
AMERICAN JOURNAL OF CRIMINAL LAW

VOLUME 50

SPRING 2024

NUMBER 1



Published at The University of Texas School of Law

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Published at The University of Texas School of Law

VOLUME 50

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The *American Journal of Criminal Law* (ISSN 0092-2315) is published biannually (Fall, Spring) under license by The University of Texas School of Law Publications, P.O. Box 8670, Austin, Texas 78713. The Journal has been published triannually in the past, but to provide high quality articles without delay, the Journal has switched to biannual publication. The number of articles published will not be substantially changed as the summer issue has historically been devoted to student notes. The annual subscription price is \$30.00; foreign delivery is \$35.00. Please make checks payable to the *American Journal of Criminal Law*. Complete sets and single issues are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209.

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Typeset by the *American Journal of Criminal Law*

Editorial Offices:

American Journal of Criminal Law
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727 Dean Keeton St., Austin, TX 78705-3299
Email: managing.ajcl@gmail.com
Website: <http://www.ajcl.org>

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Melinda Heidenreich, Business Manager
School of Law Publications
University of Texas School of Law
P.O. Box 8670, Austin, TX 78713
(512) 232-1149
Website: <http://www.texaslawpublications.com>

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Article

“MASS INCARCERATION” MYTHS AND FACTS: AIMING REFORM AT THE REAL PROBLEMS

Paul H. Robinson¹ and Jeffrey Seaman²

Few claims have won such widespread acceptance in legal academia as the “mass incarceration” narrative: the idea that the rise in America’s prison population over the last half century was fueled largely by the needless and unjust imprisonment of millions of criminal offenders due to punitive changes in sentencing. To many academics and activists, the question is not how accurate the mass incarceration narrative is but how mass incarceration can be ended. This Article argues the “mass incarceration” narrative is based on a series of myths and, as a result, many proposed reforms are based on a misunderstanding of America’s past and present carceral practices. A more accurate understanding is needed to produce effective reform.

The central myth of the mass incarceration narrative is that exceptional and unjustified punitiveness largely explains America’s significant increase in prison population since the 1960s. This explanation overlooks the numerous non-sentencing factors that increased incarceration: a near doubling in U.S. population, higher crime rates, increased justice system effectiveness, deinstitutionalization of the mentally ill, new and tightened criminalizations, worsening criminal offender histories, and more. While this Article makes no attempt at statistical precision, these non-sentencing factors can easily explain most of America’s elevated incarceration compared to the 1960s—a fact in direct conflict with the mass incarceration narrative. Additionally, while some punishments have increased in severity since the 1960s, most of these increases are likely to be seen as moving sentences closer to what the community, and many incarceration reformers, would believe is appropriate

¹ Colin S. Diver Professor of Law, University of Pennsylvania. The authors wish to express their deep appreciation to Sarah M. Robinson for substantial assistance and to Paul Heaton for his useful criticisms.

² Bachelor of Arts in Philosophy, Politics, and Economics, 2022, and Master of Science in Behavioral and Decision Sciences, 2023, University of Pennsylvania. JD candidate, University of Pennsylvania Carey Law School Class of 2027.

and just as in cases of sexual assault, domestic violence, stalking, human trafficking, firearm offenses, and child pornography among others.

Comparing America's prison population to foreign countries, as the mass incarceration narrative often does, similarly overlooks the contributions of many of these non-sentencing factors, and incorrectly assumes that a higher American per capita incarceration rate always reflects a problem with American, instead of foreign, practice. While America can certainly learn from foreign countries, the reality is that many foreign sentencing practices have sparked chronic and widespread dissatisfaction abroad. It may be that the dispute over incarceration practices is more a dispute between the elites and the community than a dispute between the U.S. and other democracies' populations.

While all decarceration reformers should welcome a clearer picture of America's incarceration practices, it is hard not to conclude that many mass incarceration myths were created deliberately by those who oppose not only incarceration but punishment generally. For these activists, the mass incarceration narrative is primarily a means toward eliminating punishment that is difficult to pursue directly because it is so contrary to the views of the general population and even a majority of academia.

This Article is not pro-incarceration. It subjects the mass incarceration narrative to much needed scrutiny precisely because reforming incarceration practices is necessary. The criminal justice system should strive to deliver just punishment in the most societally beneficial way, which we believe means increasing the use of non-incarcerative sanctions. The myths of the mass incarceration narrative frequently lead activists to overlook non-incarcerative reforms that deliver just punishment—a tragic failure because such reforms would have much stronger popular support than the anti-punishment or unsophisticated anti-prison reforms now pushed by the mass incarceration narrative.

Part I of the Article describes the mass incarceration myths that have become so broadly accepted. Part II reviews the facts of American incarceration practice, which contradict many, if not most, aspects of the narrative. Part III offers our reform proposals which we believe more accurately address the problems in current incarceration practice. Central to those proposals are the use of creative non-incarcerative sanctions that still deliver punishment proportional to a nuanced assessment of each offender's moral blameworthiness.

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INTRODUCTION

Few claims have won such widespread acceptance in legal academia as the "mass incarceration" narrative: the idea that the rise in America's prison population over the last half century was fueled largely by the needless and unjust imprisonment of millions of criminal offenders due to punitive changes in sentencing.³ To many researchers and activists, the question is not how accurate the mass incarceration narrative is but how mass incarceration can be ended. This Article argues the "mass incarceration" narrative is based on a series of myths and, as a result, many proposed reforms are based on a misunderstanding of America's past and present carceral practices. A more accurate understanding is needed to produce effective reform.

The central myth of the mass incarceration narrative is that exceptional and unjustified punitiveness largely explains America's significant increase in prison population since the 1960s. This explanation overlooks the numerous non-sentencing factors that increased incarceration: a near doubling in the U.S. population, higher crime, increased justice system effectiveness, de-institutionalization of the mentally ill, new and tightened criminalizations, worsening criminal offender histories, and more. While this Article makes no attempt at statistical precision, these non-sentencing factors can easily explain most of America's elevated incarceration as compared to the 1960s—a fact ignored by the mass incarceration narrative. Additionally, while some punishments have increased in severity since the 1960s, most of these increases are likely to be seen as moving sentences closer to what the community, and many incarceration reformers, would believe to be appropriate and just, as in cases of sexual assault, domestic violence, stalking, human trafficking, firearm offenses, and child pornography among others.

Comparing America's prison population to foreign countries, as the mass incarceration narrative often does, also overlooks the contributions of many non-sentencing factors and incorrectly assumes that a higher American per capita incarceration rate always reflects a problem with American, instead of foreign, practice. While America can certainly learn from foreign countries, the reality is that many foreign sentencing practices have sparked chronic and widespread dissatisfaction abroad. It may be that the dispute over incarceration practices is more a dispute between the elites and the community than a dispute between the U.S. and other democracies' populations.

While all decarceration reformers should welcome a clearer picture of America's incarceration practices, it is hard not to conclude that many mass incarceration myths were created deliberately by those who oppose not only incarceration but punishment generally. For these activists, the mass incarceration narrative is primarily a means toward eliminating punishment, a goal

³ The term "mass incarceration" can be used by a variety of authors to simply refer to the neutral phenomenon of America's increased prison population, but the "mass incarceration narrative" critiqued in this article tells a (often incorrect) story about the causes and consequences of that increase.

that is difficult to pursue directly because it is so contrary to the views of the vast bulk of the population,⁴ and even a majority of modern academia.⁵ Those opposed to punishment ignore the reality that delivering a just punishment as society sees it is essential not only because it can deter and protect, but also because the community believes doing justice is a moral imperative. The elitist impulse to impose a criminal justice system that ignores this societal imperative is not only deeply anti-democratic, but also bound to fail as such a “justice-less” system will lose moral credibility with the community and thereby lose its ability to shape norms and gain compliance.⁶

This Article is not pro-incarceration. It subjects the mass incarceration narrative to much needed scrutiny precisely because reforming incarceration practices is necessary. The criminal justice system should strive to deliver just punishment in the most societally beneficial way, which we believe means increasing use of non-incarcerative punishment. The myths of the mass incarceration narrative frequently lead activists to overlook the development of a wider range of non-incarcerative reforms that deliver just punishment—a tragic failure because such reforms would have much stronger popular support than the anti-punishment or unsophisticated anti-prison reforms now pushed by the mass incarceration narrative.

Part I of the Article describes the mass incarceration myths that have become so broadly accepted. Part II reviews the facts of American incarceration practice, which contradict many, if not most, aspects of the standard narrative. Part III offers our reform proposals, which we believe more accurately address the problems in current American incarceration practice. Central to our proposals is the use of creative non-incarcerative sanctions that still deliver punishment proportional to a nuanced assessment of each offender’s moral blameworthiness.

I. MASS INCARCERATION MYTHS

The popular narrative of “mass incarceration” claims America’s prison population exploded over the last half century because of the needless and unjust imprisonment of millions of criminal offenders due to punitive changes in sentencing. Even the term sounds sinister, with “mass incarceration” suggesting a carceral state herding millions of undifferentiated, often poor and minority, offenders behind barbed wire and prison walls. To many academics and activists, remedying the sin of mass incarceration is one of the most pressing social justice issues of our time. Indeed, some have gone so far

⁴ Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (Mar. 15, 2005), <https://ssrn.com/abstract=678981>.

⁵ Note, for example, the American Law Institute’s 2007 revision of the Model Penal Code’s “purposes” section that sets desert—punishment proportionate to an offender’s moral blameworthiness—as inviolate above all other distributive principles. See MODEL PENAL CODE § 1.02(2)(a) (AM. L. INST. 2007).

⁶ See the discussion and citations at note 205 *infra*.

as to compare American “mass incarceration” to slavery or Stalin’s Gulag Archipelago.⁷

Given the weightiness of the claims, it is worth investigating how accurate the mass incarceration narrative is. We have no desire to promote the status quo—unjust imprisonment is certainly a serious problem whenever it occurs. But our analysis suggests the popular mass incarceration narrative is not a good foundation on which to seek prison reform because the narrative is riddled with more myth than fact.

The myths of prison composition, continual increase, and foreign comparisons serve as support for the central myth of exceptional and unjustified punitiveness which unites the various claims of the mass incarceration narrative into a coherent, yet incorrect, causal story.

A. The Myth of Prison Composition

Ask the average American what the largest contributor to mass incarceration is and they will likely respond the “War on Drugs.” One of the many myths of the mass incarceration narrative is that America’s prison population has swelled largely through the imprisonment of drug possessors, as well as other less serious first-time and non-violent offenders. As one scholar puts it, “Though explanations [of mass incarceration] differ, almost all analysts agree that a major cause has been the ‘War on Drugs.’”⁸ That perspective is often promoted by researchers. As a piece published by Brookings opines: “Drug crimes have been the predominant reason for new admissions into state and federal prisons in recent decades.”⁹

Similarly, the claim that much of mass incarceration could be solved by simply changing the way non-violent offenders are punished is popular. For example, a report by the Brennan Center suggested the prison population could be safely reduced by twenty-five percent simply by releasing those prisoners who are “almost all non-violent, lower-level offenders.”¹⁰ That

⁷ “Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps the fundamental fact, as slavery was the fundamental fact of 1850. In truth, there are more black men in the grip of the criminal-justice system—in prison, on probation, or on parole—than were in slavery then. Overall, there are now more people under “correctional supervision” in America—more than six million—than were in the Gulag Archipelago under Stalin at its height. That city of the confined and the controlled, Lockuptown, is now the second largest in the United States.” Adam Gopnik, *The Caging of America*, NEW YORKER (Jan 22, 2012), <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

⁸ John Pfaff, *The War on Drugs and Prison Growth: Limited Importance and Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 173 (2015), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1650&context=faculty_scholarship.

⁹ Jonathan Rothwell, *Drug Offenders in American Prisons: The Critical Distinction Between Stock and Flow*, BROOKINGS, (Nov. 25, 2015), <https://www.brookings.edu/articles/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/>.

¹⁰ See Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME MAGAZINE (Dec. 9, 2016), <https://time.com/4596081/incarceration-report>.

same report suggested another fourteen percent could be released as their incarceration had “little public safety rationale.”¹¹

In discussions of mass incarceration, it is common to find reference to the supposedly draconian punishments meted out to low-level offenders. For example, one writer diagnosing the causes of mass incarceration in the U.S. writes: “The U.S. even utilizes life sentences for first-time, nonviolent offenders, and it is the only nation in the world that sentences children to LWOP [Life Without Parole].”¹² Perhaps because it is politically more palatable to advocate for reducing the punishment of first-time offenders, non-violent offenders, and drug possessors, it is these categories of prisoners that get the most rhetorical space in the mass incarceration literature. But as Part II shows, this categorization of the prison population is deeply misleading. Even informed proponents of reducing prison populations admit that blaming America’s high prison population on the treatment of non-violent offenders is incorrect. For example, the Prison Policy Initiative labels as a “myth” the idea that “Releasing ‘nonviolent drug offenders’ would end mass incarceration.”¹³

B. The Myth of Continual Increase

Another myth the mass incarceration narrative promotes is a distorted view of current incarceration trends. Many in the public would be surprised to learn that American prison populations have been falling for fifteen years. Mass incarceration activists sometimes overstate the size of prison increases or obscure the direction of trendlines to increase the urgency of their cause. Consider the ACLU’s description of mass incarceration from 2022: “Mass incarceration in the United States has ballooned over the last 30 years. Although the United States has only 5% of the world’s population, it has 25% of the world’s prison population. “There are five times as many people incarcerated today than there were in 1970.”¹⁴ One would be forgiven for assuming this “ballooning” was a constant or increasing problem over the last thirty years; in reality, the trend for thirteen of those thirty years was a decline in prison population.

