-to-day operation of the criminal justice system is considerably broader than that of governors. Not only do the courts preside over criminal proceedings, they also are charged with federal and state constitutional oversight of the entire process, from police practices to adjudication, sentencing, and prison conditions. In a recent dramatic example in 2018, a Louisiana state trial judge declared the state's law permitting nonunanimous criminal jury verdicts unconstitutional under the Equal Protection Clause of the federal Constitution, on the grounds that the law was motivated by racial animus and had powerful disparate effects on African-American jurors and on African-American defendants convicted by nonunanimous juries.⁶¹ Before the judge's ruling could be appealed through the state and federal courts, the voters of Louisiana amended the state constitution to require unanimous jury verdicts going forward, demonstrating the power of direct democracy to make criminal justice reform outside of the traditional tripartite branches of government.⁶²

Also outside of the familiar tripartite division of power are state correctional agencies, which generally exercise broad discretionary authority over state prisons, probation, and parole. In 2013, Rick Raemisch became the head of Colorado's Department of Corrections after the previous head, Tom Clements, was assassinated by a released inmate who had spent a substantial amount of time in solitary confinement.⁶³ Raemisch became a vigorous and influential voice for the

60. *See id.* at 245–47.

61. *State v. Maxie*, No. 13-CR-72522, Oct. 11, 2018.

62. *See* Kevin McGill & Rebecca Santana, *Louisiana Votes to End Non-Unanimous Jury Verdicts*, U.S. NEWS (Nov. 6, 2018), <https://www.usnews.com/news/best-states/louisiana/articles/2018-11-06/louisiana-decides-future-of-non-unanimous-jury-verdicts> [https://perma.cc/ZU7P-LRFX]. Oregon is the only state that still permits nonunanimous criminal verdicts. *Supreme Court to Consider Louisiana's Non-unanimous Juries*, AP NEWS (Mar. 18, 2019), <https://www.apnews.com/b78825d8ed8a4fc1858e889656d02da3> [https://perma.cc/V8W6-9KWE]. The continued constitutionality of that practice will be decided by the U.S. Supreme Court, which granted certiorari in a Louisiana case challenging the constitutionality of the nonunanimous conviction of a defendant whose trial predated the prospective-only constitutional change. *See id.*

63. Phaedra Haywood, *Colo. Prison System Looks Beyond Solitary Confinement as Solution*, SANTA FE NEW MEXICAN (Sept. 30, 2018), <https://www.correctionsone.com/prison-reform/articles/481544187-Colo-prison-system-looks-beyond-solitary-confinement-as-solution/> [https://perma.cc/DC3Q-KN8U].

reform of solitary confinement practices in Colorado and beyond,⁶⁴ even voluntarily spending time himself in a solitary cell—an experience he credited with galvanizing his commitment to reform.⁶⁵ In 2017, Raemisch led the Colorado DOC to eliminate the use of long-term (more than fifteen days) solitary confinement and to institute alternative de-escalation and mental health policies.⁶⁶

To focus, as the invocation of “federalism” suggests, on the federal–state divide, however, is to miss the highly local nature of much criminal justice policy. In the vast majority of states, district attorneys are locally elected, and they are the repositories of tremendous discretionary power. For this reason, criminal justice reformers have recently turned their attention to the election of “progressive prosecutors” and have achieved some stunning successes around the country. Larry Krasner in Philadelphia, Kim Foxx in Chicago, Rachael Rollins in Boston’s Suffolk County, and Eric Gonzalez in Brooklyn are just a few of the recent wave of prosecutors who are claiming the “progressive” mantle with sweeping new policies that include limiting the use of cash bail,⁶⁷ declining to prosecute low-level offenses,⁶⁸ and supporting early release on parole,⁶⁹ among many other initiatives.⁷⁰ The discretionary decisions of local prosecutors can have very substantial impacts. For example, the implementation of Krasner’s new bail policies in Philadelphia “led to an immediate 23% increase . . . in the fraction of eligible defendants [who were] released with no monetary or other conditions . . . and a 22% . . . decrease in the fraction of defendants who spent at least one

64. *Id.*

65. Rick Raemisch, Opinion, *My Night in Solitary*, N.Y. TIMES (Feb. 20, 2014), <https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html> [<https://perma.cc/M8QL-SPBB>].

66. Haywood, *supra* note 63.

67. Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-Level Crimes. Here’s What Happened Next.*, PHILA. INQUIRER (Feb. 19, 2019), <https://www.inquirer.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html> [<https://perma.cc/B2UC-NU2Z>].

68. Adrien Lynch, *Boston DA Rachael Rollins Releases Policy Memo*, UP TO BOS. (Mar. 26, 2019), <https://www.uptoboston.com/boston-da-rachael-rollins-releases-policy-memo/> [<https://perma.cc/79JH-PD8J>].

69. Tom Robbins, *Took a Plea? Brooklyn’s District Attorney Will Support Your Parole*, MARSHALL PROJECT (Apr. 17, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/17/took-a-plea-brooklyn-s-district-attorney-will-support-your-parole> [<https://perma.cc/FXB9-HLML>].

70. *See, e.g.*, Steve Bogira, *The Hustle of Kim Foxx*, MARSHALL PROJECT (Oct. 29, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx> [<https://perma.cc/BZ3U-PCBU>] (discussing some of Kim Foxx’s initiatives during her first year in office).

night in jail.”⁷¹ A less recent, though more striking, example of the high impact of prosecutorial discretion is the fact that the infamously draconian Rockefeller-era drug laws, adopted in New York State in 1973, had little effect on drug incarceration rates for more than a decade.⁷² Why? Because “[l]ocal prosecutors essentially ignored the law.”⁷³

Local prosecutorial power, however, can prove controversial. To return to the Philadelphia example, state lawmakers have pushed back against Krasner’s charging decisions in gun cases, passing new targeted legislation authorizing the state’s attorney general to prosecute certain firearms offenses only in the city of Philadelphia (and nowhere else in the state).⁷⁴ Similarly, when Orlando-area state attorney Aramis Ayala refused to seek the death penalty in the case of a murdered police officer and announced her categorical opposition to capital punishment, Florida Governor Rick Scott reassigned the police officer’s murder case to a special prosecutor and removed Ayala from numerous other potentially capital cases within her district.⁷⁵

