

CRIMINAL JUSTICE REFORM: THE PRESENT MOMENT

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I thank the editors of the *Wisconsin Law Review* for the opportunity to participate in a symposium on the collateral consequences of criminal convictions. By collateral consequences, I refer both to the formal consequences of conviction, such as deportation, loss of public housing eligibility, electoral disenfranchisement, and occupational disqualification, which attach by operation of law, and also to the many consequences which are informal in origin, such as the negative social, economic, medical, and psychological consequences that fall both on the offender and on others, primarily dependents.¹ I note also that, in addition to the consequences incurred by offenders and their families, incarceration is producing deep social transformations in the communities of those incarcerated, communities that are disproportionately poor, urban, and African American.² Determining how we can eliminate some of these consequences or lessen their burden is an enormously important subject that scholars, judges, and practitioners are only beginning to explore.³ From my standpoint, that of a judge who adjudicates guilt and imposes sentences on an almost daily basis, the topic of the symposium is particularly significant.

I want to talk about the likelihood that we can meaningfully address at least some collateral consequences in the near future. In other words, I want to explore the question of whether we have reached a point at which we have a realistic opportunity to implement major reforms in our criminal justice system. In order to do this, it is necessary to discuss some aspects of the recent history of the criminal justice system. Thus, I will begin with a brief discussion of such history and then turn to the present situation. In the course of the Article, I will attempt to illustrate certain points by referencing several of my own experiences, first as a lawyer and legislator and later as a judge.

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1. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104–05 (2013).

2. Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 117, 118 (Marc Mauer & Meda Chesney-Lind eds., 2002).

3. See Norman L. Reimer, *Preface to MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE*, at vii–viii (2013).

My first job as a lawyer was in the late 1960s when I was lucky enough to be hired by the Legal Aid Society of New York City to do defense work in the Criminal Courts Building at 100 Centre Street in Manhattan. At that time, there was a sense of excitement and optimism among criminal defense lawyers and others who worked with defendants. The Warren Court was in its heyday, and courts and other institutions were becoming more sensitive to the welfare of defendants than they had been. The concept of rehabilitation that had emerged earlier in the twentieth century remained an important idea in the field of criminal justice.⁴ One of the goals of the correctional system was to enable people who had offended to regain, through their own efforts and those of others, full membership in the community.⁵

Further, much substantive criminal law was more defendant-friendly than it later became. The law reform movement of the middle of the twentieth century had produced a number of important achievements. For example, the American Law Institute led by the reporter, Columbia Law School Professor Herbert Wechsler, proposed a major revision in substantive criminal law in the form of the Model Penal Code, and its proposal became the basis for the statutory classification of criminal offenses in many states, including Wisconsin.⁶ Sentences were indeterminate and individualized, and judges had broad sentencing discretion.⁷ Legislatures had not yet begun the rush to enact mandatory minimum sentences or to authorize the establishment of sentencing guidelines which, for a variety of reasons, including their somewhat political nature, inevitably place too much emphasis on incarceration. Early release through a system of parole, which provided an incentive for rehabilitation, remained an important part of the criminal justice system.⁸ Significantly, criminal justice issues were not yet as politicized as they later became. People's attitudes were not less punitive than they are today, but politicians were less likely to systematically exploit such attitudes for political gain. To a considerable extent, the criminal justice system as it then existed was designed by academics with a reformist bent, and elected officials did not interfere with it as much as they came to do later.

4. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8 (2001) (stating that for nearly a century rehabilitation had been the structural center of the criminal justice system).

5. See *id.*

6. See Fred A. Risser, *The Classification of Criminal Penalties in Wisconsin*, WIS. B. BULL., Dec. 1974, at 19, 19; Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1425–28 (1968).

7. GARLAND, *supra* note 4, at 12–13.

8. *Id.* at 8, 12–13.

The collateral consequences of convictions were not as serious a problem as they are now. Collateral consequences were less numerous, less severe, and not as difficult to avoid or mitigate.⁹ Some collateral consequences which are a big problem today did not exist then. For example, sex offender registration and community notification laws did not exist in the late 1960s and for several decades thereafter.¹⁰ These laws, which are largely a phenomenon of the 1990s, target persons, including juveniles, who have been convicted of sex and child-related offenses.¹¹ Registration laws “require[] [much] identifying information, mandate[] frequent verification, and threaten[] felony-level punishment for noncompliance.”¹² Community notification laws, in turn, single out individuals for public scrutiny and disdain, with many negative effects for registrants and those with whom they associate, some of which last for a lifetime.¹³

In any case, the defense community in the 1960s was excited and optimistic. We believed that we were at the forefront of what would be a long era of progress leading to a more civilized and humane criminal justice system. Although we did not think of it as a golden age, compared to what has happened since, that is exactly what it was. What we did not realize was that while we were talking about the positive change that we were going to bring about, change of a very different sort was already taking shape. Reactionary attitudes, including hostility toward the Supreme Court, racially liberal judges, and the concept of judicial discretion had been circulating widely in the south and elsewhere since the Supreme Court’s decision in *Brown v. Board of Education*¹⁴ in 1954.¹⁵ These feelings became increasingly intense as the Court ventured more deeply into the areas of civil rights and criminal justice.¹⁶ Probably the best example of the Court’s high-profile criminal justice jurisprudence was its 1966 *Miranda v. Arizona*¹⁷ decision. Conservative politicians like Barry Goldwater, Richard Nixon, and Ronald Reagan recognized the potential political benefits of attacking such decisions,

9. LOVE, ROBERTS & KLINGELE, *supra* note 3, § 1.2, at 6–7.

10. WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA, at xiii–xiv (2009).

11. *Id.* at xiv.

12. *Id.*

13. *Id.*

14. 347 U.S. 483 (1954).

15. *Id.*; Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 481–84 (2006).