Ignoring the current trend of decreasing incarceration is not purely a matter of drumming up political urgency. Acknowledging the steady decline in

¹¹ See Inimai Chettiar & Cornell William Brooks, *How Many Americans are Unnecessarily Incarcerated*, BRENNAN CENTER FOR JUSTICE, (Dec. 9, 2016), <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated> (finding that fourteen percent of the total population of prisoners could likely be released in the next year with little risk to public safety).

¹² Ross Kleinstuber, *Mass Incarceration*, in 29 ROUTLEDGE HANDBOOK OF SOC., ECON., AND CRIM. JUST. 330, 331 (2018), <https://doi.org/10.4324/9781351002707>.

¹³ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POLICY INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

¹⁴ *The Keys to our Mass Incarceration Crisis -- and Who Holds Them*, ACLU OF WASHINGTON (Aug. 12, 2022), <https://www.aclu-wa.org/story/keys-our-mass-incarceration-crisis-and-who-holds-them%C2%A0>.

prison population might raise questions about the cause of past incarceration increases—if prison populations are falling without drastic changes in sentencing policy, perhaps the previous rise in imprisonment had less to do with punitive sentencing than the mass incarceration narrative suggests. Whatever the causes of “mass incarceration,” it has clearly peaked and is receding—a fact the mass incarceration narrative would prefer to ignore.

C. The Myth of Foreign Comparisons

The mass incarceration narrative draws strength from contrasting America’s high prison population with that of foreign countries, especially other democracies. The (incorrect) claim that America has the largest prison population in the world is repeated loudly, but there is little effort to examine non-sentencing factors when making international comparisons. Instead, the narrative assumes that any difference in per capita incarceration rates is proof of exceptional and unjustified American punitiveness. These comparisons often mislead by overlooking other relevant factors such as crime rates, criminal justice system effectiveness, the criminal histories of convicted offenders, and the treatment of mentally ill offenders, among many other possible factors that contribute to incarceration rate differences. Often detailed crime and sentencing data simply does not exist to make a fair comparison between countries,¹⁵ but this rarely stops the mass incarceration narrative from leaping to conclusions.

Perhaps even more importantly, such comparisons almost never ask the inconvenient question of whether higher American per capita incarceration rates reflect a problem in other countries, which may have unjustly low prison populations compared to what their circumstances and citizens would call for. Instead, the standard narrative uses foreign comparisons to paint a portrait of an exceptionally punitive U.S. surrounded by more enlightened countries. For example, consider the Brennan Center’s perspective:

The U.S. “punisher’s brain” is absent from European justice models, which emphasize rehabilitation and resocialization. Germany’s Prison Act, for example, specifically states that the very purpose of incarceration is to help prisoners lead lives of “social responsibility free of crime” upon release.¹⁶

Such comparisons ignore whether the American public would find alternative punishment models just. Indeed, there is no consideration of whether foreign countries’ populations find such models just. The mass incarceration narrative’s use of foreign comparisons reveals a clear strain of anti-democratic elitism: a belief that certain enlightened experts know what is needed

¹⁵ See Part II.D.2.

¹⁶ *The American ‘Punisher’s Brain*, BRENNAN CENTER FOR JUSTICE (May 17, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/american-punishers-brain>.

and should dictate punishment policy while the common rabble (those who must live with the consequences) are kept safely away from having significant influence over the justice system.

While foreign countries can offer America's justice system ideas to consider, such countries' punishment practices should not be assumed to be ideal. In many cases, it is a myth to believe copying foreign countries' punishment practices and per capita incarceration rates would be possible or desirable.

D. The Central Myth: Exceptional and Unjustified U.S. Punitiveness

The central myth underpinning the mass incarceration narrative is that the predominant factor driving the increase in American incarceration from the 1960s through the 2000s was exceptional and unjustified American punitiveness manifested through changes in sentencing policies. As the Brennan Center explains:

America can't shrink its reliance on mass incarceration until we confront our approach to punishment. [The problem is] our deep-rooted impulse to punish people in ways that are far beyond what could be considered proportionate. [We must] rein in the punitive excess of the criminal legal system.¹⁷

A report by the National Academies on the causes and consequences of mass incarceration declares: "America has earned the dubious distinction of being the world's leader in incarceration," and the report decries "America's unusual preference for harsh punitive measures that eventually resulted in . . . staggering numbers [of prisoners]. . . . This form of 'American exceptionalism' is exceptional in troubling ways, with uniquely harsh and damaging consequences. . . ."¹⁸

This central claim of the mass incarceration narrative is not just that a few misguided policymakers made a mistake in setting some punishments too high, but rather that the problem stems from an exceptionally punitive American public whose intuitions about what makes a just punishment simply cannot be trusted. As critics of American imprisonment describe in their article *Why Is America so Punitive?* "'The harsh laws we have today weren't created by crunching numbers to produce a cost benefit analysis . . .

¹⁷ *Punitive Excess*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/series/punitive-excess> (last visited Mar. 9, 2024, 12:25 PM).

¹⁸ *Perspectives on Punishment: An Interdisciplinary Roundtable on Punitiveness in America*, JOHN JAY COLLEGE OF CRIMINAL JUST. (Apr. 2015), <https://johnjay.jjay.cuny.edu/punitivenessinamerica/roundtable.asp>; see also NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 4 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), <https://doi.org/10.17226/18613> (explaining that "[t]he unprecedented rise in incarceration rates can be attributed to an increasingly punitive political climate surrounding criminal justice policy formed in a period of rising crime and rapid social change.").

They were created because people believed that harsh punishment was the right approach, or because the rights of offenders didn't matter, or didn't matter as much as the rights of victims.'"¹⁹

The narrative places primary blame for the rise in America's prison population squarely on the shoulders of the American public and their misguided intuitions of justice. Once again, an anti-democratic elitism emerges. As the same source continues:

Criminal justice policy in the United States is a populist issue . . . whereas in Europe it is largely left up to a class of professional experts. Europeans would rarely, if ever, let voters decide how to punish offenders as California did in 1994 when the voters passed the infamous three strikes law.²⁰

The claim of exceptional and unjustified American punitiveness leads to the conclusion that it was largely punitive sentencing changes that created mass incarceration and so the solution lies largely in reversing those changes. As the National Academies' report on the causes of mass incarceration confidently declares:

The increase in U.S. incarceration rates over the past 40 years is preponderantly the result of increases both in the likelihood of imprisonment and in lengths of prison sentences—with the latter having been the primary cause since 1990. These increases, in turn, are a product of the proliferation in nearly every state and in the federal system of laws and guidelines providing for lengthy prison sentences for drug and violent crimes and repeat offenses, and the enactment in more than half the states and in the federal system of three strikes and truth-in-sentencing laws.²¹

Even when the narrative spreads blame to non-legislative actors, it still points back to punitive laws. For example, consider one diagnosis of the role of prosecutors in mass incarceration:

Prosecutors do not exist in a vacuum. Their importance in driving mass incarceration is a function of state legislatures passing 'harsh laws' intended to send more people to prison and keep them there longer. Tough sentencing laws, including mandatory minimums, coupled with more restrictive back-end release policies provide prosecutors with the leverage to secure favorable plea bargains and long

¹⁹ Bettina Muenster & Jennifer Trone, *Why is America so Punitive? A Report of the Interdisciplinary Roundtable on Punitiveness in America (Excerpted)*, 28 FED. SENT'G REP., 303, 344 (2016), <https://www.jstor.org/stable/26377016>.

²⁰ Ibid.

²¹ National Academies of Sciences, Engineering, and Medicine, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, WASHINGTON, DC: THE NATIONAL ACADEMIES PRESS (2014), <https://doi.org/10.17226/18613>.

prison sentences. Remove the tough sentencing laws, and you will see changes in charging practices.²²

But did sentencing changes driven by an exceptionally punitive public really cause the rise in America's prison population? And do current criminal punishments showcase unjust punitiveness? As section II demonstrates, they did not and do not. The myth of exceptional and unjustified American punitiveness overlooks the role of non-sentencing factors in the rise of incarceration, overstates punishment increases, and falsely assumes that any punishment increases that did occur were inappropriate. In addition to being simplistic and false, this myth's implications are disturbing and damaging to the prospects of useful reform. If America's high prison population is the result of exceptional and unjustified punitiveness on the part of the public, it follows that the necessary reforms to reduce incarceration will likely offend the public's punitive sense of justice, thus generating backlash. In other words, *if the reforms are producing a backlash, that is proof positive that reformers are doing the right thing*. This perspective is not only deeply anti-democratic but guarantees failure in the long run. As Part III makes clear, the aim of incarceration reformers should be to bring criminalization and punishment practices into line with public understandings of justice, while substituting non-incarcerative punishments where possible. Reforms driven by this goal are far more likely to gain widespread adoption and successfully reduce per capita incarceration rates than reforms based on the myth that the public's sense of justice is a problem to be solved instead of a mandate to be served.

II. MASS INCARCERATION FACTS

This Part questions the accuracy of the mass incarceration narrative by examining trends in American incarceration and the factors that contributed to America's increased prison population since the 1960s. Each of the mass incarceration myths identified in the previous Part are countered here with facts. Our aim is to provide a clearer picture of American incarceration and to highlight how much the mass incarceration narrative fails to consider in its confident pronouncements. At the same time, we have no wish to be contrarian for its own sake—there are elements of the narrative that are based on fact, and we will acknowledge those throughout.

A. American Incarceration: Trends and Composition

Before turning to survey general trends in American incarceration and current statistics on prison composition, we think it is important to say a few words about the availability of data.

²² Ryan King, *What David Brooks gets Wrong about Mass Incarceration*, URBAN INSTITUTE (Oct 1, 2015), <https://www.urban.org/urban-wire/what-david-brooks-gets-wrong-about-mass-incarceration>.

1. *The Problem of Data*

The problem of unavailable data bedevils attempts to carefully analyze the causes behind America's per capita incarceration rate rise. Given how much is written on mass incarceration, and the criminal justice system more broadly, one might assume that detailed historical data on America's use of prisons must be widely available to support various sweeping assertions. In fact, it often is not. The U.S. government has persistently suppressed, omitted, or neglected to collect and release vital criminal justice system statistics. These problems of data collection and publication go far back. It was only in 1979 that Congress even established the Bureau of Justice Statistics (BJS) whose stated mission is: "[T]o collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government."²³ Since 1979, the picture has remained spotty, with the BJS routinely failing to regularly gather or disclose essential statistics.

State governments also commonly fail to gather or disclose criminal justice data relating to prison use, such as time served data for specific offenses. Interestingly, it appears that large deep blue states (with all branches of government under Democratic control) are more restrictive in making specific time served data publicly available than large deep red states (with all branches of government under Republican control).²⁴ Given the mass incarceration narrative is more popular among Democrats, it may be that some state governments are reluctant to provide data that might disconfirm elements of the mass incarceration narrative.

The lack of data means researchers must attempt to build general pictures from information resembling Swiss cheese. Sometimes the missing statistics are extraordinarily basic. For example, something as simple as the percentage of convicted offenders receiving a prison sentence is difficult to determine pre-1980s.²⁵ The same is true post-2006 when the BJS inexplicably chose to stop reporting national conviction numbers.²⁶ Important factors relating to imprisonment (such as criminal offenders' prior criminal histories) are often entirely absent from historical data.

The collection and release of data should be a non-partisan issue, and many groups have noted missing criminal justice system statistics as a problem. As several organizations writing publicly note about the Bureau of Justice Statistics: "In recent years, numerous regularly released publications—

²³ *About BJS*, BUREAU OF JUSTICE STATISTICS, <https://bjs.ojp.gov/about>.

²⁴ Paul H. Robinson, Hugh Rennie & Clever Earth, *Red Codes, Blue Codes? Factors Influencing the Formulation of Criminal Law Rules*, SSRN (Jan. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4684013#:~:text=The%20U.S.%20does%20not%20in,influences%20apart%20from%20red%2Dbblue.

²⁵ Patrick Langan, *Americas Soaring Prison Population*, SCIENCE (Mar. 1991).