These examples of pushback against reformist prosecutors are representative of a larger dynamic. The fragmented and often local sites of criminal justice reform energy make such energy fragile and therefore difficult to sustain. It is often the case that criminal justice reform initiated by state or local actors generates opposition from competing institutional actors, whether from the legislature or governor in the examples above or

71. Aurelie Ouss & Megan Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail 1* (George Mason Legal Studies Research Paper, Paper No. LS 19-08, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138 [https://perma.cc/AX5E-JDM5]. *But see* Bryce Covert, *Progressive Philly D.A. Larry Krasner’s Bail Reform Plans Seem Stalled, Advocates Say*, APPEAL (June 25, 2019), <https://theappeal.org/progressive-philly-d-a-larry-krasnens-bail-reform-plans-seem-stalled-advocates-say/> [https://perma.cc/QLB9-C25N] (explaining that some bail reform advocates have remained unhappy with the pace of change in Philadelphia).

72. John Pfaff, *Mass Incarceration is a Local Affair*, DEMOCRACY J. (Aug. 1, 2017, 4:18 PM), <https://democracyjournal.org/arguments0/mass-incarceration-is-a-local-affair/> [https://perma.cc/4HEB-XMAG].

73. *Id.*

74. Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019, 5:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [https://perma.cc/5AJZ-SSVV].

75. *Florida Governor Reassigns Cases Due to State Attorney’s Stance on Death Penalty*, A.B.A. (Mar. 1, 2017), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2017/spring/florida-governor-reassigns-cases-due-to-state-attorneys-stance-o/ [https://perma.cc/9BYM-XV5U]. *See generally* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 147–73 (1st ed. 2019) (detailing the pushback against Ayala, Krasner, and other reformist district attorneys).

from police departments, prison officials, or others.⁷⁶ Thus, although there are myriad sites to pursue reform projects on the vast and complicated map of overlapping criminal justice authority in the United States, the ability to sustain such efforts depends upon building coalitions and overcoming opposition, much as success in the larger legislative context does. Federalism and fragmentation create new opportunities for innovation but offer no escape from prevailing politics.

III. GRASSROOTS ACTIVISM

What galvanizes officials at any level of government to undertake the difficult work of attempting to reform criminal justice institutions? Popular pressure has always been an important driver of reform, but the role of ground-up activism has become even more central in an era in which social media and ubiquitous cellphone cameras can instantly disseminate information and images. The past several years have seen a burgeoning of grassroots activism targeting criminal justice practices. This activism includes both national movements and smaller local initiatives, and the goals of such activism have ranged from attacking mass incarceration to promoting more prosecution and harsher punishment for sexual assault to empowering local communities.

One powerful nationwide force is the Movement for Black Lives (M4BL), which was born in the wake of the shooting of black teenager Michael Brown by a white police officer in Ferguson, Missouri, in 2014.⁷⁷ Although originally aimed at holding law enforcement officers accountable for violence against black people, M4BL has widened to include a much broader criminal justice agenda as well as issues relating to economic justice and political power.⁷⁸ M4BL's criminal justice

76. See, e.g., Am. Fed'n of Gov't Emps., *Union Representing 33,000 Federal Correctional Officers Opposes Prison Reform Bill*, CISION (May 18, 2018, 5:51 AM), <https://www.prnewswire.com/news-releases/union-representing-33-000-federal-correctional-officers-opposes-prison-reform-bill-300651349.html> [https://perma.cc/M3HZ-XXYN] (discussing union representing workers in the Bureau of Prisons' opposition to the First Step Act); Michael Barajas, *The Big Blue Obstacle to Bipartisan Criminal Justice Reform*, TEX. OBSERVER (May 3, 2019, 7:06 AM), <https://www.texasobserver.org/the-big-blue-obstacle-to-bipartisan-criminal-justice-reform/> [https://perma.cc/27M5-W4WA] (discussing police associations' involvement in criminal justice reform). See generally Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71 (2016) (chronicling the opposition of the prison industry to decarceration and proposing policies to shift industry incentives).

77. Bakari Kitwana, *Message from the Ferguson Grassroots, 5 Years After Michael Brown's Death*, COLORLINES (Aug. 9, 2019, 6:51 PM), <https://www.colorlines.com/articles/message-ferguson-grassroots-5-years-after-michael-browns-death> [https://perma.cc/UN28-EAHH].

78. See *Platform*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> [https://perma.cc/8GZL-7T6T].

platform calls for “an end to the criminalization, incarceration, and killing of our people.”⁷⁹ More specifically, the platform calls for the elimination of money bail, capital punishment, private police and prisons, and “an end to all jails, detention centers, youth facilities and prisons as we know them,” among other things.⁸⁰ M4BL’s impact has been widespread, both in concrete terms and in cultural influence. M4BL, which is made up of a broad coalition of groups, has influenced a wide range of criminal justice issues, often working in conjunction with local organizers and groups. For example, it has worked to elect reformist prosecutors,⁸¹ promote community action around bail release,⁸² empower black police chiefs,⁸³ and put forward policy briefs and model legislation.⁸⁴ But M4BL’s most lasting impact may be its groundbreaking use of social media—the #BlackLivesMatter Twitter hashtag was used nearly thirty million times in the first five years since it was created, an average of more than 17,000 times per day.⁸⁵ The hashtag has established a powerful platform to air and amplify anger at unfair criminal justice practices; for example, use of the hashtag has spiked in response to police shootings of unarmed black men.⁸⁶

The #MeToo movement is even younger than M4BL; although the phrase “Me Too” was coined in 2006, the grassroots movement was born in 2017 in the wake of sexual assault and harassment charges against the

79. *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/> [<https://perma.cc/2FLW-KL2V>].

80. *Id.*

81. Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU (July 13, 2018, 3:45 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-black-lives-matter-changed-way-americans-fight> [<https://perma.cc/WA3B-PJDP>] (noting M4BL helped oust certain “high-profile corrupt prosecutors”).

82. See Charlotte Alter, *Black Lives Matter Groups Are Bailing Black Women Out of Jail for Mother’s Day*, TIME (May 12, 2017), <https://time.com/4777976/black-lives-matter-mothers-day-bail/> [<https://perma.cc/WQ6N-GTU5>].