16. See Lynn Adelman & Jon Deitrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 251–52 (2008).

17. 384 U.S. 436 (1966).

and they began to consciously and systematically politicize criminal justice issues.¹⁸ They did this both by stirring up latent fear of criminals and by encouraging the displacement of racial animosity onto criminals.¹⁹ At the Republican National Convention in 1964, which “reek[ed] of hostility to a civil rights bill,”²⁰ Goldwater denounced the “growing menace” to personal safety.²¹ Nixon skillfully linked civil rights activism to the issue of crime and contributed to causing criminal justice to emerge as the most important domestic policy issue in electoral politics.²² Completely absent from the party platforms in 1964, sections discussing crime and law enforcement issues made up 8.4 percent of the 1968 GOP platform and 10 percent of the Democratic platform.²³

The exploitation by politicians of the criminal justice issue effectively ended the reign of elite reformers and reform-oriented organizations such as the American Law Institute over the issue and turned it into a matter largely controlled by right-wing populists who continually ginned up the public’s punitive instincts. And the urban deindustrialization and higher black unemployment, which developed in the 1970s, made people more susceptible to such appeals.²⁴ At about the same time, neoconservative intellectuals began attacking the idea that people who had committed offenses could ever be rehabilitated. In a famous 1975 article in *The Public Interest*, the organ of the neoconservative movement, Robert Martinson took the position that when it came to the possibility of rehabilitating offenders, nothing worked, and in a short time that cynical and overstated position largely became conventional wisdom.²⁵ Thus, the idea of rehabilitation as an influence on the formation of public policy was largely eclipsed by other penal goals such as retribution, incapacitation, and exclusion.²⁶ And, of course, this change in thinking about criminal justice issues led directly to the problem of mass incarceration that plagues us today.

Thus, instead of a movement toward greater equality and inclusiveness, which those of us who came of age in the 1960s thought

18. MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 33 (2006).

19. See Murakawa, *supra* note 15, at 492–93.

20. MEG GREENFIELD, *WASHINGTON* 189 (2001).

21. GOTTSCHALK, *supra* note 18, at 237 (quoting Barry Goldwater, Acceptance Speech at the 28th Republican National Convention (July 16, 1964)).

22. Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 *Geo. L.J.* 1385, 1399 (2006).

23. *Id.* at 1396.

24. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 78–79 (2006).

25. GARLAND, *supra* note 4, at 58.

26. *Id.* at 8.

we were helping to bring about, the country embarked on a long period in which it enacted increasingly harsh criminal penalties. Some examples of the legislation enacted during the roughly 35-year period commencing around 1970 are laws calling for mandatory minimum sentences in drug cases and others;²⁷ so-called “three strikes” laws; the misnamed Sentencing Reform Act, which abolished federal parole and authorized the creation of the Federal Sentencing Guidelines (the Guidelines); sex offender registration and community notification laws; the 1994 Violent Crime Control Act,²⁸ which provided states with financial incentives to impose longer prison sentences and build more prisons; and so-called Truth-in-Sentencing laws through which states eliminated parole and good time.²⁹ In addition, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which significantly curtailed the right of persons in state custody as the result of violations of their federal constitutional rights to obtain relief by petitioning for a writ of habeas corpus in federal court.³⁰ Together, Congress and the Supreme Court so weakened habeas corpus, once known as the great writ of liberty, that it has become only marginally useful as a means by which state prisoners can raise constitutional issues. Although Republicans were primarily responsible for most of this punitive legislation, Democrats participated extensively. Ted Kennedy was the principal sponsor of the Sentencing Reform Act,³¹ Joe Biden was the principal sponsor of the legislation imposing mandatory minimum sentences in drug cases and of the Violent Crime Control Act,³² and Bill Clinton signed both the AEDPA and the Violent Crime Control Act.³³

27. Murakawa, *supra* note 15, at 479.

28. See Violent Crime Control Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

29. See, e.g., Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987; see also WIS. LEGISLATIVE REFERENCE BUREAU, BUDGET BRIEF 09-1: EARLY RELEASE AND SENTENCING REFORMS 1 (2009), available at <http://legis.wisconsin.gov/lrb/pubs/budbriefs/09bb1.pdf>.

30. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Clayton & Pickerill, *supra* note 22, at 1408.

31. S. 668 (98th): *Sentencing Reform Act of 1984*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/98/s668> (last visited Feb. 15, 2015).

32. Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed as Terrible Mistake*, NPR (Sept. 12, 2014, 3:32 AM), <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>.

33. William J. Clinton, *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, AM. PRESIDENCY PROJECT (Apr. 24, 1996), <http://www.presidency.ucsb.edu/ws/?pid=52713>.

The laws identified above and others led to a huge increase in the size of the correctional population.³⁴ Moreover, they created what is perhaps the most significant collateral consequence of all—an enormous increase in American inequality. As Bruce Western explains in his seminal work, *Punishment and Inequality in America*:

The repudiation of rehabilitation and the embrace of retribution produced a collective experience for young black men that is wholly different from the rest of American society. No other group, as a group, routinely contends with long terms of forced confinement and bears the stigma of official criminality in all subsequent spheres of social life, as citizens, workers and spouses. This is a profound social exclusion that significantly rolls back the gains to citizenship hard won by the civil rights movement. The new marginality of the mass-imprisonment generation can be seen not only in the diminished rates of employment and marriage of former prisoners. Incarceration also erases prison and jail inmates from our conventional measures of economic status. So marginal have these men become, that the most disadvantaged among them are hidden from statistics on wages and employment. The economic situation of young black men – measured by wage and employment rates – appeared to improve through the economic expansion of the 1990s, but this appearance was wholly an artifact of rising incarceration rates.³⁵

In addition to adding to the already significant inequality between blacks and whites, the policies created in the years between 1970 and 2005 drove a wedge in the black community by which those without a college education travel a path of unique disadvantage that separates them from college-educated blacks.³⁶

The punitive turn described above was also reflected in the courts. One example which relates directly to the issue of collateral consequences is the Supreme Court's 1974 decision in *Richardson v. Ramirez*.³⁷ Over an eloquent dissent by Thurgood Marshall, the Court rejected an equal protection challenge to state felon disenfranchisement laws.³⁸ The result is that some 5.8 million American citizens are presently barred from voting, including 2.8 million who have already

34. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 312 (2009).

35. WESTERN, *supra* note 24, at 6.

36. *Id.* at 7.

37. 418 U.S. 24 (1974).