²⁶ Shima Baughman, *How Effective are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 106, 106 (2020).

as well as some special projects—have fallen substantially behind schedule or not been published at all.”²⁷ Examples of data collection programs the BJS has abandoned or delayed indefinitely include: Survey of Inmates in Local Jails (last data available in 2002), the National Judicial Reporting Program (last data available in 2006), and the Justice Assistance Data Survey (last data available in 2010) among many others.²⁸ Other data collection programs have been one-off despite their seemingly vital nature to policymakers. Consider the Recidivism Survey of Felons on Probation which was conducted once in 1989 and never again.²⁹

Insufficient funding may hamper some data collection, but the BJS also deliberately chooses not to release data that it has collected.³⁰ Chronic reporting omissions suggest that political considerations may be at play in publication decisions. As a result, there have been calls to reinstate the Director of the BJS as a senate-confirmed post, a requirement removed during the Obama administration in 2012.³¹

The spotty data on America’s criminal justice system means there is sometimes too little published data to prove a claim beyond reasonable doubt or construct a precise model. Indeed, the lack of data is one reason this article does not attempt to lay forth a precise and comprehensive explanation of America’s prison population growth. Comprehensive statistical analysis is sorely needed, but almost impossible to perform with current publicly available data. The fact that proponents of the mass incarceration narrative often make little effort to collect more data is perhaps telling of what that data might show. But while data is limited, it is still enough to expose the myths and false certainties of that narrative. What is certain is that America’s increased per capita incarceration rate compared to the 1960s is a multicausal

²⁷ *Data to Keep our Communities Safe*, BUREAU OF JUSTICE STATISTICS <https://www.amstat.org/docs/default-source/amstat-documents/pol-bjs-priorities-2021plus.pdf>.

²⁸ *Survey of Inmates in Local Jails*, BUREAU OF JUSTICE STATISTICS (May 26, 2009), <https://bjs.ojp.gov/data-collection/survey-inmates-local-jails-silj>; *National Judicial Reporting Program*, BUREAU OF JUSTICE STATISTICS, <https://bjs.ojp.gov/data-collection/national-judicial-reporting-program-njrp>; *Justice Assistance Data Survey*, BUREAU OF JUSTICE STATISTICS, <https://bjs.ojp.gov/data-collection/justice-assistance-data-survey>.

²⁹ Patrick Langan et al., *Recidivism of Felons on Probations, 1986-89*, BUREAU OF JUSTICE STATISTICS (Feb. 1992), <https://bjs.ojp.gov/data-collection/recidivism-survey-felons-probation>.

³⁰ By way of example, the series “Felony Sentences in the State Courts” has not been published since 2006. Sean Rosenmerkel et al., *Felony Sentences in the State Courts, 2006 - Statistical Table*, BUREAU OF JUSTICE STATISTICS (2010), <https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf>. And yet much of the data continues to be collected and is then aggregated and published in other reports. The data that is used by the BJS is now largely access restricted and despite several efforts to access it, we were never given access to the data. The data restrictions are not simply related to current information: when trying to access “National Corrections Reporting Program, 1998 (ICPSR 3029)” the site denies access. *National Corrections Reporting Program, 1998 (ICPSR 3029)*, ICPSR (Apr. 3, 2010), <https://www.icpsr.umich.edu/web/ICPSR/studies/3029>. We were told that the data was restricted in an effort to protect sensitive private information, but if that were the case, why is already analyzed data, with all identifying information stripped out, not accessible?

³¹ *Bureau of Justice Statistics: Data to Keep our Communities Safe*, BUREAU OF JUSTICE STATISTICS (2021), <https://www.amstat.org/docs/default-source/amstat-documents/pol-bjs-priorities-2021plus.pdf>.

phenomenon, and there are numerous factors utterly ignored by the mass incarceration narrative that deserve greater attention and study. While we do offer rough suggestions of how much a factor may have contributed to prison population increases, and we can certainly identify factors that were more important than others, we attempt no scientific precision in our estimations. If there is one thing every scholar of the justice system should agree on, it is this: we need more data.

2. America's Rising and Falling Prison Population

This article examines the population of sentenced offenders in state and federal prison, which is also the primary focus of the mass incarceration narrative. This excludes America's local jail population, but that exclusion does not greatly affect our critique of the mass incarceration narrative. Comparing prison versus jail per capita incarceration rates reveal they largely move together, as jail is a feeder for and reflector of prison populations. One reason we choose to focus on state and federal prisons is that historical data is easier to come by for such offenders compared to jail populations. Additionally, examining jail populations would raise the question of pretrial confinement—which is not driven by punitiveness in sentencing but rather by public safety concerns. To the extent mass incarceration activists critique unjust pretrial release conditions, we present no criticism of those critiques here. In fact, we have written elsewhere in support of more non-incarcerative measures to expand pretrial release without greatly increasing risk of flight or public safety threats.³²

Table 1 shows in mostly 5-year increments from 1925 to 2021 the U.S. total prison population (state and federal), prison population per capita, and, when available, total new imprisonments and total new imprisonments per capita (though new imprisonment data is dependent on definitions and may not be comparable between certain years). As is clear from the table, the U.S. prison population began to rise sharply in 1973 (when there were 204,000 prisoners or 95 per 100,000 residents) and reached its highest absolute point in 2009 (when there were over 1.6 million prisoners or 504 per 100,000 residents).³³ This amounts to a 680% increase in absolute prison population and a 430% increase in per capita terms over the 1973-2009 period. This 36-year-long upward trend then reversed, and prison populations have declined steadily since. In 2021, the prison population was down to 1.2 million prisoners, or 350 per 100,000 U.S. residents—a 25% decline in absolute terms and 30% per capita decline from 2009.

The mass incarceration narrative usually takes 1973 as its starting point to measure a “normal” prison population rate pre-mass incarceration, and it

³² PAUL H. ROBINSON ET. AL., *CONFRONTING FAILURES OF JUSTICE: GETTING AWAY WITH MURDER AND RAPE*, ROWMAN AND LITTLEFIELD (forthcoming 2024).

³³ The per capita prison population peaked a year earlier in 2008 at 506 per 100,000 residents.

often takes a year around 2009 as its ending point to maximize the stated increase. We believe it makes more sense to begin an analysis of the prison population in the early 1960s. The late 1960s and early 1970s were marked by social unrest, the beginning of a crime surge, and the Vietnam War, which may have siphoned off young men who might otherwise have ended up in prison. Starting an analysis in 1960, before all these societal transformations, seems to give a better benchmark for what “normal” incarceration levels looked like.³⁴ Additionally, it is important to choose a recent year like 2021 as an end point for the analysis as it captures the recent decline in prison population.

Therefore, the relevant question is what factors are responsible for the 2021 U.S. prison population being 200% larger, on a per capita basis, than in 1960? According to the mass incarceration narrative, the explanation for this tripling lies largely in increased and unjustified American punitiveness. Specifically, a higher percentage of offenders are being sent to prison and prisoners are receiving unjustly longer sentences. If sentencing policy was returned to the 1960s, then the prison population would shrink back to comparable levels—or so the story goes. Indeed, some activists point to 1960s sentencing practices as the solution to mass incarceration.³⁵

Table 1. U.S. Prison Population Over Time

Year	Total Prison Population	Prison Pop. per 100k U.S. residents	Total New Imprisonments	New Imprisonments per 100k U.S. residents ³⁶
1925 ³⁷	91,669	79		
1930	129,453	104		
1935	144,180	113		
1940	173,706	131		
1945	133,649	100		
1950	166,123	109		
1955	185,780	112		

³⁴ Of course, the exact starting date of our analysis does not significantly change the overall trends or explanatory factors.

³⁵ See James Austin et al., *Unlocking America: Why and How to Reduce America’s Prison Population*, NCJRS (2007), <https://www.prisonpolicy.org/scans/jfa/UnlockingAmerica.pdf> (stating “our recommendations would reestablish practices that were the norm in America for most of the previous century, when incarceration rates were a fraction of what they are today.”).

³⁶ The 1980-2015 data is from the Disaster Center. *United States Crime Rates 1960-2019*, DISASTER CENTER (2020), <https://www.disastercenter.com/crime/uscrime.htm>. The 2021 data is from the U.S. Census Bureau. *Prisoners in 2021 – Statistical Tables*, BUREAU OF JUSTICE STATISTICS (Dec. 2022), <https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables#0-0>.

³⁷ The 1925-1980 data is from the Bureau of Justice Statistics. *Prisoners 1925-81*, BUREAU OF JUSTICE STATISTICS (1982), <https://bjs.ojp.gov/content/pub/pdf/p2581.pdf>.

1960	212,953	117	103,598 ³⁸	58
1965	210,895	108		
1970	196,429	96		
1973	204,211	95		
1975	240,593	111	190,014 ³⁹	89
1980	315,974	138	182,617 ⁴⁰	81
1985	481,616	201	271,366	113
1990 ⁴¹	773,905	292	474,128	191
1995	1,125,874	411	562,724	214
2000	1,381,892	477	666,077	237
2008 ⁴²	1,608,282	506	750,392	246
2009 ⁴³	1,615,487	504	736,796	240
2011 ⁴⁴	1,598,968	492	676,793	217
2015	1,526,603	459	612,952	191
2021	1,204,322	350	412,006 ⁴⁵	124

³⁸ This number includes only new court commitments and violators returned to prison. It does not include other admissions such as escapees returned to prison, special court orders, or administrative transfers. See page 12, table 5 of NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS 1967, BUREAU OF JUSTICE STATISTICS (July 1969), <https://www.ojp.gov/pdffiles1/Digitization/2172NCJRS.pdf>. A more comparable number to post 1978 data (which includes all admission categories) would be 1961’s total new admissions which totaled 175,824. For the 1961 data, see table 2 of NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS 1961, BUREAU OF JUSTICE STATISTICS (Aug. 1962), <https://www.ojp.gov/pdffiles1/Digitization/2160NCJRS.pdf>.

³⁹ *Prisoners in State and Federal Institutions on December 31, 1975*, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (Feb. 1977), <https://www.ojp.gov/pdffiles1/Digitization/39194NCJRS.pdf>.

⁴⁰ 1980-2015 new imprisonments data from: *Prison Admissions, 1978-2019*, BUREAU OF JUSTICE STATISTICS, <https://csat.bjs.ojp.gov/freq-requested-charts> (last visited Apr. 7, 2024).

⁴¹ 1990-2000 incarceration data from: Allen Beck and Paige Harrison, *Prisoners in 2000*, BUREAU OF JUSTICE STATISTICS (Aug. 2001), Prisoners in 2000 | Bureau of Justice Statistics (ojp.gov).

⁴² Ann Carson & William Sabol, *Prisoners in 2011*, BUREAU OF JUSTICE STATISTICS (Dec. 2012), <https://bjs.ojp.gov/content/pub/pdf/p11.pdf>.

⁴³ Ibid.

⁴⁴ 2011-2021 data from: Ann Carson, *Prisoners in 2021 – Statistical Tables*, BUREAU OF JUSTICE STATISTICS (Dec. 2022), <https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables>.

⁴⁵ Ibid.

3. Prison Composition

In addition to clarifying what per capita prison population increase has occurred, a reasoned examination also needs to clarify the kind of offender who is and is not actually in prison. Consider this recent summary:⁴⁶

Table 2. Composition of U.S. prison population



Those who take the mass incarceration narrative at face value may be surprised to learn that prison is not filled with non-violent, first-time drug possessors. As the chart labeled Table 2 shows, most of those in prison are much more serious offenders. Drug offenders comprise just 17% of the total prison population. Moreover, most of these drug offenders have committed crimes worse than simple possession. There are 34,000 state prisoners serving sentences for drug possession, compared to 98,000 state prisoners serving sentences for more severe drug crimes (i.e., drug trafficking). Even more lopsidedly, of the 69,000 federal drug offenders, 99% or more are serving sentences for drug trafficking. In other words, just 17% of *drug offenders* in prison are serving sentences for drug possession (many of which may have been plea bargained down from more serious offenses).⁴⁷ Only 3% of the total prison population is made up of those sentenced for drug possession. For those who believe mass incarceration would mostly be solved by simply

⁴⁶ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie, 2023*, (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.
⁴⁷ Sawyer & Wagner, *supra* note 13.

releasing drug possessors (or even all drug offenders including traffickers), these numbers will come as a nasty surprise.

The mass incarceration narrative’s myth of prison composition also runs into the inconvenient fact that the prison population is largely made up of those sentenced for violent crimes or recidivism. For example, a 1996 BJS study examining a representative sample of 711,000 imprisoned felons found “that fully 94% of state prisoners had either committed one or more violent crimes (62 percent) or been convicted more than once in the past for nonviolent crimes (32 percent).”⁴⁸ More recent data confirms this picture. In 2021, 62% of state prisoners were convicted of a violent crime, and if anything, the criminal histories of convicted offenders have worsened over time.⁴⁹ Almost no one goes to prison for a first-time, non-violent offense. As John Dilulio noted: “It’s the Hard Core Doing the Hard Time.”⁵⁰

This description has only become truer over time. As Table 3 shows, the percentage of the state prison population convicted of violent offenses increased from 41% to 62% from 1960 to 2021—appearing to contradict the notion that the prison population is larger today because of an increased share of non-violent offenders receiving prison sentences. Ironically, one would be more likely to meet a non-violent offender in prison before the era of “mass incarceration” than after it.