83. Taylor Hosking, *The Long History of Black Officers Reforming Policing from Within*, ATLANTIC (Dec. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-long-history-of-black-officers-reforming-policing-from-within/547457/> [<https://perma.cc/DZX7-94BX>].

84. See Vann R. Newkirk, II, *The Permanence of Black Lives Matter*, ATLANTIC (Aug. 3, 2016), <https://www.theatlantic.com/politics/archive/2016/08/movement-black-lives-platform/494309/> [<https://perma.cc/LS98-2FME>].

85. Caroline Simon, *How Social Media Has Shaped Black Lives Matter, Five Years Later*, USA TODAY (July 12, 2018, 4:13 PM), <https://www.usatoday.com/story/news/2018/07/12/black-lives-matter-movement-and-social-media-after-five-years/778779002/> [<https://perma.cc/D5UE-75RM>].

86. See *id.* (noting that use of the hashtag “was at an all-time high” after the shootings of Alton Sterling, Philando Castile, and five Dallas police officers).

influential film producer Harvey Weinstein.⁸⁷ Like M4BL, the #MeToo movement started with a Twitter hashtag and morphed into a powerful national grassroots movement; indeed, #MeToo has become an influential international movement as well.⁸⁸ Unlike M4BL, however, #MeToo has been invoked to *increase* the use of the tools of criminal justice to address what many activists believed to be under-prosecuted and under-punished crimes of sexual violence⁸⁹ (although #MeToo activists also pursue other, noncriminal goals, such as addressing sexual harassment, and use other, noncriminal means such as public shaming).⁹⁰ In a few short years, the #MeToo movement has had substantial influence on both criminal justice practices and the broader culture. Professor Catharine MacKinnon credits #MeToo with influencing the most recent Bill Cosby trial, the Larry Nassar sentencing, the recall of California judge Aaron Persky for his sentence in the case of a Stanford athlete convicted of sexual assault, and the more responsive treatment of ongoing allegations of sexual abuse in the Catholic church.⁹¹ At a systemic level, the #MeToo movement has been cited as a force behind new state laws that extend the statute of limitations for sex crimes, require the timely processing of rape kits, and forbid nondisclosure agreements from preventing sexual assault victims from testifying in court.⁹² The #MeToo movement is also promoting the legislative adoption of laws that require “affirmative consent” to sex, also known as “yes means yes,” that will change the nature of the underlying crime of sexual assault.⁹³ In the broader domain of culture, #MeToo has unquestionably wrought a profound shift. From dinner table conversations to nervous jokes and

87. Catharine A. MacKinnon, *Where #MeToo Came from, and Where It's Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/> [<https://perma.cc/EBU9-T3WJ>].

88. *See id.*

89. Rebecca Beitsch, *#MeToo Movement Has Lawmakers Talking About Consent*, PEW: STATELINE (Jan. 23, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/23/metoo-movement-has-lawmakers-talking-about-consent> [<https://perma.cc/J7KV-F6V4>].

90. *Cf.* Melissa Murray, *Consequential Sex: #MeToo*, *Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 870 (2019) (discussing how victims of sexual harassment are using social media and traditional media to seek extralegal redress of their injuries).

91. MacKinnon, *supra* note 87.

92. *See* Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, PEW (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws> [<https://perma.cc/6VDY-5NYH>].

93. Beitsch, *supra* note 89.

changed policies in the workplace, to media coverage of a steady stream of disgraced abusers, the influence of #MeToo is everywhere, though it remains to be seen if attitudes and behavior can or will quickly change.

Both M4BL and #MeToo demonstrate the power of grassroots activism to shift public discourse and influence institutional actors. However, both movements also illustrate the challenges of broad-based, diffuse grassroots networks. In the case of M4BL, the organization is a loose coalition of more than fifty racial justice organizations with dozens of local chapters that “eschew[] hierarchy and centralized leadership.”⁹⁴ Nonetheless, M4BL maintains a website that takes positions, lists “demands,” and offers policy prescriptions.⁹⁵ By contrast, the website for the “Me Too Movement” appears to be run by Tarana Burke,⁹⁶ who coined the term “Me Too” in 2006, but who was not the driving force behind its grassroots explosion in 2017 and beyond, which was a ground-up rather than a top-down phenomenon.⁹⁷ In the case of both movements, it is fair to wonder how priorities are set and policy prescriptions are developed; in short, for whom can these movements claim to speak? It also remains to be seen whether either movement can avoid internecine struggles over power and message and whether they can sustain momentum in the absence of a strong center.

Not all, or even most, grassroots activism looks like M4BL or #MeToo. Smaller, more focused grassroots activism around criminal justice tends to predominate, and such organizations can avoid some of the challenges faced by sprawling mega-movements. For example, some local communities have organized to engage in “court watching” to bring attention to perceived injustices in exercises of discretion that would ordinarily fly below the radar of traditional media coverage.⁹⁸ For example, in its two-week pilot program in the winter of 2018, @CourtWatchNYC tweeted, “Today two people arraigned in Manhattan

94. Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 6, 2016), <https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [https://perma.cc/B83R-UUYB]; see also *About Us*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/about/> [https://perma.cc/5TV4-9T7F] (giving information about the fifty racial justice organizations affiliated with the Movement for Black Lives).