38. *Id.* at 56.

completed their sentences and 13 percent of all African American males.³⁹ Disenfranchisement policies in the United States are exceptional in their severity. They not only restrict the voting rights of people who have completed their prison terms but also of people who were never incarcerated at all.⁴⁰ And in addition to harming millions of American citizens, disenfranchisement policies have had a substantial political impact. Such policies likely affected the outcome of seven United States Senate elections between 1970 and 1998.⁴¹ In addition, they almost certainly led to the result of the 2000 presidential election between George W. Bush and Al Gore.⁴²

Another example of how the punitive spirit that pervaded our criminal justice system in the post-1970 years also infected the Supreme Court can be seen in the Court's Eighth Amendment jurisprudence. Previously, the Court had acknowledged that human dignity was an important value underlying the Eighth Amendment's ban on cruel and unusual punishment.⁴³ The Court did so in *Trop v. Dulles*,⁴⁴ in which it found that depriving a serviceman of his United States citizenship for having deserted from the military constituted cruel and unusual punishment.⁴⁵ Writing for a plurality of four justices, Chief Justice Warren asserted, "[T]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."⁴⁶ Fourteen years later, in *Furman v. Georgia*,⁴⁷ in which the Court struck down the death penalty as it was then carried out, Justice Brennan wrote a concurring opinion extending and refining the dignity view of the Eighth Amendment.⁴⁸ In the post-*Furman* years, however, during the buildup of mass incarceration, the Supreme Court stopped talking about dignity in relation to imprisonment altogether. Instead, the Court's most significant decision on the meaning of cruel and unusual punishment during those years was Justice Kennedy's opinion in *Harmelin v. Michigan*,⁴⁹ which held that the Eighth Amendment imposed practically no limits on

39. JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 2-3 (2014), http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf.

40. *Id.* at 5.

41. *Id.*

42. *Id.*

43. JONATHAN SIMON, MASS INCARCERATION ON TRIAL 136 (2014).

44. 356 U.S. 86 (1958).

45. SIMON, *supra* note 43, at 137.

46. *Id.* (citing *Trop*, 356 U.S. at 100).

47. 408 U.S. 238 (1972).

48. SIMON, *supra* note 43, at 138.

49. 501 U.S. 957 (1991).

punishment.⁵⁰ The *Harmelin* case involved a defendant who received a mandatory life sentence without parole for possession of cocaine.⁵¹ Kennedy's opinion emphasized that a state had virtually unfettered freedom to choose its criminal justice objectives and to impose punishment on persons who ran afoul of them.⁵²

Needless to say, as the criminal justice pendulum swung in an ever more punitive direction in the years after 1970, the work of those of us who had a particular interest in the treatment of criminal defendants became more difficult, and it was sometimes hard to avoid becoming discouraged. During some of those years (1977–97), I was privileged to serve as a member of the Wisconsin State Senate, representing a suburban and exurban area southwest of the city of Milwaukee. For most of my years in the senate, my party (Democratic) was in the majority, and I served as chair of the Senate Judiciary Committee (the Committee). In that capacity, one of my most important functions was to prevent as many as possible of the punitive, law and order type bills that legislators seemed unable to resist introducing from getting out of the Committee and reaching the floor of the Senate. Nor was this function entirely self-chosen. Not infrequently, legislators would introduce bills, often in response to an incident in their district and/or to a constituent request, and then ask me to ensure that the bill never saw the light of day. The Committee was regarded as a sort of legislative Bermuda Triangle—a place where certain proposals would go only to later disappear. Unfortunately, for several reasons, I was unable to bury all of the bad criminal justice legislation that was introduced.

Thus, the period beginning around 1970 represented a sort of dark ages of American criminal justice. As the result of the laws enacted in those years, the United States has become a carceral state. We have tripled the percentage of defendants sentenced to prison and doubled the length of their sentences.⁵³ But I began by suggesting that the present moment may be different, a moment in which hoping for positive and meaningful change might not be unrealistic. Why might this be so? Why are people in the criminal defense community more hopeful than they have been? Most importantly, there is a sense that the public has become more aware of mass incarceration and the harm that it has caused.

50. SIMON, *supra* note 43, at 139.

51. *Id.* at 139.

52. *Id.* at 140.

53. See Clear & Austin, *supra* note 34, at 307. Some argue that mass incarceration has lowered crime rates, but the data do not support that assertion. See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 341 n.10 (2006); see also Lynn Adelman & Jon Deitrich, Rita, *District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 59 n.54 (2007).

Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, and other books and articles describing the extent to which the United States has become a carceral state and the costs of maintaining such a state have surely had some effect.⁵⁴ And some public officials have begun to respond. Legislative bodies, both at the federal and state levels, have enacted modest proposals to make the criminal justice system less punitive. At the federal level, Congress passed the Fair Sentencing Act, which considerably reduced the disparity between the penalties for offenses involving crack and powder cocaine.⁵⁵ It also enacted the Second Chance Act, which provided additional funding for programs designed to assist released prisoners reenter society.⁵⁶ Further, after many years of unremittingly ratcheting up penalties for almost everything, the United States Sentencing Commission (the Commission) took several actions to reduce penalties. In separate decisions in 2014, the Commission reduced the penalties called for by the Guidelines in drug cases and made the reduction retroactive.⁵⁷ In addition, between 2007 and 2012, 31 states reduced their imprisonment rates, including 14 which did so by more than 10 percent.⁵⁸ These achievements came about in part because of an interest in saving money, but also because of research indicating that alternatives to prison such as diversion and treatment do a better job than prison of cutting reoffense rates.⁵⁹

With respect to collateral consequences, despite the growing body of model laws and best practices created by entities interested in law reform, such as the American Bar Association, no state has yet comprehensively reformed the ways in which people with criminal convictions are prevented from participating in civic and business activities.⁶⁰ Some states, however, have enacted piecemeal reforms. Illinois authorized its courts to grant certificates of rehabilitation some

54. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

55. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372.

56. Second Chance Act of 2007, Pub. L. No. 110-199 § 3, 122 Stat. 657, 658 (2008).

57. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 21 (2014), available at http://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf (changes in drug quantity); U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 1 (2014), available at http://www.usc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf (retroactive).

58. Press Release, Pew Charitable Trusts, U.S. Imprisonment Rate Continues to Drop Amid Falling Crime Rates (Mar. 14, 2014).

59. *Id.* at 4.