Table 3. Percentage of Violent Offenders in State Prison Population Over Time

Year	Violent Offenders as % of state prison population ⁵¹
1960	41%
1974	52%
1980	58%

⁴⁸ John J. Dilulio, Jr., *The Numbers Don’t Lie: It’s the Hard Core Doing Hard Time*, BROOKINGS (Mar. 17, 1996), <https://www.brookings.edu/opinions/the-numbers-dont-lie-its-the-hard-core-doing-hard-time/>.

⁴⁹ See Part II.B.5.

⁵⁰ Dilulio, *supra* note 48.

⁵¹ See MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850- 1984, BUREAU OF JUST. STAT., 48 tbl.3-20 (1986) (For 1960: 24.7% total person+16.6% robbery offenses. For 1974: 30.1% total person + 22.8% robbery offenses.), <https://bjs.ojp.gov/content/pub/pdf/hcsus5084.pdf>; 1980 and 1992 data from: ALLEN J. BECK & DARRELL K. GILLIARD, PRISONERS IN 1994, BUREAU OF JUST. STAT. BULL., 11 tbl.14 (1995) (For 1980: 173,000 violent/295,819 total offenses. For 1992: 370,300 violent/778,495 total offenses), <https://bjs.ojp.gov/content/pub/pdf/Pi94.pdf>; 2001 data from: PAIGE HARRISON & ALLEN J. BECK, PRISONERS IN 2001, BUREAU OF JUST. STAT. BULL., 13 tbl.17 (2002) (589,100 violent/ 1,206,400 total offenses, <https://bjs.ojp.gov/content/pub/pdf/p01.pdf>; 2010 data from: E. ANN CARSON & WILLIAM J. SABOL, PRISONERS IN 2011, BUREAU OF JUST. STAT. BULL., 9 tbl.9 (2012) (725,000 violent/1,362,028 total offenses), <https://bjs.ojp.gov/content/pub/pdf/p11.pdf>; 2021 data from: E. ANN CARSON, PRISONERS IN 2021 – STATISTICAL TABLES, BUREAU OF JUST. STAT., 31 tbl.16 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf>.

1992	47%
2001	49%
2010	53%
2021	62%

This does not mean prison is necessarily an ideal punishment for all violent offenders or serial property and public order offenders (a category which includes weapons offenses), but it does expose the myth that America’s prisons are crammed with non-violent, first-time offenders caught in the clutches of a carceral state. The nature of America’s prison population must be acknowledged by reformers who wish to seriously change American incarceration practices. Releasing all drug offenders would mean releasing primarily drug traffickers who have profited from destroying the lives of others. Releasing all non-violent offenders would mean turning loose mostly hardened recidivists who have had a second or third chance already and used it to commit more crimes against their communities. Again, this does not mean there is nothing that can be done to reduce prison populations, but these facts must be faced squarely without aid from the comforting myth that America’s prisons are a place where pot smokers mingle with shoplifters and first-time burglars.

B. Non-sentencing Factors in the Rise of the U.S. Prison Population

This section examines factors behind the rise of the U.S. prison population that are largely unrelated to sentencing – and the punitiveness it supposedly reflects. To the extent that non-sentencing factors explain most of the rise in U.S. prison population, it contradicts the mass incarceration narrative’s assumption that the increase is caused by unjustified and exceptional American punitiveness.⁵²

1. Population Increase

An obvious but sometimes ignored factor in the rise of the U.S. prison population has been the increase in the U.S. population. Between 1960 and 2020, the U.S. population increased by 85%, from 179,323,175 in the 1960 census to 331,449,281 in the 2020 census.⁵³ Assuming a constant crime rate and incarceration policy, one would expect the prison population to increase proportionally to the population. In other words, *one would expect an 85% increase in the U.S. prison population over this period purely due to*

⁵² We recognize one possible exception covered in this section’s discussion of new or tightened criminalization. The tightening of criminalization against the distribution and possession of illicit drugs could be considered an unjustified increase in punitiveness, though even there, the picture is more complicated than often assumed.

⁵³ *Historical Population Change Data (1910-2020)*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html>.

population growth. Of course, many serious proponents of the mass incarceration narrative deal in per capita terms, which account for population changes, but it is not hard to find absolute prison population change still being cited by some to overemphasize the scale of the increase.⁵⁴ It should not need to be said that an incarceration increase caused by overall population growth is perfectly justified.

2. Increased Crime

A fact strangely missing from standard accounts of mass incarceration in the latter half of the 20th century is mention of the enormous crime surge that also took place during the same period. Between 1960 and 1990, the per capita violent crime rate increased by over 350%.⁵⁵ Perhaps mass incarceration activists forget to mention this crime surge because it suggests much of the increase in incarceration had nothing to do with American punitiveness but rather with American criminality. Holding sentencing and criminal justice system effectiveness constant (the percentage of reported crimes converted into convictions/imprisonment), a higher crime rate naturally leads to a higher incarceration rate. While crime rates peaked in the 1990s, the crime rate today remains significantly higher than that which prevailed in the 1960s before the start of the crime or incarceration surge. In 2019 (before the violent crime surge beginning in 2020),⁵⁶ the violent crime rate was 379.4 per 100,000 people compared with 160.9 in 1960—an increase of over 135%.⁵⁷ Property crime was also higher in 2019 than in 1960 with 1,726 property crimes reported per 100,000 in 1960 compared to 2,110 in 2019—an increase of 22%.⁵⁸

These higher crime rates—especially the higher violent crime rates—guarantee a higher incarceration rate than in the 1960s, and such an increase is desirable so long as crime remains at elevated levels. To get a rough sense

⁵⁴ See, for example, this tweet on mass incarceration that garnered hundreds of retweets: “sometimes i forget that our hyperincarceration crisis happened so recently (less than fifty years ago) and so quickly (prison population grew 700% in 40 years). it makes me sick and it makes me hopeful. this country made this in less than one lifetime, we can unmake it in ours.” Rena (@ReenNahMean), TWITTER (June 15, 2021, 7:01 PM), <https://twitter.com/ReenNahMean/status/1404937052324392961>. While technically correct, statements like this one add no context either about population increases or any other factors such as crime increases.

⁵⁵ *United States Crime Rates 1960-2019*, DISASTER CENTER, <https://www.disaster-center.com/crime/uscrime.htm> (last visited Mar. 15, 2024, 4:24 PM), (showing that the U.S. rate of violent crime per 100,000 people was 160.9 in 1960 but increased to 731.8 in 1990, a 355% increase).

⁵⁶ See *id.* (showing that the U.S. rate of violent crime per 100,000 people rose from 379.4 in 1960 to 395.5 in 2021).

⁵⁷ The increase in severe violent crime was even greater, with advances in medical care turning what would have been homicides in 1960 into non-fatal assaults today. As one study found: “Murder rates would be up to five times higher than they are but for medical developments over the past 40 years.” See Roger Dobson, *Medical advances mask epidemic of violence by cutting murder rate*, BMJ (Sept. 21, 2002), <https://www.bmj.com/content/325/7365/615.2>.

⁵⁸ *United States Crime Rates 1960-2019*, DISASTER CENTER, <https://www.disaster-center.com/crime/uscrime.htm> (last visited Apr. 7, 2024).

of how much increased crime could affect incarceration rates, let us assume that about 55% of the 1960 prison population was sentenced for property offenses and 40% were sentenced for violent offenses.⁵⁹ If the per capita violent offense rate increased by 135% and property offense rate by 22%, we would expect an overall per capita incarceration rate increase of 66%, assuming no changes in sentence severity or criminal justice system effectiveness.⁶⁰ Of course, if criminal justice system effectiveness increased or sentencing for crimes became stricter, the effect of increased crime on the incarceration rate would be multiplied.

The previous calculation does not even consider the greatest crime increase of all from 1960 to the present: drug crimes. As noted previously, some mistakenly assume the “War on Drugs” initiated in the 1970s is solely responsible for the increase in drug offenders in prison compared to their much smaller (around 5%) share in 1960. Under this misperception, the use of illicit drugs stayed steady, but the government suddenly intervened with harsher punishments in the ‘70s. In fact, this is only partially correct—the manufacture, distribution, and possession of illicit drugs were banned well before the 1960s, but a massive spike in drug usage led to greater enforcement and higher penalties. However, even without the stricter legislation associated with the “War on Drugs,” the population of drug offender in prison would still have swelled from 1960s levels simply because of the greater prevalence of drug crimes. This is important when considering the specific effect of the “War on Drugs” in increasing incarceration (something considered later in this article).

Unlike for property or violent crimes, where police receive victimization reports, drug offenses are generally not a reported crime, making it necessary to turn to other sources in estimating the increasing incidence of drug crimes in the population. In 1960, less than 5% of the U.S. population had ever tried any illicit drug.⁶¹ By 2020, that number was 50%, an almost ten-fold increase. Additionally, in 2020, over 20% of Americans used an illicit drug or abused prescription drugs within the last year, and 13.5% were illicit drug users within the last month.⁶² In other words, it seems likely the rate of illicit drug use (and therefore drug crimes) in the population increased by somewhere between 5-10 times between 1960 and 2020. If we assume drug offenders made up 5% of the prison population in 1960, and the rate of drug crimes conservatively only quintupled, then we should expect another 20% increase in the per capita prison population just from increased drug crime without

⁵⁹ Margaret Calahan, *Historical Corrections Statistics in the United States, 1850-1984*, BJS (Dec. 1986), <https://perma.cc/47VS-GUNF>.

⁶⁰ This is because $0.55 (1.22) + 0.4 (2.35) + 0.05 = 1.66$ or a 66% increase over the previous incarceration rate.

⁶¹ Joseph Gfroerer & Marc Brodsky, *The incidence of illicit drug use in the United States, 1962-1989*, BRITISH JOURNAL OF ADDICTION (Sept. 1992), <https://pubmed.ncbi.nlm.nih.gov/1392556/>.

⁶² *Drug Abuse Statistics*, NATIONAL CENTER FOR DRUG ABUSE STATISTICS, <https://drugabusestatistics.org/> (last visited Apr. 7, 2024).

any changes to drug enforcement or sentencing policy; if the drug crime rate increased by 900%, we should expect a 45% incarceration rate increase.⁶³ Again, these increases would be expected even if the criminal justice system punished drug offenders in the same way and at the same rate as it did in 1960 before “mass incarceration.” Holding all other factors constant, it would appear increases in the underlying rate of drug, property, and violent crime would be expected to cause at least an 85% per capita incarceration rate increase since 1960—a factor largely ignored by the mass incarceration narrative.⁶⁴

3. *Deinstitutionalization of the Mentally Ill*

A relevant and overlooked factor in America’s crime and incarceration surge in the latter half of the 20th century was the widespread deinstitutionalization of the mentally ill. During the first part of the 20th century, private and state mental hospitals and asylums absorbed hundreds of thousands of mentally ill Americans. However, changes in medicine, societal perception, and law in the 1960s and ‘70s led to the shuttering of most of these institutions, and society was forced to deal with the mentally ill in other ways. Instead of being locked up in mental hospitals, some mentally ill ended up incarcerated in prisons instead, after being freed from civil commitment only to run afoul of the criminal law. Deinstitutionalization meant in many cases that penal institutions simply took over for mental institutions. While America’s treatment of the mentally ill has often been tragic and frustrating, the increase in incarceration caused by deinstitutionalization obviously had nothing to do with increased punitiveness or a change in criminal justice policy, but rather with the unintended consequences of closing mental institutions.⁶⁵

The scale of deinstitutionalization should not be underestimated. In 1955—at its peak—the population of state mental hospitals was almost 560,000. In 2015, despite the U.S. population almost doubling since 1955,

⁶³ That is because $0.05 \times 5 = 0.25$ and $0.05 \times 10 = 0.5$.

⁶⁴ Of course, incarceration did not neatly track crime increases, mainly due to changes in criminal justice system effectiveness (the rate at which crime is punished). In other words, when crime went up, system effectiveness went down, and when crime went down, system effectiveness went up. As a result, increases in crime are less important when modelling incarceration increases for specific slices of the 1960-2021 period, and this is one reason increased crime is overlooked in the literature as an explanatory factor. However, higher levels of crime today clearly do contribute to the higher levels of incarceration since criminal justice system effectiveness has caught up and exceeded its 1960 benchmarks. Since police make a similar percentage of arrests compared to reported crime today as they did in 1960, and prosecutors convert a higher percentage of arrests into convictions, it would be impossible for the higher crime rate not to contribute to a higher per capita incarceration rate.