95. See *Platform*, *supra* note 78.

96. See *About, ME TOO MOVEMENT*, <https://metoomvmt.org/about/> [https://perma.cc/AD6W-THGG].

97. See MacKinnon, *supra* note 87.

98. Beth Schwartzapfel, *Court Watch NYC Volunteers Sit in Courtrooms to Monitor How Prosecutors Use Their Discretion*, A.B.A. J. (Feb. 28, 2018, 7:30 AM), http://www.abajournal.com/news/article/court_watch_nyc_volunteers_monitor_prosecutors [https://perma.cc/2N8H-Q3RK].

for dancing on the subway,” and “Last night in Brooklyn: DA asked for \$1500 bail on someone accused of stealing 4 bars of SOAP.”⁹⁹ One of their tweets included Manhattan D.A. Cyrus Vance’s own Twitter handle with a string of eyeball emojis.¹⁰⁰ In addition to publicizing the inner workings of the criminal justice system, grassroots advocates have sought to actively intervene in the process. A number of local communities have set up community bail funds that post bail for indigent defendants who would otherwise remain incarcerated pending trial because of their inability to pay to secure their release.¹⁰¹ If and when these defendants make their final court appearances, all or most of the funds are returned to the fund and recycled for use in other cases (except in jurisdictions that deduct individual defendants’ fees and fines from their posted bail).¹⁰²

Although local, focused grassroots organizations can avoid some of the organizational challenges of larger movements, much grassroots advocacy, large or small, runs the risk of provoking pushback against what opponents or even just more mainstream reformers see as populist excesses. For example, a recent poll on the #MeToo movement showed that 40% of respondents thought that it has gone too far.¹⁰³ And the *New York Times* recently ran a magazine cover story entitled “The Tragedy of Baltimore,” which described a deliberate police pullback in response to the protests that erupted after the killing of Freddie Gray by police officers in 2015.¹⁰⁴ Many, including me, are troubled by the recall of the California state judge who sentenced Stanford student Brock Turner to only six months for his sexual assault of an unconscious woman.¹⁰⁵ Despite this real risk of political overreach and pushback, there is no gainsaying the growing power and relevance of grassroots movements in

99. *Id.*

100. *Id.*

101. See Alysia Santo, *Bail Reformers Aren’t Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2016), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform> [https://perma.cc/4A9U-N867].

102. *Id.*

103. Tovia Smith, *On #MeToo, Americans More Divided by Party than Gender*, NPR (Oct. 31, 2018, 5:00 AM), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender> [https://perma.cc/NAS6-YLLK].

104. Alec MacGillis, *The Tragedy of Baltimore*, N.Y. TIMES MAG. (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/magazine/baltimore-tragedy-crime.html> [https://perma.cc/BSX3-4UXE].

105. See, e.g., Jessica Levinson, *The Recall of Brock Turner’s Judge, Aaron Persky, Is a Concerning Blow to Judicial Independence*, NBC NEWS (June 7, 2018, 4:17 PM), <https://www.nbcnews.com/think/opinion/recall-brock-turner-s-judge-aaron-persky-concerning-blow-judicial-ncna880821> [https://perma.cc/ZH6Q-REU6].

igniting and maintaining the fire that makes those in power feel the heat of the need for change.

IV. EMPIRICAL STUDIES

Turning down the heat, there is also power in the cool call of facts. True, there is a large body of literature on how people often perceive events and accept facts that confirm what they already believe, a phenomenon that psychologists call “motivated cognition.”¹⁰⁶ But as an academic, I cannot help having some faith in the power of truth to move policy debates. Just as grassroots activism has surged in recent years, so has deep empirical engagement with the criminal justice system that offers rigorous evidence and insight regarding some of the most pressing dysfunctions and injustices of the system.

One of the most detailed and dramatic exposés of police abuses is the so-called Ferguson Report issued by the U.S. Department of Justice (DOJ), the product of an extensive investigation into local law enforcement practices after the shooting of an unarmed black teenager by a white police officer in Ferguson, Missouri, in the summer of 2014.¹⁰⁷ Although the DOJ did not find grounds for a federal prosecution of the individual officer,¹⁰⁸ it issued a separate report addressing the day-to-day practices of the Ferguson Police Department. This latter report was a scathing indictment of racially biased, abusive practices by the Ferguson police that treated the primarily black residents of the city with violence and indignity and subjected them to exorbitant and often unfounded municipal charges to raise revenue.¹⁰⁹ The report disclosed the stunning statistic that 16,000 of the 21,000 residents of Ferguson had outstanding municipal warrants,¹¹⁰ many for extremely petty and sometimes entirely false offenses. Although empiricists like to say that “the plural of anecdote is not data,” accompanying statistics with stories of individual cases can be extremely effective in communicating the nature of the

106. See, e.g., David Dunning, *Motivated Cognition in Self and Social Thought*, in 1 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY 777, 777–78 (Mario Mikulincer et al. eds., 2015).

107. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/AX5L-G5CU>].

108. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 5 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [<https://perma.cc/5QN3-99VK>].

109. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *supra* note 107.

110. *Id.* at 6, 55.

conduct at issue. The Ferguson Report accompanied its statistical findings with many detailed accounts of outrageous police behavior. The following is just one example:

[I]n the summer of 2012, a 32-year-old African-American man sat in his car cooling off after playing basketball in a Ferguson public park. An officer pulled up behind the man's car, blocking him in, and demanded the man's Social Security number and identification. Without any cause, the officer accused the man of being a pedophile, referring to the presence of children in the park, and ordered the man out of his car for a pat-down, although the officer had no reason to believe the man was armed. The officer also asked to search the man's car. The man objected, citing his constitutional rights. In response, the officer arrested the man, reportedly at gunpoint, charging him with eight violations of Ferguson's municipal code. One charge, Making a False Declaration, was for initially providing the short form of his first name (e.g., "Mike" instead of "Michael"), and an address which, although legitimate, was different from the one on his driver's license. Another charge was for not wearing a seat belt, even though he was seated in a parked car. The officer also charged the man both with having an expired operator's license, and with having no operator's license in his possession. The man told us that, because of these charges, he lost his job as a contractor with the federal government that he had held for years.¹¹¹

The Ferguson Report uncovered an extreme pattern of police abuses that contributed to a nationwide re-examination of the enforcement of municipal ordinances and the imposition of exorbitant fees and fines in the criminal justice system as revenue-raising measures. For example, the National League of Cities cited the Ferguson Report as a key impetus for its new initiative called "Cities Addressing Fines and Fees Equitably," which provides "technical assistance and grant funding for six cities to assess the negative impacts of municipal fines and fees . . . and [to] implement equitable collections strategies."¹¹²

The most common source of empirical studies regarding the criminal justice system is academic research. Some powerful recent examples of research into key criminal justice issues are Professor John Pfaff's book

111. *Id.* at 3.