60. LOVE, ROBERTS & KLINGELE, *supra* note 3, § 9.8, at 516.

years ago, and Ohio and North Carolina more recently enacted laws allowing courts to grant certificates of relief from disabilities and certificates of good conduct.⁶¹ In addition, since 1997, 19 states have taken steps to reform felony disenfranchisement policies.⁶² Maryland and New Mexico repealed the ban on voting after completion of a sentence, Connecticut and Rhode Island extended voting rights to people on probation or parole, and Washington State eliminated the requirement of satisfying financial obligations before voting rights could be restored.⁶³ Further, advocates in a number of states successfully challenged certain collateral consequences, including the ban on the receipt of welfare and food stamp benefits for persons convicted of certain crimes and unwarranted employment restrictions for persons with felony convictions.⁶⁴ And some states expanded the authority of courts to seal criminal records, to impose limits on preemployment inquiries about criminal history, and to give employers a measure of protection from negligent hiring suits.⁶⁵

The Supreme Court has also contributed to the more hopeful mood regarding criminal justice reform. In 2005, in its truly landmark *United States v. Booker*⁶⁶ decision, the Court made the Guidelines advisory instead of mandatory, thus enabling district court judges to impose less severe sentences than those called for by the Guidelines.⁶⁷ Further, the Court followed up *Booker* with other decisions reinforcing and expanding its holding.⁶⁸ These decisions made clear that courts no longer had to treat the Guidelines as edicts promulgated by an agency with knowledge superior to theirs but rather as a set of essentially provisional recommendations valuable only to the extent that they are persuasive.⁶⁹ From a personal standpoint, it is impossible to overstate the importance of *Booker*. For the first time since I became a judge, which was in 1997, *Booker* made it possible for me to impose sentences that I believed were fair. *Booker* substantially increased my job satisfaction, and I have no doubt that many other federal judges feel similarly.

61. *Id.* § 9.8, at 516–17.

62. *Id.* § 9.8, at 517 & n.6.

63. *Id.*

64. *Id.*

65. *Id.*

66. 543 U.S. 220 (2005).

67. *Id.* at 245.

68. *Kimbrough v. United States*, 552 U.S. 85, 90 (2007); *Gall v. United States*, 552 U.S. 38, 41 (2007); *Rita v. United States*, 551 U.S. 338, 341 (2007).

69. Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 *DRAKE L. REV.* 575, 575–76 (2009).

The Supreme Court also played a very important part in bringing the problem of collateral consequences to the forefront. It did this in 2010 when it decided *Padilla v. Kentucky*,⁷⁰ in which it held that a noncitizen defendant has a constitutional right to be told by a lawyer about the deportation consequence of pleading guilty.⁷¹ The *Padilla* decision was the first time that the Court indicated that defense counsel has an obligation to discuss a collateral consequence of a conviction.⁷² The obligation appears to arise when the consequence at issue is sufficiently important to the defendant.⁷³ *Padilla* has led to an important discussion of collateral consequences of which this symposium is a part, and it has stimulated a number of constructive proposals for reform in connection with the process of reaching plea agreements.⁷⁴ And, the Court also rendered a very important decision regarding the relationship of the idea of human dignity and the Eighth Amendment. In *Brown v. Plata*,⁷⁵ a 5-4 majority of the Court upheld a lower court decision requiring California to reduce its prison population over a period of time by approximately 40,000 prisoners in order to relieve the serious overcrowding in the state's prisons and thus provide constitutionally adequate health care to inmates.⁷⁶ Justice Kennedy's opinion offered some of the strongest language in decades about the rights of prisoners, and it once again identified human dignity as the important value underlying the Eighth Amendment.⁷⁷

Reformers are also more hopeful because a number of conservatives have departed from the traditional tough-on-crime Republican mantra and espoused a less punitive approach. Prominent Republicans such as Rick Perry, Newt Gingrich, Rand Paul, and Jeb Bush have called for sentencing changes and rehabilitation programs for some drug and other nonviolent offenders.⁷⁸ In the last legislative session, Paul introduced five bills dealing with criminal justice issues, including bills to scale back mandatory minimum sentences, reform civil asset-forfeiture

70. 559 U.S. 356 (2010).

71. *Id.* at 374.

72. *See id.* at 365–66, 374.

73. *See* Hanh H. Le, *The "Padilla Advisory" and Its Implications Beyond the Immigration Context*, 20 WM. & MARY BILL RTS. J. 589, 601 (2011).

74. *See* Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 117–18 (2011).

75. 131 S. Ct. 1910 (2011).

76. *Id.* at 1923.

77. SIMON, *supra* note 43, at 15.

78. Wesley Lowry, *Conservatives Try to Make Criminal Justice Reform a Signature Issue*, WASH. POST, Mar. 7, 2014, http://www.washingtonpost.com/politics/conservatives-try-to-make-criminal-justice-reform-a-signature-issue/2014/03/07/4b006368-a626-11e3-84d4-e59b1709222c_story.html.

procedures, and shield medical marijuana businesses from federal intervention.⁷⁹ Republican Senator Mike Lee, together with Democratic Senator Dick Durbin, introduced legislation called The Smarter Sentencing Act, which also called for reduced mandatory minimums for nonviolent drug offenders and other changes in sentencing law.⁸⁰ And Gingrich, who made a promise of more incarceration an item of his 1994 Contract with America, more recently opined that: “[t]here is an urgent need to address the astronomical growth in the prison population with its huge costs in dollars and lost human potential. . . . The criminal-justice system is broken, and conservatives must lead the way in fixing it.”⁸¹

The roots of this shift in conservative thinking can be traced to several lesser known conservative figures. One, a Texas lawyer named Marc Levin, saw the light in 2005 when a board member of the free-market-oriented Texas Public Policy Foundation where he worked told him that Texas was not getting a good return for its money in connection with prisons.⁸² Looking at the state’s prison buildup, Levin agreed. “Once you reach a certain rate of incarceration, you start to have diminishing returns because you aren’t just putting dangerous people in prison anymore,” Levin concluded.⁸³ “You are putting in nonviolent offenders. You are not really impacting crime. You are not making people safer.”⁸⁴ Another conservative who has been influential in subverting the Republican orthodoxy on crime is Pat Nolan, a former California state legislator who served time in prison and now works at the jailhouse ministry Prison Fellowship.⁸⁵ “Called ‘the most important person to make any of this happen’ by Julie Stewart of Families Against Mandatory Minimums, Nolan has been so effective as a revisionist precisely because he was weaned on the traditional politics of law and order.”⁸⁶

79. Ryan Grim et al., *The Dark-Horse Policy Reform That Has Both Obama and Some GOPers Optimistic*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/11/10/criminal-justice-reform_n_6133454.html (last updated Nov. 11, 2014, 1:59 PM).