⁶⁵ Deinstitutionalization resulted from a confluence of factors: the discovery of effective psychiatric drugs, an advocacy campaign to raise awareness of poor conditions in mental institutions, new laws designed to move the mentally ill out of institutions into the community, and Supreme Court decisions making it harder to civilly commit mentally ill individuals. See Megan Testa & Sara G. West, *Civil Commitment in the United States*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Oct. 7, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3392176/>.

the number of people in state mental hospitals was around 35,000.⁶⁶ In per capita terms, that equates to *an over 95% reduction in the rate of institutionalization for the mentally ill* in state mental hospitals. While most of those deinstitutionalized posed no criminal threat to the community, there was a portion that did. While precise quantification is difficult, a non-trivial proportion of current prisoners would have been institutionalized in mental hospitals in the past. For example, one study suggested that anywhere from 4.5 to 14% of state prisoners in 1996 would have been institutionalized in mental hospitals before deinstitutionalization—48,000 to 148,000 prisoners in absolute terms.⁶⁷ Similarly, another study suggested that 40,000 to 72,000 prisoners in 2000 would have been institutionalized in the past.⁶⁸ Prisons are full of mentally ill offenders. By one count, 14% of state prisoners meet the qualifications for “serious psychological distress,” and 43% have a history of mental health problems.⁶⁹ It appears that anywhere from 5 to 15% of currently incarcerated offenders in prison might have been confined in mental institutions in 1960.⁷⁰

It should be no surprise, then, that there is an inverse relationship between institutionalization and crime/incarceration. Graph 1 shows the relation between deinstitutionalization in mental hospitals and incarceration in prison.⁷¹

⁶⁶ Anna Swanson, *A shocking number of mentally ill Americans end up in prison instead of treatment*, WASHINGTON POST (Apr. 30, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/30/a-shocking-number-of-mentally-ill-americans-end-up-in-prisons-instead-of-psychiatric-hospitals/>.

⁶⁷ Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934-2001*, 40 J. LEGAL STUD. 39, 46, (2011) (explaining that deinstitutionalization from 1971 to 1996 resulted in significant numbers of additional state prisoners).

⁶⁸ Steven Raphael & Michael Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42, J. LEGAL STUD. 187, 190-219 (2013) (explaining prison growth population attributable to deinstitutionalization).

⁶⁹ Laura M. Maruschak et al., *Indicator of Mental Health Problems Reported by Prisoners*, BUREAU OF JUSTICE STATISTICS (June 2021), <https://bjs.ojp.gov/library/publications/indicators-mental-health-problems-reported-prisoners-survey-prison-inmates>.

⁷⁰ When considering how deinstitutionalization increased the per capita incarceration rate from 1960s levels, it is important to avoid double counting between its actual increase and the effect of generic crime increases. Deinstitutionalization both meant more crime (thus increasing incarceration) and a higher likelihood that a mentally ill offender who committed a crime would end up in prison as opposed to a mental hospital (thus also increasing incarceration).

⁷¹ Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934-2001*, 40 J. LEGAL STUD. 39, 42, (2011) (analyzes data from prisons and mental hospitals to evaluate the institutionalization effect).

Graph 1. Institutionalization in Mental Hospitals and in Prisons

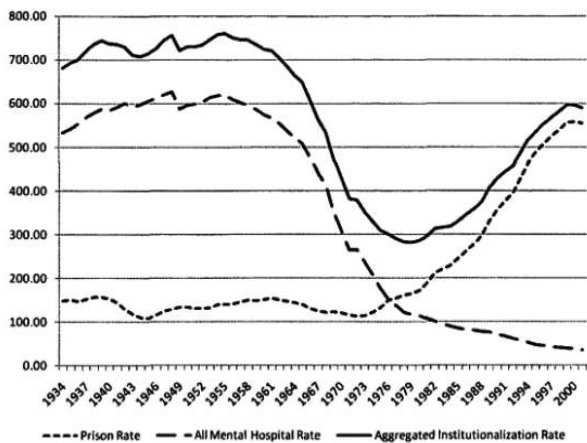


Figure 1. Rates of institutionalization in the United States (per 100,000 adults), 1934–2001

4. Increased Criminal Justice System Effectiveness

Not all incarceration increases should be seen as problematic. If prison populations rise because of improved justice system effectiveness, with no change in sentencing policy, the increase represents progress. One factor broadly overlooked in the mass incarceration literature is criminal justice system effectiveness: the rate at which criminal offenders are caught and convicted.

If police and prosecutors became twice as effective at catching and punishing rapists tomorrow, the prison population of rapists would soon double without any change in rape sentencing practices, but few would consider this increase problematic. If the goal of a successful criminal justice system is to catch and justly punish every serious offender, then increasing effectiveness is cause for celebration, and the resulting increase in imprisonment reflects a problem with the ineffectiveness of past practices. Reducing incarceration through degrading the effectiveness of the justice system at catching criminals (as opposed to reducing the punishments for convicted criminals) would be downright perverse as it purchases lower prison populations through denying justice to innocent victims and increasing future victimizations.

Perhaps because the rate of justice failures is so high, governments are wary of publishing statistics on criminal justice system effectiveness. However, usable statistics exist for some things, such as total crime, arrests, and new imprisonments – but the middle steps between arrest and imprisonment, particularly prosecution effectiveness, are harder to gauge. There are no nationwide historical statistics on the rate at which prosecutors accept and prosecute cases “cleared” by police or the percentage of filed cases that result in

conviction. Even today, statistics on prosecution are often murky. However, general trends in criminal justice effectiveness are still discernible.

In 1960, FBI statistics showed a total of 3,384,200 crimes reported to police. That same year, there were approximately 95,368 new prison admissions resulting from crime, thus representing 2.8% of reported crime.⁷² By 2018, statistics showed 8,402,881 total reported crimes and approximately 495,698 new imprisonments resulting from crime, or 5.9% of reported crime.⁷³ This equals a 110% increase in the rate of new imprisonments compared to reported crimes.

Clearly, the justice system is getting better at turning reported crime into imprisonment—but why? Contrary to the mass incarceration narrative, most of the answer does not appear to come from sentencing (i.e., judges sentencing a higher percentage of convicted offenders to prison). While data on the percentage of convicted offenders sentenced to prison is hard to find pre-1980s, the picture becomes clearer in the following two decades and suggests the higher percentage of imprisonments is mainly due to changes in arrest or prosecution as opposed to harsher judicial sentencing. For example, between 1986 and 2006 the share of convicted state felony offenders receiving prison sentences slightly decreased from 46% to 41%, even as the prison population increased substantially and new imprisonments as a percentage of total crime rose.⁷⁴ In 1986, there were approximately 13,211,869 crimes reported to police and approximately 202,995 new prison admissions resulting from crime,

⁷² In 1960, there were approximately 175,000 new prison admissions, but many of these were prison transfers or other admissions not representative of punishment for a new crime. The number of prison admissions where a crime was punished can be estimated since there were 88,575 new court commitments (new convictions resulting in prison) and 13,586 parole violators returned to prison, around half of whom (6,793) were likely returned for a new criminal offense. See PATRICK A. LANGAN, U.S. DEP'T OF JUST., RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS 1926-86 (1991) (providing the new court commitments data); see NATIONAL PRISONER STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS: 1961 I (1961) (providing number of parole violators in 1960). We estimate 50% of these parole violators were returned for criminal violations based on a reasonable guess at the current national rate. See Jacob Schuman, *Criminal Violations*, 108 VIRGINIA L.R. 1817, 2022 (2022) (providing an overview of violations and revocations of community supervision), which based on U.S. Sentencing Commission Data estimated that over 50% of supervised release revocations were “criminal violations.” The actual rate of criminal vs. technical violations differs by jurisdiction (and likely somewhat across time), but 50% seems a reasonable guess at the national number across time.

⁷³ We use 2018 FBI UCR data because of changes in 2019 to reporting rules that resulted in participation changes. There are limitations to this comparison, of course. FBI UCR data only counts certain types of crime (while new imprisonments result from all types of crime), and the 1960 FBI UCR data is unideal and may undercount crimes more than the 2018 data, but this does not prevent an approximate instructive comparison. The data for new imprisonments in 2018 comes from the Prisoners in 2018 Table 8, data E. Ann Carson, *Prisoners in 2018*, BUREAU OF JUSTICE STATISTICS (Apr. 2020), <https://bjs.ojp.gov/content/pub/pdf/p18.pdf>. In 2018, there were 410,867 new court commitments and 169,663 supervised release revocations. *Id.* We use the previous 50% guess at new imprisonments from parole caused by criminal as opposed to technical violations.

⁷⁴ *Felony Sentences in State Courts*, U.S. DEP'T OF JUST. (1986) (using table 2); U.S. DEP'T OF JUST., FELONY SENTENCES IN STATE COURTS, 2006 I, 4 (using table 1.2). In 1986, 46% of convicted felony defendants in state courts received a prison sentence, 21% received a jail sentence, and 33% received non-incarcerative punishments (usually probation). In 2006, 41% of convicted felony defendants in state courts received prison sentences, 28% received jail sentences, and 31% received non-incarcerative sentences.

or 1.5% of reported crime.⁷⁵ In 2006, the numbers were 11,401,511 reported crimes and approximately 615,200 new imprisonments resulting from crime, or 5.4% of reported crime, a substantial increase from 1986 despite convicted offenders receiving prison sentences at a lower rate.⁷⁶

When looking at the data from 1960 to the present, a general trend becomes apparent.⁷⁷ The devastating crime wave starting in the late 1960s caught the criminal justice system unprepared, underfunded, and understaffed. The result was a steep drop in justice system effectiveness as criminals got away with crimes at ever higher rates, leading to more crime in a vicious cycle. Finally, significantly increased funding and personnel, as well as more effective policing and prosecution strategies, allowed the justice system to catch up with the crime wave and recover its previous effectiveness. As the crime wave abated beginning in the 1990s, criminal justice system effectiveness continued to increase as crime rates fell, creating a virtuous cycle.

More detailed statistical analyses in existing literature bear out these surface level observations. One study found that between 1990 and 2006, the "true conviction" rate for all crimes (measured by crime victimization data and FBI conviction rates) rose from 1.24% to 1.95% of total crime—a 57.2% increase over this period alone.^{78,79}

Increased criminal justice system effectiveness compared to 1960 is clearly one reason America has a higher prison population today. The main driver of this increased effectiveness appears to be changes in the prosecution success of arrests as opposed to increased arrest clearance rates.⁸⁰ In other words, a criminal is not much more likely to be arrested for a crime today than in 1960, but once arrested, he is more likely to be successfully prosecuted. There are numerous possible explanations for this increased prosecution success, including better police investigations and increased prosecution resources, but whatever the cause, the result is clear. One study found that

⁷⁵ There were 145,895 new state court commitments in 1986 and 63,830 parolee/probation violators returned to state prison, of which we assume half (31,915) were returned for criminal violations. There were also 25,185 federal prison admissions. See *National Corrections Reporting Program, 1992*, BUREAU OF JUSTICE STATISTICS (Oct.1992), <https://bjs.ojp.gov/library/publications/national-corrections-reporting-program-1992-0>.

⁷⁶ In 2006, new court commitments totaled 491,810 and there were 246,781 parole violators, of which we assume half (123,390) were returned for criminal violations. See *PRISON INMATES AT MIDYEAR 2007*, BUREAU OF JUSTICE STATISTICS (June 2008), <https://bjs.ojp.gov/content/pub/pdf/pim07.pdf>.

⁷⁷ This is the most plausible interpretation of the data of which we are aware. It represents an oversimplification of many complex factors, but the general trend appears sound.

⁷⁸ Shima Baughman, *How Effective are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 94–95 (2020) (showing that the use of crime victimization data as opposed to reported crime does not complicate the picture as the reporting rate was about the same in 1990 and 2006).

⁷⁹ *Ibid.* In 1990, 15.98% of all reported crimes resulted in arrest, while in 2006 the number was 21.16%, a 32.4% increase in the arrest rate of reported crimes. An increase in prosecution effectiveness also must have occurred to achieve the 57.2% increase in "true" conviction rate.

⁸⁰ John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations*, SSRN (Jan. 23, 2012), <https://ssrn.com/abstract=1990508>.

“between 1994 and 2008 filings [of criminal charges] per arrest rise from 0.374 to 0.573.” Since the conviction rate did not change much, that amounts to an almost 55% increase in prosecution effectiveness over that 14-year period alone.

The 110% increase in the rate of new imprisonments compared to reported crimes over the 1960–2018 period likely overestimates the increase in justice system effectiveness because drug offenders made up a larger share of new imprisonments in 2018 compared to 1960, and drug crimes are not a reported crime. Accounting for this concern, we estimate only an increase in justice system effectiveness of 50% across this period.⁸¹ This means we should expect a 50% per capita incarceration increase from increasing system effectiveness compared to 1960 even if we hold all other factors constant. Of course, this increased effectiveness interacts with other factors, such as the increased crime rate, to explain even larger increases in incarceration with no change in sentencing policy. For example, if we assume increased non-drug crime rates in 2021 would result in a 66% per capita incarceration increase compared to the 1960 rate, then also increasing criminal justice system effectiveness by 50% would lead to an expected per capita incarceration rate increase of 150%—meaning increased non-drug crime and justice system effectiveness already likely explain three-quarters of the 200% per capita incarceration rate increase from 1960 to 2021.⁸²

Despite its significant effects on incarceration, justice system effectiveness is almost never seriously discussed in the mass incarceration narrative because it would cast some incarceration increases as a success to be celebrated instead of a problem to be solved. To the extent system effectiveness is mentioned, it is portrayed in a negative light, implying that police are making wrongful arrests and prosecutors are generating numerous wrongful convictions.⁸³ However, research shows the percentage of wrongful convictions is tiny,⁸⁴ and there is no good reason to think the rate of wrongful convictions

⁸¹ If we assume 33% of new admissions in 2018 were for drug crimes, and conservatively assume only 5% of new admissions were for drug crimes in 1960, and redo the calculations from notes 72 and 73, we find new (non-drug) imprisonments equaled 2.6% of reported crime in 1960 and 3.9% in 2018. This equals a 50% increase in the rate of comparable new imprisonments relative to reported crimes. Again, there is nothing precise about these numbers, but they are reasonable estimations of a clear general trend.