112. See Denise Belser, *Why Cities Should Find Equitable Ways to Impose and Collect Fines and Fees*, CITIESPEAK (Feb. 8, 2019), <https://citysspeak.org/2019/02/08/why-cities-should-find-equitable-ways-to-impose-and-collect-fines-and-fees/> [<https://perma.cc/6N6Z-EMHA>].

on the primary drivers of mass incarceration and Professor Brandon Garrett's book on the main causes of wrongful convictions. In *Locked In: The True Causes of Mass Incarceration-and How to Achieve Real Reform*,¹¹³ Pfaff debunks the commonly accepted idea that mass incarceration was primarily the result of the "War on Drugs" and the adoption of draconian sentencing laws. Rather, Pfaff argues that the massive run-up in the American incarceration rate was largely the product of a major shift in how prosecutors used their charging discretion; starting in the mid-1990s, prosecutors began bringing felony charges against arrestees about twice as often as they had previously.¹¹⁴ Pfaff argues that popular reforms that reduce or eliminate criminal sentences for nonviolent drug offenders will not substantially move the needle on mass incarceration; instead, we need to change the way we address violent crime and to view it as a stage in an offender's life (violence being primarily associated with younger offenders) rather than as a permanent type or status of offender.¹¹⁵ By boldly challenging received wisdom with careful attention to detail, Pfaff makes a strong case that a successful solution to over-incarceration requires an accurate assessment of its causes.

In *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*,¹¹⁶ Garrett performs an in-depth analysis of the first 250 wrongfully convicted people to be exonerated by DNA evidence. His study revealed a pattern of common abuses and errors across the cases, including contaminated confessions, suggestive eyewitness identification procedures, flawed forensics, perjured informant testimony, and inadequate defense representation.¹¹⁷ Garrett's book highlights the scale of the problem of wrongful convictions and scrupulously chronicles the cases by painstakingly reviewing thousands of pages of court records. As a result, his recommendations for reform practically write themselves, focusing on correcting the failures that repeatedly appear in cases of proven injustice.

In addition to demonstrating the need for reform and identifying the most promising paths to achieve reform goals, empirical studies can play a role in protecting preexisting reform initiatives. Hard-won reform often

113. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION-AND HOW TO ACHIEVE REAL REFORM* (2017).

114. *Id.*

115. *Id.* at 229–32.

116. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

117. *Id.*

faces resistance and pushback, and empirical studies can demonstrate that reform efforts are successfully achieving their stated goals or not producing feared negative effects. For example, Philadelphia District Attorney Larry Krasner’s initiative to reduce the use of money bail has been criticized from both the left and the right—from the left for not being applied broadly enough, and from the right for releasing people who lacked a financial incentive to appear for later court dates and who might commit other crimes on release.¹¹⁸ Two professors, a lawyer and a criminologist, studied the impacts of Krasner’s “No-Cash-Bail” reform policy and found that the policy led to a substantial (23%) increase in the fraction of eligible defendants released on personal recognizance, without monetary or other conditions, and a similarly substantial decrease (22%) in the fraction of defendants who spent at least one night in jail.¹¹⁹ Despite this large decrease in the fraction of defendants having monetary incentives to appear in court, the authors found no change in the rate of failures to appear in court or in recidivism by released defendants.¹²⁰ Similarly, two law professors from the University of Michigan did a statewide study of criminal record expungement in Michigan, finding that those who obtained expungement of their criminal records had extremely low subsequent crime rates, even better than the rate of the general population—“a finding that defuses a common public-safety objection to expungement laws.”¹²¹

Of course, not all empirical work is of high quality, and empirical results will not always point in the same direction. For the most controversial issues, there will undoubtedly be “expert” studies that purport to support diametrically opposed positions. Thus, policy makers, like the general public, may well decide to credit the studies that support their preexisting views. And researchers themselves are not free from the “motivated cognition” that affects the rest of us—they may be biased,

118. See David Chang & Alicia Victoria Lozano, *Can Philadelphia District Attorney Larry Krasner's Radical Approach Protect the City?*, NBC PHILA. (Apr. 12, 2018, 3:13 PM), <https://www.nbcphiladelphia.com/news/local/Larry-Krasner-Philadelphia-District-Attorney-Social-Reform-Crime-Prisons-First-100-Days-479479463.html> [<https://perma.cc/LHC4-STAG>]; Linn Washington, Jr., ‘*Criminal Injustice*’: *How City’s Cash Bail System Hurts Poor, People of Color*, PHILA. TRIB. (Jan. 6, 2019), https://www.phillytrib.com/news/local_news/criminal-injustice-how-city-s-cash-bail-system-hurts-poor/article_98bae3f1-fbef-57b4-8fe3-e4bb23f386a9.html [<https://perma.cc/VL9X-8EYN>].

119. Ouss & Stevenson, *supra* note 71, at 1.

120. *Id.*

121. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study* 1 (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 19-001, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620 [<https://perma.cc/TB4E-2V3S>].

consciously or not, in their construction of studies and interpretation of data.¹²² Despite these daunting challenges, it remains the case that facts exist. And empirical work—both quantitative and qualitative—is one of the best tools we have for finding them. It should therefore come as no surprise that such work is playing an increasingly important role in both promoting new and smarter reform initiatives and evaluating the success of preexisting ones.

V. DISSEMINATION

Empirical work does not tend to be easy to read or to understand and thus is not easily disseminated beyond the confines of the academic and policy arenas. As a result, non-technical, non-scholarly information about the need for reform of the criminal justice system has played a substantial role in moving public opinion in the past decade. Some of the avenues for reaching a wider, public audience allow for aesthetic and emotional connections as well as intellectual ones.

Traditional journalism addressing criminal justice issues has seen a flowering in recent years. Much of the credit must go to The Marshall Project, launched in 2014 and led by Bill Keller, the former Executive Editor of the *New York Times*. The Marshall Project (or “TMP,” as it is known) describes itself as “a nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the U.S. criminal justice system.”¹²³ TMP produces investigative, explanatory and narrative journalism and publishes commentaries that include the perspective of those directly impacted by the criminal justice system. Its work has won many journalism awards, including a Pulitzer Prize,¹²⁴ and has been influential in promoting change. For example, on its fundraising page, TMP describes how its reporting on the pretrial detention of juveniles in solitary confinement in Tennessee and on the brutality at Attica prison directly contributed to policy reforms.¹²⁵

122. See Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCH. 259, 263 (1998).

123. *Mission Statement*, MARSHALL PROJECT, <https://www.themarshallproject.org/about/#mission> [<https://perma.cc/5TWL-GCKX>].