80. The Smarter Sentencing Act, S. 1410, 113th Cong. § 4 (2013).

81. David Dagan & Steven M. Tells, *The Conservative War on Prisons*, WASH. MONTHLY (Nov./Dec. 2012), http://www.washingtonmonthly.com/magazine/novemberdecember_2012/features/the_conservative_war_on_prison041104.php?page=all.

82. Shane Bauer, *How Conservatives Learned to Love Prison Reform*, MOTHER JONES (Mar./Apr. 2014), <http://www.motherjones.com/politics/2014/02/conservatives-prison-reform-right-on-crime>.

83. *Id.*

84. *Id.*

85. James Ridgeway, *Pat Nolan’s Evangelical Prison Reform*, SOLITARY WATCH (Aug. 8, 2013), <http://solitarywatch.com/2013/08/08/draft-pat-nolans-evangelical-prison-reform/>.

86. Dagan & Tells, *supra* note 81.

Criminal justice reformers have also been encouraged by certain actions of the Obama Administration. Attorney General Eric Holder has made efforts to scale back the use of mandatory minimum sentences in cases involving nonviolent drug offenders and has signaled the federal government's interest in deferring the prosecution of low-level drug cases to state governments.⁸⁷ Holder also gave Washington and Colorado the go-ahead to implement marijuana legislation incentives.⁸⁸ Further, the Obama Administration has indicated an interest in developing a responsible pardon policy. The power to pardon is explicitly granted to presidents by the Constitution as a crucial backstop to undo an unjust conviction or to temper an unreasonably harsh punishment.⁸⁹ A pardon also undoes some of the collateral consequences of a criminal conviction by restoring basic rights that people lose upon being convicted, like the right to vote.⁹⁰ As tough-on-crime politics became increasingly ascendant, the number of pardons fell dramatically.⁹¹ And although the Obama Administration's record on pardons is about as bad as that of any administration in history (after six years in office the President had pardoned only 62 petitioners), it recently took a step toward remedying the problem when it dismissed the attorney in charge of pardons and announced that it would consider granting clemency to thousands of low-level drug offenders serving what the president called "unjust" sentences.⁹²

The results of a number of referenda on the ballot in the 2014 midterm elections have also been encouraging. Perhaps the most significant of these was Proposition 47 in California, a proposal to

87. Vikrant P. Reddy & Marc A. Levin, *Holder's Conservative Sentencing Reforms*, NAT'L REV. ONLINE (Aug. 14, 2013, 4:00 AM), <http://www.nationalreview.com/article/355729/holders-conservative-sentencing-reforms-vikrant-p-reddy-marc-levin>.

88. Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go into Effect*, HUFFINGTON POST (Aug. 29, 2013), http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html; see also Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

89. See U.S. CONST. art. 2, § 2, cl. 3; see also Editorial, *It's Time to Overhaul Clemency*, N.Y. TIMES, Aug. 18, 2014, http://www.nytimes.com/2014/08/19/opinion/its-time-to-overhaul-clemency.html?_r=0.

90. See MARGARET COLGATE LOVE & SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 1, 13 (1996), available at <https://www.ncjrs.gov/pdffiles1/pr/195110.pdf>.

91. Kathleen "Cookie" Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, CRIM. JUST., Fall 2009, at 26, 32–33. For a look at presidential pardons, see Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1193–94 (2010).

92. *It's Time to Overhaul Clemency*, *supra* note 89.

reclassify many low-level offenses from felonies to misdemeanors.⁹³ California voters approved the initiative, and as a result it is expected that an estimated 40,000 offenses per year will be downgraded from felonies to misdemeanors.⁹⁴ In addition, in Alaska, Oregon, and Washington, D.C., voters legalized recreational marijuana.⁹⁵ A medical marijuana measure in Florida received 57 percent of the vote, though it needed 60 percent support in order to pass.⁹⁶ There were smaller-scale victories for marijuana decriminalization in local jurisdictions in Maine and New Mexico, while voters in New Jersey approved a reform to bail policy that is expected to benefit many low-level offenders.⁹⁷

And yet, even though the sense of hopefulness among reformers is based on several real legislative achievements and a genuine change in attitude among some people, given the post-1970 history of our criminal justice system, one cannot help but be skeptical about how much progress can realistically be expected. In comparison to the immense scope of the public policy disasters that gave us mass incarceration, the positive changes of the last decade are small beer, and it is far from clear that they are the beginning of something more substantial. Recently, the Justice Department reported that while the total number of prisoners in state and federal prisons declined slightly in the years 2010 through

93. Grim et al., *supra* note 79.

94. Shane Bauer, *California Voters Helped Kick Off the Prison Boom. They Just Took a Huge Step Toward Ending It*, MOTHER JONES (Nov. 5, 2014), <http://www.motherjones.com/mojo/2014/11/proposition-47-california-prisons-nonviolent>.

95. Josh Barro, *D.C., Oregon and Alaska Vote to Legalize Marijuana*, N.Y. TIMES (Nov. 3, 2014), http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html?_r=0&abt=0002&abg=1.

96. *Florida Right to Medical Marijuana Initiative, Amendment 2 (2014)*, BALLOTPEDIA, [http://ballotpedia.org/Florida_Right_to_Medical_Marijuana_Initiative,_Amendment_2_\(2014\)](http://ballotpedia.org/Florida_Right_to_Medical_Marijuana_Initiative,_Amendment_2_(2014)) (last visited Feb. 5, 2015).