⁸² Because $1.5 \times 1.67 = 2.5$.

⁸³ Consider one anti-incarceration source: “Law enforcement lie to secure the arrest and prosecution of innocent persons; prosecutors suppress mitigating evidence, knowingly use perjured testimony, and fabricate evidence to secure criminal convictions . . . It is estimated that anywhere from 2 to 10 percent of the nearly 2 million people incarcerated in U.S. prisons are innocent. That means there could be as many as 200,000 innocent people are victims of the nation’s prison industrial complex.” See Billy Sinclair, *The Human Cost of Maintaining the Prison Industrial Complex*, UNINCARCERATED PRODUCTIONS (June 30, 2022), <https://www.unincarcerated.com/blog/human-cost-of-prison-industrial-complex>. While these estimates do exist, they are wildly exaggerated.

⁸⁴ The true rate of wrongful convictions is likely between 0.016% and 0.062%. See Paul G. Cassell, *Overstating America’s Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Conviction*, 60 *Ariz. L. Rev.* 815, 818 (2018).

or wrongful arrests has significantly increased due to greater system effectiveness at punishing crime generally.

Some proponents of the mass incarceration narrative deplore increasing justice system effectiveness because they prioritize low prison populations over punishing crime (or because their real agenda is anti-punishment). While the public would welcome a doubling of justice system effectiveness, many mass incarceration activists would oppose such a change. This ideological prioritization of low prison populations over doing justice in cases of crime is especially bizarre since the vast majority of serious crime already goes unpunished.⁸⁵

5. *Changing Criminal Histories*

One almost completely ignored factor in incarceration increases is the fact that the average criminal offender's criminal record has changed over time. Repeat offenders are punished differently than first-time offenders in America—a difference in treatment most people would find completely appropriate even if they strongly disagree with the severity of current repeat offender sentences. Repeat offenders' blameworthiness is greater, as they are engaging in "nose-thumbing" against the law⁸⁶ and showcasing a hardened bent toward criminality through rejecting previous chances at reform. As a result, repeat offenders are more likely to receive a prison sentence upon conviction, and the length of that prison sentence is likely to be longer.⁸⁷ It is important to note that repeat offenders were sentenced differently than first-time offenders long before the era of "mass incarceration."⁸⁸ Therefore,

⁸⁵ For example, the conviction rate for murder was 36% in 2006, the last year data was made available, and it has almost certainly decreased since. See Sean Rosenmerkel, Matthew Durose & Donald Farole Jr., *Felony Sentences in State Courts, 2006 Statistical Tables*, BUREAU OF JUSTICE STATISTICS (2009), <https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf>. Also, around 92% of aggravated assaults and 97% of rapes and sexual assaults end in no conviction. For assault data, see Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization*, BUREAU OF JUSTICE STATISTICS (2020), <https://bjs.ojp.gov/content/pub/pdf/cv19.pdf>. For sexual assault data, see *The Criminal Justice System: Statistics*, RAINN (last visited Mar. 24, 2024) <https://www.rainn.org/statistics/criminal-justice-system> (noting that 975 perpetrators out of every 1,000 sexual assaults walk free); *Victims of Sexual Violence: Statistics*, RAINN (last visited Mar. 24, 2024), <https://www.rainn.org/statistics/victims-sexual-violence>.

⁸⁶ ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS, 78–85 (1985) (noting that affording first time offenders a limited degree of tolerance for their wrongdoing is appropriate).

⁸⁷ See e.g. Gerard Rainville & Brian A. Reaves, *Felony Defendants in Large Urban Counties*, BUREAU OF JUSTICE STATISTIC (2003), <https://bjs.ojp.gov/content/pub/pdf/fdluc00.pdf> (finding that 86% of defendants with more than one prior felony conviction and convicted of an additional felony were sentenced to incarceration compared to 58% of defendants without any prior convictions); Rebecca Pirus, *Repeat Offenders and Recidivism*, NOLO (Mar. 6, 2024), <https://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-offense/repeat-criminal-charges.htm> (noting that repeat offenders generally receive longer sentences than first-time offenders for the same crime because judge's consider criminal history when sentencing).

⁸⁸ See RAINVILLE & REAVES, *supra* note 87 (finding that in 2000, sixty-two percent of defendants with more than one prior felony conviction were sentenced to prison for a new felony conviction compared to forty-six percent of defendants with one prior felony conviction).

incarceration increases caused by an increasing share of convicted criminals being repeat offenders cannot be chalked up solely to increased punitiveness in sentencing. While post-1960s laws certainly increased the punishment for some repeat offenders, an underlying increase in repeat offenders would have generated incarceration increases under pre-1970s sentencing policies.

Unfortunately, detailed historical data on convicted offenders' criminal histories is extremely hard to find. We are unaware of any useful comparisons from before the 1990s. However, data does exist from the 1990s through 2000s, and the trend found there is enlightening for the overall period since 1960. According to a study examining felony defendants in large urban counties,⁸⁹ the percentage of defendants with 10 or more prior arrests jumped from around 20% in 1990 to 36% in 2009. The percentage with 10 or more *felony* arrests jumped from 9% to 17%. The data on prior convictions is even more shocking. In 1990, 64% of felony defendants had no prior felony conviction, while 36% did. Only 4% had 5-9 prior felony convictions, and only 1% had 10 or more. In 2009, 40% of felony defendants had no prior felony conviction, a drop of 24 percentage points. Even worse, 15% had 5-9 previous felony convictions, and a stunning 14% had 10 or more felony convictions—a 1300% increase in the presence of the most serious recidivists.

There was clearly a severe increase in the criminal records of offenders from 1990 to 2009.⁹⁰ That this contributed to the rise in incarceration over that period (even as the crime rate fell) is beyond question. Extrapolating from the limited period of data available, it seems likely that there was a significant increase in the criminal records of offenders between 1960 and today—a factor that would contribute to a higher incarceration rate.⁹¹

⁸⁹ Brian A. Reaves, *Felony Defendants in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf>. For 1990 data, see Robyn L. Cohen, *Prisoners in 1990*, BUREAU OF JUSTICE STATISTICS (1991), <https://bjs.ojp.gov/content/pub/pdf/p90.pdf>.

⁹⁰ Some might argue the increase in criminal records did not come from offender recidivism worsening but rather police or prosecutors being more effective than in the past. Increased criminal justice system effectiveness may indeed have contributed to a worsening in offenders' official criminal records, but it is impossible to say how much.

⁹¹ For this extrapolation to be inaccurate, the criminal records of offenders would have had to improve significantly between 1960 and 1990, a virtual impossibility given the increase in crime over that period and the increasing chance of an arrest resulting in imprisonment over that period. See Patrick A. Langan, *America's Soaring Prison Population*, 251 *SCI.* 1537, 1572 (1991) (finding that the reported crime rate for robbery increased from 206 in 1974 to 226 in 1984 and that the imprisonment rate for robbery increased from 0.190 in 1974 to 0.281 in 1984). Another reason why more offenders are almost certainly sentenced as recidivists today than in 1960 is the rise of computerized law enforcement records that make it far easier for a local judge or prosecutor to have access to an offender's full criminal history instead of only those offenses committed in the local jurisdiction. The National Crime Information Center (NCIC), which stores information on criminal offenders, was created in 1967 and has grown steadily since. It is possible that greater access to offenders' criminal records at sentencing is a significant contributor to why an increasing share of offenders are sentenced as recidivists. For information on the NCIC, see <https://le.fbi.gov/informational-tools/ncic>.

6. *New Criminalizations and Increased Enforcement*

The mass incarceration narrative is eager to point to how the “War on Drugs” expanded criminalization and enforcement against illicit drugs as a contributor to incarceration increases, but it forgets to mention other significant changes to criminalization that have expanded the scope of incarcerable behavior. Since 1960, governments at the state and federal level have created entirely new crimes and tightened their enforcement of many existing laws. Except for drug laws, most of these changes in criminalization and enforcement are uncontroversial, and any increases in incarceration caused by them are likely to be seen as appropriate by most of society. These changes to criminalization are not examples of exceptional American punitiveness. Indeed, all the crimes discussed in this section are also crimes in most comparable countries.

Drug Offenses

As anyone aware of the mass incarceration narrative knows, America’s criminalization of both drug trafficking and possession has increased the prison population. While the “War on Drugs” began in the 1970s, America first sought to control drugs at the federal level in 1914 with the Harrison Anti-Narcotics Act. Even before the 1960s, the government recognized illegal drug use as a threat and repeatedly tightened punishments. As the Drug Enforcement Agency notes:

In the first half of the 1950s the average length of narcotics sentences in 86 U.S. district courts had doubled, from two years to four years, largely because of the penalty provisions of the Boggs Act. After the Congress unanimously passed the Boggs-Daniel Narcotic Control Act of 1956, the average length of sentences rose in the next two years from four to six years. The Act provided a mandatory minimum sentence of five years in prison for a first offense of illegally selling narcotic drugs or marihuana, and from 10 to 40 years . . .⁹²

These new laws did not result in massive incarceration increases because illegal drug trafficking and usage were still a relatively minor problem. In 1960, drug offenders made up around 5% of the total state prison population.⁹³ By 1965, however, there were already almost 4,000 drug offenders in federal prison, making up 17.9% of the federal prison population.⁹⁴

⁹² *DEA History-The Early Years*, U.S. DRUG ENF’T ADMIN. (2018), <https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf>.

⁹³ *State and Federal Prisoners, 1925-1985*, BUREAU OF JUSTICE STATISTICS (1986), <https://bjs.ojp.gov/content/pub/pdf/sfp2585.pdf>.

⁹⁴ Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335 (1995).

This history is important because it shows that regardless of any punitive changes associated with the “War on Drugs,” existing criminalization of drugs would have guaranteed a substantial drug offender population in prison simply because of increasing drug crime, a point noted previously. If we assume the criminal justice system made no changes to drug sentencing but simply kept the same rate of enforcement as it had in 1960 before the “War on Drugs,” then a conservatively estimated quintupling in the rate of illicit drug use would be reflected in a 400% rise of drug offenders in prison. Roughly adjusting for the increases in other types of crime, one would expect drug offenders to make up about 13% of the prison population today.⁹⁵ Their actual share is 15%—about what one would expect if the increase in underlying drug crimes was a little over fivefold, as seems likely.

Of course, this picture is not perfectly accurate, as the surge in drug usage was not met with the same level of enforcement, at least initially. It seems likely a smaller percentage of illegal drug users were caught, but those that were caught suffered somewhat more severe penalties due to sentencing changes post-1970. The epidemic of drug usage in the 1960s and ‘70s led to stricter punishments in the ‘70s, ‘80s, and ‘90s as policymakers seized sentencing as a utilitarian tool to stop the drug surge. The infamous “War on Drugs” was declared in 1971 by Richard Nixon and led to a series of state and federal laws ratcheting up punishments for drug crimes. For example, Nelson Rockefeller, New York’s Governor, oversaw the passage of a mandatory minimum sentencing law that mandated a minimum of 15 years in prison for those convicted of selling 2 ounces or possessing 4 ounces of certain controlled substances. That said, much of the “War on Drugs” did not consist in increasing penalties or criminalization but simply spending greater resources on enforcement to keep up with the surge in drug crimes.

Today, there is substantial debate whether criminalizing drugs instead of pursuing legalization and regulation was the correct policy choice. Without minimizing the importance of such debates, it is important to remember that the initial decision to criminalize drugs was not a result of exceptional punitiveness on the part of the American public and policymakers. Drug prohibitions are a feature of governments worldwide, and the Single Convention of Narcotics was first adopted in 1961 and later amended in 1972. The treaty has been ratified by 186 nations worldwide and commits signatory states to combating the drug trade and possession through criminal penalties.⁹⁶ The enormous costs of drug abuse made governments’ decision to tighten drug laws and ramp up criminal penalties worldwide understandable, even though

⁹⁵ That is because $0.55 (1.22) + 0.4 (2.35) + 0.05 (5) = 1.861$ and $0.25/1.861 = 0.13$. Again, this is quite rough and assumes all other factors (such as criminal justice system effectiveness) being held equal for all crimes. Still, it gives an idea for how much the drug offender prison population might have changed if the government had not made any punitive changes to drug policy post-1960 but had simply attempted to keep the level of enforcement consistent even as drug crimes proliferated.

⁹⁶ *Single Convention on Narcotic Drugs*, UNITED NATIONS (1961), https://www.unodc.org/pdf/convention_1961_en.pdf.

many today have come to see criminal justice systems as ill-equipped to deal with substance abuse. The size of the problem and its societal cost are certainly hard to ignore. One study found that, "Substance misuse and substance use disorders costs the U.S. and local communities approximately \$442 billion each year."⁹⁷ The decision to combat dangerous and addictive drugs through criminal means is understandable, even if some of the punishments for drug crimes have come to be seen as unjustified, or the entire policy of criminalization a mistake.