124. *The Marshall Project Wins a Pulitzer Prize*, MARSHALL PROJECT, <https://www.themarshallproject.org/2016/04/18/the-marshall-project-wins-a-pulitzer-prize> [<https://perma.cc/X67N-VJ7H>].

125. See Bill Keller, *How You Can Support Our Work*, MARSHALL PROJECT (June 4, 2018), <https://www.themarshallproject.org/2018/06/04/support-our-work-2018> [<https://perma.cc/JPC3-Q7KM>].

Another example of tremendously influential journalism on the criminal justice system is Jennifer Gonnerman's piece in *The New Yorker* about Kalief Browder, the teenager who spent nearly three years in Rikers Island jail, nearly two of them in solitary confinement, waiting for his case to be processed.¹²⁶ The charges against him (of stealing a backpack) were eventually dismissed without a trial, but his incarceration took its toll—Browder killed himself a few years after his release.¹²⁷ Browder's story, compellingly told and widely disseminated by Gonnerman's reporting, has been a touchstone in the movements to close Rikers Island and for bail reform.¹²⁸

In addition to influential journalism, the movement for criminal justice reform has been propelled by several blockbuster books. Three such works are Michelle Alexander's *The New Jim Crow*,¹²⁹ Bryan Stevenson's *Just Mercy*,¹³⁰ and Ta-Nehisi Coates's *Between the World and Me*.¹³¹ All three books highlight in different ways the racial injustices inflicted by the American criminal justice system, both historically and in the present. In *The New Jim Crow*, Alexander argues that current criminal justice policies, especially the enforcement of laws promulgated during the "War on Drugs," have effectively reproduced the racial caste system of the Jim Crow era supposedly dismantled by the Civil Rights Movement.¹³² In *Just Mercy*, Stevenson tells the compelling story of a black man wrongfully convicted and sentenced to death (though finally exonerated) for the capital murder of a white woman in Alabama.¹³³ In *Between the World and Me*, Coates, in the form of a letter to his adolescent son, reflects on the ever-present threat of violence to black people from practices stretching from slavery to policing and

126. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/8WFM-Y5HD>].

127. Jennifer Gonnerman, *Kalief Browder 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/P9SX-7D9C>].

128. See Maurice Chammah, *Inside the Mayor's Plan to Close Rikers*, NEW YORKER (Mar. 22, 2019), <https://www.newyorker.com/news/dispatch/inside-mayor-bill-de-blasio-plan-to-close-rikers-island> [<https://perma.cc/9JD9-93QU>]; Jesse McKinley & Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal.*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html> [<https://perma.cc/U6WX-6U9R>].

129. See ALEXANDER, *supra* note 12.

130. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

131. See TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015).

132. See ALEXANDER, *supra* note 12 (calling for a new generation of civil rights advocates to influence change within the criminal justice system).

133. See STEVENSON, *supra* note 130.

incarceration.¹³⁴ All three books have reached tremendously wide audiences: each has spent many weeks on the *New York Times* bestseller list, and they all appear with regularity on high school and college reading lists. As a professor of criminal law who teaches a course on capital punishment, I can attest to the countless students who have reported that they were moved to attend law school or to study criminal justice because of one of these books.

An even wider audience has likely been reached through podcasts, television, and film. The podcast *Serial* had a break-out hit with its first season, released in 2014, addressing the case of Adnan Syed, a high school student accused of murdering his ex-girlfriend in 1999 and sentenced to life in prison in Maryland.¹³⁵ The podcast did a deep investigation of the case, raising many questions about the reliability of Syed's conviction.¹³⁶ The podcast reached the number one ranking on iTunes and became a cultural phenomenon.¹³⁷ Syed won an appeal that granted him a new trial; however, the highest court in Maryland reversed that decision and reinstated Syed's conviction and life sentence.¹³⁸ Media interest in the case has not subsided; HBO released a documentary in early 2019 entitled *The Case Against Adnan Syed* that further explores the issues.¹³⁹ The television documentary series *Making a Murderer*, released by Netflix starting in late 2015, was filmed over thirteen years and raises questions about the reliability of the murder convictions of two men in Wisconsin, exploring issues of evidence contamination, coercive questioning tactics, and ineffective defense counsel.¹⁴⁰ As with *Serial*, the show was a huge hit both commercially and critically, winning four Emmys, including Outstanding Documentary or Nonfiction Series.¹⁴¹ Also as with *Serial*, one of the convicted men won a reversal of his conviction only to have that decision overruled on appeal and the

134. See COATES, *supra* note 131 (warning his son that police departments within this country have been endowed with authority to “destroy his body”).

135. See Sarah Larson, “*Serial*”: *The Podcast We’ve Been Waiting For*, *NEW YORKER* (Oct. 9, 2014), <https://www.newyorker.com/culture/sarah-larson/serial-podcast-weve-waiting> [<https://perma.cc/965U-PXZV>].

136. *Id.*

137. *Id.*

138. Sonia Rao, *Maryland Court Reinstates Adnan Syed’s Murder Conviction*, *WASH. POST* (Mar. 8, 2019), https://www.washingtonpost.com/arts-entertainment/2019/03/08/maryland-court-reinstates-adnan-syeds-murder-conviction/?utm_term=.39e86ea88dd9 [<https://perma.cc/J838-YVZP>].

139. *See id.*

140. *See Making a Murderer*, *NETFLIX*, <https://www.netflix.com/title/80000770> [<https://perma.cc/NS76-7A6R>].

141. *Id.*

conviction reinstated.¹⁴² On the silver screen, acclaimed filmmaker Ava Duvernay's documentary *13th*, released by Netflix in 2016, addresses the racial causes and effects of American mass incarceration, drawing heavily on the work of Michelle Alexander's *The New Jim Crow*¹⁴³ and featuring Bryan Stevenson. The film was nominated for an Academy Award and won Best Documentary at the Emmys, the BAFTAs, and the NAACP Image Awards.¹⁴⁴ These huge hits are just some of the many media releases, both documentary and fictional, that explore miscarriages of justice and systemic racism in the American criminal justice system, keeping the topic on the front burner of public awareness.