97. See *Bernalillo County Marijuana Decriminalization Advisory Question, Measure*, BALLOTPEDIA, [http://ballotpedia.org/Bernalillo_County_Marijuana_Decriminalization_Advisory_Question,_Measure_1_\(November_2014\)](http://ballotpedia.org/Bernalillo_County_Marijuana_Decriminalization_Advisory_Question,_Measure_1_(November_2014)) (last visited Feb. 5, 2015) (New Mexico); *City of Albuquerque Marijuana Decriminalization Measure*, BALLOTPEDIA, [http://ballotpedia.org/City_of_Albuquerque_Marijuana_Decriminalization_Measure_\(November_2014\)](http://ballotpedia.org/City_of_Albuquerque_Marijuana_Decriminalization_Measure_(November_2014)) (last visited Feb. 5, 2015) (New Mexico); *Maine Medical Marijuana Initiative, Question 5 (2009)*, BALLOTPEDIA, [http://ballotpedia.org/Maine_Medical_Marijuana_Initiative,_Question_5_\(2009\)](http://ballotpedia.org/Maine_Medical_Marijuana_Initiative,_Question_5_(2009)) (last visited Feb. 5, 2015); *New Jersey Pretrial Detention Amendment, Public Question No. 1 (2014)*, BALLOTPEDIA, [http://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_\(2014\)](http://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014)) (last visited Feb. 5, 2015); *Santa Fe County Marijuana Decriminalization Advisory Question*, BALLOTPEDIA, [http://ballotpedia.org/Santa_Fe_County_Marijuana_Decriminalization_Advisory_Question_\(November_2014\)](http://ballotpedia.org/Santa_Fe_County_Marijuana_Decriminalization_Advisory_Question_(November_2014)) (last visited Feb. 5, 2015) (New Mexico).

2012, in 2013 that number increased.⁹⁸ In 2013, the prison population was 1,574,741, an increase of about 4300 over the previous year.⁹⁹ One of the reasons for the increase is that the recent reforms have been extremely modest. As one expert noted, the use of drug courts and treatment programs is valuable, but such policies are directed at offenders who would not have served much prison time anyway.¹⁰⁰ Focusing exclusively on low-level offenders ignores a major source of prison growth, that of longer-term prisoners. The substantial increase in numbers of prisoners serving life terms—one of every 11 prisoners nationally—along with declining prospects for release of these persons means that any diversionary impact at the lower scale of offense severity risks being eroded by hard-line sentencing policies at the higher end of the scale.¹⁰¹ And, in addition to life sentences, judges continue to impose more multi-decade terms than ever.¹⁰² Further, not all states have indicated an interest in reform. In 15 states, including many in the south, the prison population continues to increase.¹⁰³

Further, many conservatives seem not to have embraced the less punitive approach to criminal justice. In the last session of Congress, the Senate killed the smarter-on-crime legislation because old guard conservatives Charles Grassley, John Cornyn, and Jeff Sessions opposed the sentencing reductions contained in the bill.¹⁰⁴ A number of law enforcement groups such as The National Association of Assistant U.S. Attorneys also opposed the reductions, as did two former attorneys general, three former chiefs of the Drug Enforcement Administration, and 18 former U.S. Attorneys.¹⁰⁵ Traditional tough-on-crime conservatives in the House of Representatives, such as Wisconsin's Jim Sensenbrenner, who chairs a subcommittee with jurisdiction over federal sentencing issues, also have given little sign of changing their

98. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (REV. SEPT. 2014), at 2, available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

99. Erik Eckholm, *Report Finds Slight Growth in Population of Inmates*, N.Y. TIMES, Sept. 16, 2014, <http://www.nytimes.com/2014/09/17/us/number-of-prisoners-in-us-grew-slightly-in-2013-report-finds.html>.

100. *Id.*; see also Marc Mauer, *Sentencing Reform Amid Mass Incarcerations – Guarded Optimism*, CRIM. JUST., Spring 2011, at 27, 31.

101. Mauer, *supra* note 100.

102. Eckholm, *supra* note 99.

103. Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POL'Y INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/overtime.html> (using data from the U.S. Department of Justice's Bureau of Justice Statistics).

104. See John Cornyn et al., *Letter from Senators Cornyn, Grassley, and Sessions About the Smarter Sentencing Act*, 26 FED. SENT'G REP. 307, 307–11 (2014).

105. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REVIEW BOOKS, Nov. 20, 2014, at 14, 18.

approach.¹⁰⁶ Not long ago, Sensenbrenner convened a subcommittee hearing at which he expressed concern that sentences under the post-*Booker* advisory regime were insufficiently severe.¹⁰⁷

The same is true of many Republican officials at the state level. Wisconsin's governor, Scott Walker, is an example. As a state legislator in the 1990s, Walker sponsored one of the most draconian truth-in-sentencing laws in the country.¹⁰⁸ Unlike many jurisdictions which require offenders to serve 75% or 85% of the confinement time to which they are sentenced, Wisconsin requires inmates to serve 100%, and its law applies not just to violent offenders but to all offenders.¹⁰⁹ Wisconsin also provides no credit for good time served in prison or for time successfully served on supervision in the event that supervision is later revoked.¹¹⁰ The law created considerable overcrowding in Wisconsin's prisons, and as a result, a subsequent legislature modified it to provide a number of avenues for early release.¹¹¹ In 2010, however, when Walker became governor, he pushed through legislation repealing almost the entire reform package and returned the law to something very close to its original form.¹¹² Walker's hard-line approach can also be seen in his handling of the pardon power. As stated, a pardon is particularly significant in connection with the issue of collateral consequences because it wipes out all formal collateral consequences.¹¹³ A recipient of a pardon can run for public office, possess firearms, and hold licenses.¹¹⁴ Wisconsin governors have issued hundreds of pardons, and over 30 years ago Governor Dreyfus created a Pardon Advisory Board (the Board) to review applications for pardons and make recommendations to the

106. See *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 1–3 (2011) (statement of Rep. Sensenbrenner, Chairman).

107. *Id.*

108. See Lynn Adelman, *The Adverse Impact of Truth-in-Sentencing on Wisconsin's Efforts to Deal with Low-Level Drug Offenders*, 47 VAL. U. L. REV. 689, 694–96 (2013).

109. WIS. STAT. § 973.01 (2013–14).

110. Adelman, *supra* note 108, at 690.

111. Jessica VanEgeren, *Prison Population, Corrections Budget Spike During Truth in Sentencing*, CORRECTIONS.COM (Apr. 22, 2009), <http://www.corrections.com/articles/21360>; see also WIS. LEGISLATIVE REFERENCE BUREAU, BUDGET BRIEF 09-1: EARLY RELEASE AND SENTENCING REFORMS 1 (2009), available at <http://legis.wisconsin.gov/lrb/pubs/budbriefs/09bb1.pdf>.