Contrary to a strain of conspiratorial thinking prevalent in the mass incarceration narrative that views the criminalization of drugs as resulting from a racist plot to imprison people of color, the truth is more mundane.⁹⁸ The surging cost to society of drug usage led to a public demand for government intervention. During the decades in which the "War on Drugs" was at its height, it commanded clear public support. As one researcher summarizes the polling data:

"Since 1969, the first year Gallup asked about illegal drug use, Americans have grown increasingly more concerned about the effects of drugs on young people. For instance, in 1969, 48% of Americans told Gallup that drug use was a serious problem in their community. In 1986, a majority of Americans, 56%, said that the government spent "too little" money fighting drugs. By 1995, 31% said drug use was a "crisis" and an additional 63% said it was "a serious problem" for the nation as a whole."⁹⁹

The effect of the "War on Drugs" on incarceration should not be ignored, but neither should it be overstated. Drug criminalization by itself can explain only 15% of the prison population today.¹⁰⁰ However, changes to drug criminalization and punishment associated with the "War on Drugs" and American punitiveness post-1970 can explain a much smaller percentage, since pre-1970 drug criminalization and enforcement policies would still result in a substantial drug offender prison population today.

It is also important to remember the "War on Drugs" is in steep decline. Between 2009 and 2019, the numbers of people admitted to and held in state

⁹⁷ FACING ADDICTION IN AMERICA, SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS AND HEALTH, U.S. SURGEON GENERAL (Nov. 2016), <https://store.samhsa.gov/product/facing-addiction-america-surgeon-generals-report-alcohol-drugs-and-health-full-report/sma16-4991>.

⁹⁸ We of course do not deny that the motives of some individual policymakers in tightening drug criminalization may have been to target groups they were biased against, but taken wholistically, greater drug criminalization would not have been accepted if it did not reflect prevailing public concerns—including among minority communities.

⁹⁹ Jennifer Robinson, *Decades of Drug Use: Data from the '60s and '70s*, GALLUP (Jul. 2, 2002), <https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx>.

¹⁰⁰ Some argue that drug criminalization is a contributing factor to the worsening of criminal offender histories, as without drug criminalization, some offenders would have fewer total prior convictions. As a result, drug criminalization may indirectly explain a bit more than 15% of the current prison population, but without better data, it is impossible to say how much more—though it is not likely to be particularly large.

prisons for drug offenses both fell by about a third.¹⁰¹ All told, there are a little over 200,000 sentenced drug offenders in U.S. prisons. As previously discussed, the vast majority of these (over 165,000) are in prison for more serious drug offenses than possession, such as trafficking. Moreover, many of these offenders have committed other crimes.¹⁰² Simply decriminalizing the possession of drugs would barely reduce the prison population, and even assuming a complete legalization of drugs, it is likely that many of the current 200,000-or-so imprisoned drug offenders would land, or remain, behind bars on different charges. Becoming a drug trafficker does not tend to be a one-off crime, and is often part of a general criminal orientation that seeks to live and make money outside the law.

Child Pornography and Sexual Abuse

While drug criminalization has become controversial, there have been many other new criminalization and tightened enforcement decisions since 1960 that command broad support today. Examples include laws targeting child pornography and sexual abuse. The criminal justice system was practically uninvolved with such conduct in the 1960s, and laws mandating reporting of potential child abuse were only enacted in 1974,¹⁰³ though truly serious efforts by the criminal justice system to combat the problem would take longer. While child sexual abuse has always existed, its importance to policymakers has risen, perhaps fueled by the internet aiding in grooming children and disseminating child pornography.¹⁰⁴ As a result, a wave of expanded criminalization and enforcement has led to far more people incarcerated for child sex offenses than in the past. The resulting increase in imprisonment is substantial. There were an estimated 127,282 individuals incarcerated in 2021 at the state level for “sex offenses involving children” and another 12,850 such offenders incarcerated at the federal level.¹⁰⁵ This represents

¹⁰¹ *Drug Related Crime Statistics*, NATIONAL CENTER FOR DRUG ABUSE STATISTICS (2020), <https://drugabusestatistics.org/drug-related-crime-statistics/>.

¹⁰² Offenders tend not to stick to just one crime type. Consider one report which found that “More than three-quarters (77%) of released drug offenders were arrested for a non-drug crime within 9 years.” See Mariel Alper Et al., *2018 Update on Prisoner Recidivism: A 9-year Follow-up Period*, BUREAU OF JUSTICE STATISTICS (May 2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

¹⁰³ Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471 (2008).

¹⁰⁴ Pre-internet, the occurrence of child sexual abuse appeared to be stable across multiple decades and a 1997 study found it was 14.5% for females and 7.2% for males (heartbreakingly high numbers). See Kevin M. Gorey & Donald R. Leslie, *The Prevalence of Child Sexual Abuse: Integrative Review Adjustment for Potential Response and Measurement Biases*, PUBMED (1997), [https://pubmed.ncbi.nlm.nih.gov/9134267/#:~:text=05%3B%20\(4\)%20female%20and,response%20rates%20and%20definitions%2C%20the](https://pubmed.ncbi.nlm.nih.gov/9134267/#:~:text=05%3B%20(4)%20female%20and,response%20rates%20and%20definitions%2C%20the) (synthesizing cross-sectional surveys to analyze the prevalence of child sexual abuse).

¹⁰⁵ Maria Blackburn, *Incarcerating Child Sexual Abusers Topped \$5.4 Billion in 2021 According to Study*, HUB (Apr. 5, 2022), <https://hub.jhu.edu/2022/04/05/incarcerating-child-sexual-abusers-5-billion/#:~:text=At%20the%20federal%20level%2C%20the,of%20%24508%20million%20in%20spending>.

roughly 11% of America's 1.2 million prison inmates. Few would argue the expanded criminalization and enforcement of child sex offenses is unjustified or reflects exceptional punitiveness. Rather, most would see it as progress in combating a scourge that has always existed but until recently was not treated by the justice system with the gravity it deserves.

Human Trafficking

Another area of expanded criminalization since the 1960s is human trafficking. The Trafficking Victims Protection Act of 2000 was the first comprehensive federal legislation targeting human trafficking.¹⁰⁶ Previously, trafficking could only be prosecuted under a series of patchwork older laws regarding slavery and involuntary servitude that were often too narrow to clearly apply. The new legislation added "provisions prohibiting forced labor, trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, and sex trafficking of children or by force, fraud, or coercion" as well as criminalizing any attempt to engage in such activities. Historically, around 500 or more human traffickers are convicted each year in the federal system.¹⁰⁷ Almost all such traffickers are sentenced to prison, with 86% of federal trafficking defendants in one recent year sentenced to 5 or more years.¹⁰⁸

New White-Collar Crimes

Since the 1960s, federal and state governments have moved to create more white-collar crimes with statutes targeting environmental and financial offenses, among others. For example, in 1982, the EPA and DOJ created specialized units to prosecute environmental crimes, and the Clean Water Act was amended in 1987 to create felony crimes for some environmental offenses, such as knowingly polluting waters without a permit. In 1990, the Clean Air Act was amended to add "numerous felony provisions."¹⁰⁹ Environmental advocates have hailed the increasing use of criminalization and incarceration as appropriate responses and deterrents to those who willfully cause grave environmental damage.

Identity theft is another white-collar crime that ballooned in recent years with the aid of the internet. In 1998, Congress passed the first federal identity

¹⁰⁶ *The Trafficking Victims Protection Act of 2000*, U.S. DEP'T OF JUST. (2023), <https://www.justice.gov/humantrafficking/key-legislation>.

¹⁰⁷ *Human Trafficking Data Collection*, U.S. DEP'T OF JUST. (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/htdca22.pdf>.

¹⁰⁸ *2023 Trafficking in Persons Report: United States*, U.S. DEP'T OF JUST. (2023), <https://www.state.gov/reports/2023-trafficking-in-persons-report/united-states>.

¹⁰⁹ David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, UTAH L. REV. 1223, 1227 (2009) (detailing the development of environmental criminal statutes and explaining the elevation of punishment to felony charges).

theft specific statute, the Identity Theft and Assumption Deterrence Act.¹¹⁰ Since then, prosecutions have increased with many resulting imprisonments. “Identity theft offenders accounted for slightly more than two percent (2.2%, n=3,694) of the federal prison population as of September 30, 2016.”¹¹¹

Financial crimes have also been increasingly defined, penalized, and enforced. For example, in 1986, Congress passed the Money Laundering Control Act, which made money laundering a federal crime for the first time.¹¹² According to U.S. Sentencing Commission data, over 70% of those convicted of fraud and related crimes at the federal level were sentenced to some form of incarceration.¹¹³ While these new white-collar crimes and increased enforcement have only had a small impact on the prison population, their effect should still be noted to showcase just how much the criminal justice system has seen its scope—and therefore the scope for incarceration—expand in recent decades.

Sexual Assault

While there have always been laws criminalizing rape and many kinds of sexual assault, the post-1960 period saw an increase in public attention to sexual violence and an expanded focus on enforcing the law. Behaviors that were once normalized or accepted are now rightly viewed as criminal by society. The #MeToo and #TimesUp movements were a recent manifestation of a broader trend to take sexual crimes more seriously. It makes sense that as women gained more political, economic, and social power over the last half-century, rape and sexual assault would be addressed more rigorously by the justice system. The resulting increase in imprisonment reflects progress, and seeking to reduce the rate of punishment for sexual crimes is a step in the wrong direction.

New legislation has substantially expanded criminalization around sexual assault in the last 50 years. As strange as it may seem to our moral consciences today, marital rape was not considered a rape crime 50 years ago and could only be prosecuted under assault laws. “In 1976, however, Nebraska became the first state to make marital rape a crime. By 1993, marital

¹¹⁰ *Identity Theft*, U.S. DEP’T OF JUST. (Aug. 11, 2023), <https://www.justice.gov/criminal/criminal-fraud/identity-theft/identity-theft-and-identity-fraud>.

¹¹¹ William Pryor et al., UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES FOR IDENTITY THEFT OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 33 (2018). However, there is significant room for greater state and federal enforcement of statutes against fraud and identity theft since as “as many as 700,000 people fall victim to identity theft and other forms of Internet fraud every year.” Dan Verton, *Criminals Using High-tech Methods for Old-style Crimes*, COMPUTERWORLD (Feb. 2003), <https://www.computerworld.com/article/1347437/criminals-using-high-tech-methods-for-old-style-crimes.html>.

¹¹² *Money Laundering Control Act*, FINANCIAL CRIMES ENFORCEMENT NETWORK (1986), <https://www.fincen.gov/history-anti-money-laundering-laws>.

¹¹³ Joseph Fawbush, *How Much time will I Serve for Fraud and Related Crimes?*, LAWINFO (June 6, 2021), <https://www.lawinfo.com/resources/criminal-defense/sentencing/sentencing-statistics/how-much-time-will-i-serve-for-fraud-and-related-crimes.html>.

rape was a crime in all 50 states.”¹¹⁴ Additionally, it was only in 1975 that Congress passed “rape shield” laws to change the federal rules of evidence to prevent a victim’s sexual history from being used in court to undermine or humiliate the victim.¹¹⁵ Prior to such changes, the ability to drag a victim’s sexual history through court served as a deterrent to victims seeking justice. New technologies have also opened new avenues for sexual abuse, resulting in new criminalization. For example, “Thirty-eight states . . . have enacted revenge porn laws, criminalizing the distribution of sexually explicit images or videos without the individual’s consent.”¹¹⁶

These changes reflect a broader societal change—often implemented in updated state laws—that sees “lesser” forms of sexual assault as increasingly equivalent to rape and recognizes that rape is a crime that can affect people of any gender. Considering that some researchers estimate that less than 1% of rapes lead to the rapist spending time in prison, activists should be looking for ways to continue expanding the prison population of rapists, not decrease it.¹¹⁷ As one Stanford researcher has noted about comparing the current U.S. incarceration rate with lower pre-1970s rates, “[t]hat low rate was in part a function of not taking rape, spousal abuse, and other male violence against women seriously — and we should not seek to go back there.”¹¹⁸

Domestic Violence

The criminal justice system has also shifted to take domestic violence more seriously over time. In the past, domestic violence was considered an interpersonal issue beyond the purview of criminal law. “In fact, many police departments had ‘hands off’ policies prior to the 1970s, and police training manuals actually specified that arrest was to be avoided whenever possible in responding to domestic disputes.”¹¹⁹ Since then, states have tightened

¹¹⁴ Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, ARKANSAS JOURNAL OF SOCIAL CHANGE AND PUBLIC SERVICE (Apr. 15, 2018)

<https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/> (explaining the progression of laws addressing sexual assault).

¹¹⁵ Ibid.