Finally, museums are more permanent sites of public engagement with the need for criminal justice reform. The Eastern State Penitentiary Historical Site (ESP) in Philadelphia has taken the massive, crumbling remains of the world's oldest penitentiary and turned it into a museum with the mission to "interpret[] the legacy of American criminal justice reform, from the nation's founding through to the present day, within the long-abandoned cellblocks of the nation's most historic prison."¹⁴⁵ Although ESP engages in some events of questionable educational value (such as a hugely popular annual Halloween event that plays up the scare quotient of the former prison),¹⁴⁶ it primarily focuses on its central mission of educating the public about the history of imprisonment and current issues regarding the need for reform. For example, ESP's most recent press release highlights its project of projecting animated films made by currently incarcerated people on the huge stone walls that surround the site—bringing the inside out.¹⁴⁷ A museum that focuses on

142. See Debra Cassens Weiss, *En Banc 7th Circuit Reinstates Brendan Dassey's Conviction in 'Making a Murderer' Case*, A.B.A. J. (Dec. 8, 2017, 4:55 PM), http://www.abajournal.com/news/article/en_banc_7th_circuit_reinstates_brendan_dasseys_conviction_in_making_a_murderer [<https://perma.cc/B26U-3TCH>].

143. See Pamela Kruger, *Netflix's '13th' Explores 'Modern Slavery' in Incendiary New Documentary*, FORTUNE (Oct. 6, 2016), <https://fortune.com/2016/10/06/13th-netflix-documentary-ava-duvernay/> [<https://perma.cc/3VUX-9K3S>].

144. See Steve Dove, *13th Receives Documentary Feature Nomination for Oscars 2017*, (Jan. 24, 2017, 4:42 PM), <https://oscar.go.com/news/nominations/13th-gets-oscar-nomination-for-best-documentary> [<https://perma.cc/LK72-P86W>]; *13th*, NETFLIX, <https://www.netflix.com/title/80091741> [<https://perma.cc/6UH9-5ZXL>].

145. See *About Eastern State*, E. ST. PENITENTIARY HIST. SITE, <https://www.easternstate.org/about-eastern-state> [<https://perma.cc/7KH2-KG4A>].

146. *The Prison*, TERROR BEHIND WALLS, <https://www.easternstate.org/halloween/preview/the-prison> [<https://perma.cc/PJ32-8XNB>].

147. See *ESP Screens New Animated Films Created by Currently-Incarcerated Artists*, E. ST. PENITENTIARY HIST. SITE (June 24, 2019), <https://www.easternstate.org/press-room/press->

the racial origins and impact of mass incarceration was opened in 2018 in Montgomery, Alabama, by the Equal Justice Initiative, led by Bryan Stevenson.¹⁴⁸ “The Legacy Museum: From Enslavement to Mass Incarceration” is an 11,000-square-foot museum that “explores the history of racial inequality and its relationship to a range of contemporary issues from mass incarceration to police violence.”¹⁴⁹ The museum accompanies a National Memorial for Peace and Justice that acknowledges the victims of racial terror lynchings.¹⁵⁰ The memorial, which recalls the Vietnam War memorial in Washington, D.C., and the Holocaust memorial in Berlin, Germany, offers a physical site that invites public reflection on horrors of the past that leave long-term legacies.

VI. PHILANTHROPY

Museums and memorials, as well as much media, empirical work, organizing, and advocacy addressing criminal justice reform would not be possible without the support of philanthropic contributions by individual and organizational donors. A final distinctive feature of the criminal justice “moment” of the past decade has been the involvement of a large range of philanthropic organizations in a similarly large range of reform efforts.

The philanthropic supporters of criminal justice reform have included not just left-leaning donors like the Soros-funded Open Society Foundations, but also right-leaning donors like the Charles Koch Foundation.¹⁵¹ The list of major organizations that have contributed substantially to criminal justice reform projects include the Annie E. Casey Foundation, the Chan Zuckerberg Initiative, the Laura and John Arnold Foundation, the Ford Foundation, the MacArthur Foundation, the Open Philanthropy Project, the Pew Charitable Trusts, and the Public Welfare Foundation, among many others. To give some sense of the scale of their investments, the MacArthur Foundation has poured almost \$150

releases/esp-screens-new-animated-films-created-currently-incarcerated-artists [https://perma.cc/SEA8-L57R].

148. *The Legacy Museum: From Enslavement to Mass Incarceration*, EQUAL JUST. INITIATIVE, <https://eji.org/legacy-museum> [https://perma.cc/MBQ8-YXZV].

149. *Id.*

150. *The National Memorial for Peace and Justice*, EQUAL JUST. INITIATIVE, <https://museumandmemorial.eji.org/> [https://perma.cc/QE3P-QFKN].

151. See *Criminal Justice*, OPEN SOC’Y FOUND., <https://www.opensocietyfoundations.org/voices/topics/criminal-justice> [https://perma.cc/SS4M-HECB]; *Criminal Justice Reform Grants*, CHARLES KOCH FOUND., <https://www.charleskochfoundation.org/apply-for-grants/requests-for-proposals/criminal-justice-policing-reform/> [https://perma.cc/6V48-T3PV].

million into reforming U.S. jails,¹⁵² while the Art for Justice Fund, managed by the Ford and Rockefeller foundations, was seeded with more than \$100 million and has given out \$43 million over the past two years.¹⁵³ Some donors focus on particular issues (for example, the Arnold Foundation has been a major force in bail reform),¹⁵⁴ while others sweep more broadly or eclectically. Philanthropic investment intersects with other criminal justice reform tools (and of course, they with each other). For example, philanthropy supports the production of empirical studies and media that contribute to criminal justice momentum. When philanthropy comes from a politically wide base, it promotes bipartisanship in the political sphere. And philanthropy often funds small-scale, local, and grassroots projects that take advantage of federalism when larger and more centralized reform projects are stymied. These projects can often serve as pilots for possible scaling-up in the future.