112. 2011 Wis. Act 38 (codified at WIS. STAT. § 973.01 (2013–14)) (amending section 973.01 to its pre-2009 form).

113. See *supra* note 90 and accompanying text.

114. See LOVE & KUZMA, *supra* note 90, at 6–8, 13–14.

governor.¹¹⁵ Walker, however, has allowed the Board to cease functioning and made clear that he has no intention of issuing any pardons.¹¹⁶

Reformers need also be wary of placing too much hope that budgetary problems will generate major reforms. Fiscal constraints can be a double-edged sword. Just as money for prisons has become tight, so too has money for services such as substance abuse and mental health treatment that might otherwise be employed to divert people from incarceration.¹¹⁷ Further, framing the carceral state as primarily an economic issue is likely to ultimately fall short in the political arena.¹¹⁸ Arguments based on economics are unlikely to overcome either the political incentives to retain the current system or arguments based on personal security. Moral arguments focused on racial inequities and gross miscarriages of justice—not instrumental arguments based on dollars and cents—have carried the day in some of the most notable recent victories, such as the growing momentum among states to revert to age 18 as the minimum age to try someone as an adult and Congress’s decision to reduce the crack/powder sentencing disparity.¹¹⁹ As Michael Tonry puts it, “If the moral arguments are never engaged, they can never be won. If they are not won, then nothing will change much. . . . [W]hat is needed is a widely shared belief that high imprisonment rates are undesirable, unjust, and destructive.”¹²⁰

The recent performance of judges also has not provided much reason to be encouraged. As stated, judges often impose very long sentences. And the impact of *Booker* on federal sentence severity has been much less than many observers expected. A recent law review article persuasively argues that federal appellate judges have rebelled against *Booker* by “over-policing sentences that fall outside the Guidelines and under-policing” sentences within the Guidelines.¹²¹ The author points out that courts of appeals have given little weight to

115. WIS. LEGISLATIVE REFERENCE BUREAU, WISCONSIN BLUE BOOK 326 (2003–04), available at <http://legis.wisconsin.gov/lrb/pubs/bluebook.htm>.

116. See, e.g., Dan Barry, *Not the Official Kind, but Still a Wisconsin Pardon*, N.Y. TIMES, June 3, 2014, <http://mobile.nytimes.com/2014/06/04/us/not-official-but-still-a-wisconsin-pardon.html>.

117. Mauer, *supra* note 100, at 31.

118. Marie Gottschalk, *The Past, Present, and Future of Mass Incarceration in the United States*, 10 CRIMINOLOGY & PUB. POL’Y 483, 497 (2011).

119. *Id.*

120. *Id.* (citing Michael Tonry, *Making Peace, Not a Desert: Penal Reform Should Be About Values, Not Justice Reinvestment*, 10 CRIMINOLOGY & PUB. POL’Y 637, 644 (2011)).

121. Alison Siegler, *Rebellion: The Courts of Appeals’ Latest Anti-Booker Backlash*, 82 U. CHI. L. REV. (forthcoming 2015) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484762.

challenges to within-Guideline sentences based on arguments that the defendant's personal characteristics justified a lower sentence or that a Guideline sentence created unwarranted disparity because similarly situated defendants typically received below-Guideline sentences.¹²² Nor have the district courts done well. While district courts have moved in the direction of imposing more below-Guideline sentences, the movement has been very modest.¹²³ Notwithstanding the widespread criticism of the harshness of the Guidelines when they were mandatory, the judiciary has decidedly not engaged in a broad-based revolt against Guideline severity levels.¹²⁴ Why is this so? It may be that judges look for rules to apply and, in performing the difficult task of quantifying punishment, feel the need for standards provided by officially appointed experts,¹²⁵ even though such "experts" offer no explanation for the standards they espouse, and even though such standards are a substantial contributor to the problem of mass incarceration.

Ultimately, the question is whether reform-minded organizations and individuals, both public officials and private citizens, can generate a continuing impetus for change. The case for reform, of course, is strong. The United States incarcerates a larger proportion of its people than any other country.¹²⁶ Nearly seven million people—or approximately 1 in every 31 adults—are either incarcerated or under some form of supervision.¹²⁷ And based on current trends, one in three black males and one in three Hispanic males will likely spend time in prison.¹²⁸ But a substantial problem for would-be reformers, a problem much in evidence in the years after 1970 and still with us today, is that unlike such continental democracies as France or Germany, punishment practices in the United States are neither controlled by a professional civil service capable of exercising restraint, nor are they informed by a tradition of mercy.¹²⁹ Rather, they are driven by a mass politics in which public officials impose harsh punishments out of fear that if they do not, they

122. *Id.*

123. Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1247–50 (2014).

124. *Id.* at 1249.

125. *Id.* at 1269.

126. HUMAN RIGHTS WATCH, NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION 5 (2014), available at http://www.hrw.org/sites/default/files/related_material/2014_US_Nation_Behind_Bars_0.pdf.

127. LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

128. Gottschalk, *supra* note 118, at 483.

129. JAMES WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 199 (2003).

themselves will be punished by the voters. As James Whitman explains in his important book, *Harsh Justice*:

The harshness of American punishment is made in the volatile and often vicious currents of American democratic electioneering. Calling one's opponent "soft on crime" has become a staple of American campaigning—even in judgeship elections, whose candidates were longtime holdouts for norms of decorum; and this has had a powerful, often a spectacular, impact on the making of harsh criminal legislation in the United States. Even practices that have nothing directly to do with election campaigns are part of a momentous American pattern—a pattern in which public officials use garish punishments as a way of grabbing political publicity. Prosecutors in particular have been making political hay all over the country through actions such as leading Wall Street executives out of their offices in handcuffs or televising the names of the busted clients of prostitutes. . . .

It is surely the case that Americans punish more harshly because the management of the punishment system in the United States is more given over to democratic politics—which is often to say demagogic politics. Every commentator who tries to explain punishment in America points to the character of its politics—of a politics that led Mario Cuomo, for example, to build unprecedented numbers of prisons in order to shield himself from criticism for his opposition to the death penalty; or of Bill Clinton to interrupt his campaign schedule in 1992 to deny clemency to another death row inmate.¹³⁰

In short, in the United States, we have "popular justice," and such justice "is often a very harsh business."¹³¹

A good example of how democratic politics in the United States can become a vehicle for punitive criminal justice policies virtually overnight is the stampede of states to enact laws targeting sex offenders in the 1990s.¹³² Partly because of a few highly publicized offenses but mostly because of political demagoguery, legislatures passed an unprecedented number of laws singling out sex offenders as a subpopulation deserving of special hatred and disdain.¹³³ States enacted many of these laws hastily

130. *Id.* at 15, 199.

131. *Id.* at 199.

132. LOGAN, *supra* note 10, at xv.

133. *Id.* at xiv.

without meaningful debate or consideration, and they vastly overstated sex offenders' recidivist tendencies.¹³⁴ Rather, they focused excessively on the personal profiles of the parties involved in the publicized incidents, the innocent victim, and the demonic perpetrator.¹³⁵ Prison terms for sex offenders also increased dramatically, triggering massive increases in sex offender prison populations, and several states adopted laws permitting chemical and surgical castration.¹³⁶ Many states passed laws authorizing the involuntary commitment of offenders as "sexually violent predators."¹³⁷ Such laws committed individuals to state psychiatric institutions indefinitely, not in lieu of imprisoning them but in addition to doing so.¹³⁸ Typically, the involuntary commitment begins when the prison sentence ends.¹³⁹ Sadly, Wisconsin was among the states participating in the stampede.¹⁴⁰

Thus, supporters of major reform of the criminal justice system will unquestionably have to deal with the politics of criminal justice in the United States. In confronting that problem, however, it is worth asking whether public officials overestimate the degree to which they are vulnerable electorally to charges of being soft on crime. My own experience may be relevant to this question. As a legislator, I represented a strongly Republican district and was always a prime electoral target, with the main line of attack usually being that I was insufficiently tough on crime. While the attacks were unpleasant and sometimes difficult to fend off, they never caught on with enough voters to succeed. I cannot say for sure why this was so. To some extent, it may have been because my suburban district was not a high-crime area. People were mostly concerned about pocketbook issues. Also, many families had had some relatively direct experience with drug problems and knew very well that the issue was more complicated than simply being tough. Further, I found that many people were able and willing to talk thoughtfully about criminal justice matters. In any case, the crime issue lacked the political

134. *Id.* at xv.

135. *Id.*

136. Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1597 n.211 (2014); see also Ryan Cauley, *Is Chemical Castration a Progressive or Primitive Punishment? Balls Are in Your Court*, *Iowa Legislature*, 17 J. GENDER, RACE & JUST. 493, 498 (2014).

137. McLeod, *supra* note 136, at 1598 n.214.

138. *Id.*

139. *Id.* at 1597.

140. Wisconsin's Sex Offender Registration law was passed in 1993. 1993 Wis. Act 98, § 116 (codified at WIS. STAT. § 301.45 (2013–14)). Wisconsin's Sexually Violent Person Commitment Act was also passed in 1993. 1993 Wis. Act 479, § 40 (codified in scattered sections of the Wisconsin Statutes ch. 980). Notification laws were passed in 1995 and 1997. 1995 Wis. Act 440, § 75 (codified at WIS. STAT. § 301.46); 1997 Wis. Act 6 (codified at WIS. STAT. § 301.46).

resonance that elected officials attribute to it. This is not to say that it was easy to deal with the issue, but rather that with a serious effort, it was not impossible. Hopefully, this will be increasingly so as people become more aware of the negative effects of some of our policies.

For lawmakers who are inclined to address the issue of collateral consequences, as discussed, some progress has been made.¹⁴¹ Further, academics and organizations interested in reform have developed some excellent proposals to deal with the problem. One proposal is to make collateral consequences more visible.¹⁴² Collateral consequences are increasingly important because many people have been convicted of crimes and because criminal records are increasingly available. Yet, in most states understanding the full range of collateral consequences is very difficult because such consequences have not been systemically collected. The American Bar Association has recommended that legislatures place all such consequences in a single chapter of the statutes and has recently completed a project to catalog such consequences.¹⁴³

Probably the most important reform proposal is to enable judges to provide offenders with relief from collateral consequences. This can be done in several ways. One approach is to authorize courts to vacate an offender's conviction after a period of time based on a finding that the offender has been rehabilitated. The court's action, of course, does not call into question the original finding of guilt. Another approach is for the court to defer the adjudication of guilt or the imposition of sentence and thus avoid a conviction altogether. In the 1960s, these vehicles for providing relief and also laws authorizing expungement or sealing of an offender's criminal record were used fairly extensively.¹⁴⁴ But, over the years, states increasingly restricted both who may obtain relief and the scope of relief available. Most jurisdictions authorize relief only for offenders who are convicted of misdemeanors or minor felonies and only if they have not previously been convicted.¹⁴⁵ Indeed, very few jurisdictions have anything resembling a comprehensive scheme of judicial relief that is available to a significant number of adult felony offenders. As the older forms of relief have become less useful, a new variant, the "certificate of rehabilitation," has emerged. This approach admits of different ways of structuring relief toward the goal of removing

141. Mauer, *supra* note 100, at 29.

142. NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org> (last visited Feb. 5, 2015).

143. *Id.*

144. LOVE, ROBERTS & KLINGELE, *supra* note 3, § 7.16, at 424–25.

145. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 777 (2011).

at least some disabilities and affording some degree of reassurance about the offender's conduct and character.¹⁴⁶

So, there is a great deal that legislatures could do to lessen the burden of collateral consequences on offenders. Of course, individual legislators who care about the subject need to emerge to champion reform proposals. Finding such legislators may not be easy. This is so because successfully shepherding such legislation to passage requires a great deal of work with few obvious political benefits. Yet, it would be a rare piece of legislation that would have greater significance than a bill comprehensively addressing collateral consequences. Effectively addressing the issue will essentially require reconnecting to the idea that America is a land of second chances, a country where redemption is possible. Years ago, we had laws designed to restore and forgive those who had committed crimes. Faced with the bleak results of years of lawmaking informed by a different vision, the question presented is whether the moment has arrived at which we are able to find a better path.¹⁴⁷

146. LOVE, ROBERTS, & KLINGELE, *supra* note 3, § 7.16, at 425.

147. *Id.* § 9.14, at 528.