Obviously, philanthropic investment can expand the capacity of reformers to develop and implement change. But the bigger the investments of private donors, the more critics worry about ceding control over the direction of criminal justice reform to nonpublic actors. The Koch Foundation's motives and influence, in particular, have come under scrutiny from the radical wing of the mostly left-leaning supporters of criminal justice reform, who raise concerns that the Kochs' libertarian agenda will "co-opt a grassroots liberation movement and rebrand it as a libertarian charity industry."¹⁵⁵ These concerns seem overblown, given that the politics of the vast majority of the private donors in the criminal justice reform space seem to lean decidedly to the left. However, the general concern that private actors might co-opt a movement—or even just diminish the public's sense of responsibility for change—is a real one. The balance between faster movement forward and public stewardship over reform agendas will always remain a delicate one in

152. See Alex Daniels, *MacArthur, Seeing Success in Reducing Jail Time, Boosts Funding for Criminal Justice Overhaul*, CHRON. PHIL. (Oct. 24, 2018), <https://www.philanthropy.com/article/MacArthur-Seeing-Success-in-244888> [https://perma.cc/PYX7-NUUS].

153. See Julia Travers, *With Its Latest Grants, the Art of Justice Fund is Looking to Spark New Connections*, INSIDE PHIL. (July 7, 2010), <https://www.insidephilanthropy.com/home/2019/7/7/nw-people-have-to-listen-where-is-the-art-for-justice-fund-heading-now> [https://perma.cc/K7PZ-2DBT].

154. See *Pretrial Justice*, ARNOLD VENTURES, <https://www.arnoldventures.org/work/pretrial-justice> [https://perma.cc/YA5A-6Z7W].

155. Michelle Chen, *Beware of Big Philanthropy's New Enthusiasm for Criminal Justice Reform*, NATION (Mar. 16, 2018), <https://www.thenation.com/article/beware-of-big-philanthropys-new-enthusiasm-for-criminal-justice-reform/> [https://perma.cc/PQ8V-A2JG].

every area of public concern that has the capacity to draw substantial private donations.

VII. CRITICS OF CRIMINAL JUSTICE REFORM: SHOULD WE REJECT REFORM IN PURSUIT OF TRANSFORMATION?

Not all of the six tools I have canvassed above are synergistic; sometimes they tug in different directions. For example, the “grassroots” Movement for Black Lives opposed the “bipartisan” federal First Step Act on the grounds that “despite the few positive reforms, [it] is a dangerous bill” because it promoted electronic monitoring, the use of risk assessment tools, and increased investment in improved law enforcement—all things that M4BL opposes as “increased carceral infrastructure.”¹⁵⁶ This conflict is just one example of the ways in which these tools do not always or easily work in tandem.

I will conclude by briefly addressing a generalized version of this specific critique of the First Step Act. More broadly and more deeply, some radical critics from M4BL and elsewhere oppose the basic theme of this lecture—the idea that the current criminal justice reform moment is a positive development whose momentum we should work to protect as the political wheel turns. These critics hold the view that many reforms that have gained some traction in recent years—such as body-worn cameras for police, bail reform, and improved prison conditions, among others—are too partial and incremental. Such reforms involve making investments in existing institutions—like police, prosecutor’s offices, and prisons—that are essentially rotten to the core.

Some radical scholars and advocates have suggested that we stop lauding so-called progressive prosecutors or supporting any criminal justice reform that is “reformist” rather than “transformative.”¹⁵⁷ Alec Karakatsanis, founder and Executive Director of the Civil Rights Corps and a leader in the bail reform movement, has argued that “current ‘criminal justice reform’ discourse is . . . dangerous”¹⁵⁸ and that “[t]he emerging ‘criminal justice reform’ consensus is superficial and

156. *The Movement for Black Lives Position on the First Step Act*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/2018/12/the-movement-for-black-lives-position-on-the-first-step-act/> [<https://perma.cc/8PCP-X9PK>].

157. See, e.g., Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 759 n.88 (2018) (discussing Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives* (2017) (unpublished manuscript) (on file with Rutgers Law School)).

158. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J. F. 848, 852 (2019).

deceptive.”¹⁵⁹ He contends that we need to focus on dismantling what he calls the “punishment bureaucracy” and to reject reforms that see criminal justice as a “silo” separate from a host of other social problems such as “white supremacy, lack of access to health care, economic deprivation, educational divestment, neighborhood segregation, gender inequality, banking, lack of access to the arts, unaffordable housing, and environmental destruction.”¹⁶⁰ Karakatsanis maintains that we should reject the project of mere “reform” of the punishment bureaucracy and embrace only “transformational” interventions that shift resources and power to the marginalized communities who have suffered from past injustice.¹⁶¹

I have sympathy for the argument that sometimes incremental reform can entrench and legitimize a broken system—I co-authored an article arguing along those lines with regard to reforming as opposed to abolishing the death penalty.¹⁶² But the lines I would draw between worthwhile and objectionable reforms are different from those advanced by Karakatsanis and others. For example, police training in de-escalation techniques invests new resources in police departments, but the gains in better practices make that money well-spent, in my view. The same holds for investing in improved prison conditions, such as developing alternatives to the use of solitary confinement. I agree that it is important to have serious discussions about, say, whether money for police training is actually going to support militarized vehicles or whether improving prison conditions is in reality a whitewash. Such discussions should include recognizing the possibility that genuine improvements can work to make people more comfortable—too comfortable—with essentially unjust institutions. But the ultimate question should be one of weighing the magnitude of improvement against the likelihood of entrenchment of injustice. In contrast, an insistence on transformation or nothing seems to me unrealistic and even cruel in its willingness to decline to support real reductions in human misery. After all, first steps (as in the federal First Step Act opposed by the Movement for Black Lives) are often the only way to get to a second step. As one thoughtful student queried in a class debate about this issue, “Can anyone think of any truly transformative change that has ever happened in American history that did not involve many incremental steps along the way to achieve it?”

159. *Id.* at 851.

160. *Id.* at 930.

161. *Id.* at 930–35.

162. See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 418 (2002).

It may also be the case, however, that “unrealistic” is not necessarily the same thing as “counterproductive.” Ironically, the opposition of the Movement for Black Lives to the First Step Act may actually have enhanced its prospects in the Republican-led Congress that passed it by reassuring more conservative members that the bill did not go too far. In short, having a far-left flank arguing against criminal justice reform (that is, arguing for transformation or nothing) may in fact be a good thing—as long as we do not really choose nothing.