¹¹⁶ Ibid. (showing the shift to take all forms of sexual assault more seriously is exemplified by the FBI’s 2013 decision to change the definition of rape to include previously excluded crimes. The previous definition of “carnal knowledge of a female forcibly and against her will” was changed to “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”); *Rape*, FBI (2013), <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape#:~:text=The%20revised%20UCR%20definition%20of,rape%20and%20incest%20are%20excluded.>

¹¹⁷ Andrew Van Dam, *Less than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018) <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/>.

¹¹⁸ German Lopez, *The US Incarcerates too Many People. But Comparisons with Europe are Flawed*, VOX (Apr. 7, 2015), <https://www.vox.com/2015/4/7/8364263/us-europe-mass-incarceration>.

¹¹⁹ JEFFREY FAGAN NAT’L INSTITUTE OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 6 (1996).

domestic violence laws and police have stepped up enforcement. While most domestic violence arrests do not lead to a felony assault prosecution, and so such offenders do not receive prison sentences, a substantial number of those sentenced to prison for aggravated assault were convicted on domestic violence charges. One study found that “of the approximately 1,500 defendants charged with felony assault during May 2000 in the State courts of 11 large counties, about a third were charged with family violence.”¹²⁰ Of those convicted, 83% were sentenced to prison or jail.¹²¹ Between 2000 and 2002, domestic violence offenders convicted under federal law for “an interstate domestic violence offense” received even stricter punishments, as “91% received a prison term with a median length of 60 months.”¹²² Given that 146,000 state prisoners are serving sentences for assault, the effect of increased domestic violence criminalization and enforcement on increasing incarceration should not be ignored.

Stalking

Stalking is an old behavior only recently criminalized by specific laws. Stalking is widespread and ranges in seriousness, but it affects a disturbingly large segment of the population. By one count, “Approximately 3.4 million people are stalked each year in the United States, and 1 in 5 women and 1 in 10 men will be stalked in their lifetime.”¹²³ California was the first state to pass a specific anti-stalking statute in 1990, but all states have followed with their own anti-stalking laws. The first federal anti-stalking statute was passed in 1996.¹²⁴ According to a 2009 study by the Department of Justice, stalking results in over 50,000 offenders being jailed or imprisoned each year.¹²⁵

Weapons Offenses

While states and the federal government regulated weapon possession long before the 1960s, the increase in violent crime beginning in the late 1960s led to calls for taking weapon offenses more seriously. The result was new gun control laws at the state and federal levels and increased enforcement against weapon offenders. At the federal level, these new laws included the Gun Control Act of 1968, the Firearm Owners Protection Act of 1986,

¹²⁰ MATTHEW DUROSE ET. AL., FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGER AND ACQUAINTANCES 2 (2005).

¹²¹ *Ibid.* (showing that 32% of these incarceration sentences were prison sentences).

¹²² *Ibid.*

¹²³ Robert T. Muller, *Why We need to take Stalking More Seriously*, PSYCHOLOGY TODAY (Jul. 8, 2021), <https://www.psychologytoday.com/us/blog/talking-about-trauma/202107/why-we-need-take-stalking-more-seriously>.

¹²⁴ R. Myers, *Anti-Stalking Statutes*, NCJRS (1998) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/anti-stalking-statutes> (evaluating State and Federal statutes on stalking laws).

¹²⁵ KATRINA BAUM ET. AL., BUREAU OF JUSTICE STATISTICS, STALKING VICTIMIZATION IN THE UNITED STATES 15 (2009).

the Brady Handgun Violence Prevention Act of 1993, and the Public Safety and Recreational Firearms Use Protection Act of 1994.¹²⁶ New state laws tightened gun control and added additional penalties for crimes committed with deadly weapons. By 1992, 26,000 offenders were convicted under state laws regulating weapons, with 66% receiving an incarcerative sentence. The average prison sentence for weapon offenders sentenced to prison was 4 years.¹²⁷ According to a 2016 study, 21% of state and federal prisoners had “possessed or carried a firearm when they committed the offense for which they were serving time in prison.”¹²⁸ Over 153,000 arrests were made for weapon offenses in 2019 by state and local police,¹²⁹ and there are around 39,000 prisoners serving time in state prison for a weapons offense.¹³⁰ At a time when gun violence is rightly considered a serious issue, there is likely to be significant support for maintaining the system’s current criminalization and punishment of weapon offenses.

7. Other Non-Sentencing Factors

The above factors are only a selection of the most important ones to consider; they are by no means an exhaustive list of possible non-sentencing factors that affect prison populations. Consider two other examples: changes in general life expectancy and parolee behavior.

Life expectancy in society has increased significantly since the middle of the 20th century, meaning that those serving life sentences are likely to survive longer, possibly contributing to rising prison populations (especially since those with LWOP sentences received during the crime wave of the 1960s-1990s will remain in the prison population longer). In 1950, U.S. life expectancy was about 68 years.¹³¹ In 2021, it was around 79 years, an increase of 16%. More specific to the prison population of mostly male and increasingly elderly lifers, the life expectancy of a 65-year-old man in 1960 was 12.8 more years. In 2021, the life expectancy was 17 more years, an

¹²⁶ Sarah Gray, *Here’s a Timeline of the Major Gun Control Laws in America*, TIME (Apr. 30, 2019), <https://time.com/5169210/us-gun-control-laws-history-timeline/>.

¹²⁷ Lawrence Greenfeld & Marianne Zawitz, *Weapons Offenses and Offenders*, BUREAU OF JUSTICE STATISTICS (Nov. 1995), <https://bjs.ojp.gov/content/pub/pdf/woofecj.pdf>.

¹²⁸ Mariel Alper & Lauren Glaze, *Source and use of Firearms Involved in Crime: Survey of Prison Inmates, 2016*, BUREAU OF JUSTICE STATISTICS (Jan. 2019), <https://bjs.ojp.gov/content/pub/pdf/su-ficspi16.pdf>.

¹²⁹ David Olson, *Illegal Firearm Possession: A Reflection on Policies and Practices that May Miss the Mark and Exacerbate Racial Disparity in the Justice System*, DUKE CENTER FOR FIREARMS LAW (Jan. 19, 2022), https://firearmslaw.duke.edu/2022/01/illegal-firearm-possession-a-reflection-on-policies-and-practices-that-may-miss-the-mark-and-exacerbate-racial-disparity-in-the-justice-system/#_ftn12.

¹³⁰ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie, 2023*, PRISON POLICY INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

¹³¹ MACROTRENDS, *U.S. Life Expectancy 1950-2024* (last visited Mar. 6, 2024), <https://www.macrotrends.net/countries/USA/united-states/life-expectancy>.

increase of over 30%.¹³² We make no claims about how much increases in life expectancy may have translated to the prison population and thus increased the share of prisoners serving life or extremely long sentences, but it seems likely to have had a non-trivial impact.

Another important non-sentencing factor is the behavior of parolees or other supervised releasees who may be returned to prison for violating their release terms. The share of new prison admissions caused by parolees violating the terms of their release (either through committing a new crime or a technical violation such as failing to meet monitoring conditions) has increased substantially since 1960. In 1960, the number of new admissions caused by release revocations was only 15% of the number of new convictions.¹³³ By 2018, the proportion increased to 41%.¹³⁴ While this increase in revocations clearly contributed to rising incarceration, its effect is hard to untangle from other factors that both increase incarceration and the total number of parolees. The increasing number of parolees returned to prison for committing new crimes is largely a downstream effect of larger prison populations generating larger parole populations that then re-offend in line with general crime and recidivism increases.¹³⁵

However, one possible distinct parole-related factor is whether parolee behavior has changed over time to be less compliant. For example, if current releasees are more likely to ignore monitoring conditions than in 1960, this would lead to incarceration increases. Alternatively, even if parolee behavior has not changed, better monitoring conditions today might make it easier to detect parolee violations than in the past. Unfortunately, answers to these questions are difficult to determine, not only due to a lack of data, but also because the discretion of parole officers plays a large role in determining what kind of violations qualify for readmission to prison. We make no claims about how these factors may have affected incarceration, but the question deserves research.

8. The Total Effect of Non-Sentencing Factors on Incarceration

Proponents of the mass incarceration narrative usually make no attempt to consider how a wide variety of non-sentencing factors contributed to the increase in prison population because such factors have nothing to do with supposed American punitiveness. Instead, proponents of the narrative

¹³² *Life expectancy for men at the age of 65 in the U.S. from 1960 to 2021*, STATISTA (last visited Apr. 4, 2024), <https://www.statista.com/statistics/266657/us-life-expectancy-for-men-at-the-age-of-65-years-since-1960/>.

¹³³ $13586/88575 = 0.15$.

¹³⁴ Carson, *supra* note 73 ($169,663/410,867 = 0.41$).

¹³⁵ See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U.L. REV. 1239, 1253 (2012) (concluding that the impact of parole on the rise in incarceration rates is significantly less than commonly believed, due to it being a downstream consequence of incarceration itself).

commonly mislead their audience into believing that increased incarceration is itself proof of increased punitiveness.

Contrary to that narrative, the above non-sentencing factors likely explain a large majority of the increased per capita incarceration rate when comparing 1960 to 2021. In fact, one can plausibly explain almost the entire incarceration increase without reference to increasing punitiveness in sentencing.¹³⁶ Increased crime and criminal justice system effectiveness alone likely account for more than 150% of the 200% increase in per capita incarceration. If one considers the increase in drug crimes, this number might be 170% or higher. New criminalization and enforcement likely accounts for at least a 50% increase, though this is already counted by the crime and justice system effectiveness increase (since new criminalization increases total crime even with no underlying changes in societal behavior, and greater enforcement raises system effectiveness). The effect of deinstitutionalization and criminal offender histories likely accounts for at least a double digit increase in incarceration, though this overlaps significantly with the effect of increased crime and system effectiveness. Our best guess is all these non-sentencing factors account for at least 150-175% of the 200% per capita incarceration rate rise between 1960 and 2021. This does leave some (small) room for sentencing factors, but as discussed in the next section, it is difficult to distinguish the effect of increased punitiveness in sentencing from a non-sentencing factor like changing criminal histories in determining why a harsher sentence was handed down. As a result, this estimate is conservative. What is clear is that *one can explain most of America's elevated per capita incarceration rate compared to the past with factors ignored by the mass incarceration narrative.*

C. Sentencing Factors in the Rise of the U.S. Prison Population

The mass incarceration narrative is quick to blame punitive sentencing whether in the form of mandatory minimums, truth-in-sentencing laws (that abolish early release on parole), or higher guideline punishments for America's incarceration increase. All these changes fall under two broad sentencing factors that affect incarceration. First, the system may change the chance of a convicted offender receiving a prison sentence vs. non-incarcerative punishment. Second, the system may change the time served in prison for offenders sentenced to prison (either by changing its sentence length policies or by changing its early release on parole policies). The mass incarceration narrative does have a kernel of truth in that punishment for some offenses

¹³⁶ Nor would this finding be unique in the literature. John Pfaff's extensive empirical work on incarceration has concluded that non-sentencing factors are largely responsible for America's incarceration rate increase. See, e.g., John Pfaff, *The Empirics of Prison Growth: A Critical Review and Path*, 98 J. CRIM. L. & CRIMINOLOGY 101, 101-179 (2008). Patrick Langan also cast doubt on the idea that changes to sentencing were a main driver of incarceration increases. See Patrick A. Langan, *America's soaring prison population*, 251 SCIENCE 1568, 1568-1573 (1991).

has increased since 1960, and this increased punishment likely contributes to the higher U.S. prison population today. Where the narrative misleads is in claiming that these sentencing factors explain most of the incarceration increase and in claiming that these punishment increases reflect unjustified punitiveness. In fact, *sentencing factors likely explain less than a fifth of the 200% per capita incarceration rate increase between 1960 and 2021, and much of this sentencing-related increase would be seen as appropriate by most people, regardless of political persuasion.*

1. Changes in the Chance of Receiving a Prison Sentence

Perhaps the most important way sentencing changes could impact incarceration is if a significantly higher percentage of similar defendants convicted of the same crime received prison sentences than had in the past. Frustratingly, we are unaware of published national data on this seemingly simple question before 1986. A 1991 study by Patrick Langan of the BJS was also unable to obtain such data, noting that while the imprisonment rate per 100 arrests had increased, this could be either a consequence of increased prosecution effectiveness (more arrests being turned into convictions) or judges more frequently handing out prison sentences.¹³⁷ While the percentage of convicted defendants receiving prison sentences may have increased somewhat over the 1960-1986 period, it would appear neither to be a massive increase nor entirely tied to harsher sentencing laws as changes in the characteristics of convicted defendants themselves might account for changes in their likelihood of receiving a prison sentence (e.g., the pool of convicted defendants may have been increasingly tilted toward more serious crimes or perhaps seriousness of criminal histories was increasing).¹³⁸

Fortunately, good data exists from 1986 to 2006 for measuring the percentage of state felony defendants who received prison sentences. (The BJS has not released national data since 2006, but there is little reason to think there has been any subsequent increase in the percentage of convicted offenders sentenced to prison given the steady decline in incarceration since 2009.) Given that the 1986-2006 period reflects the height of “tough on crime” sentencing laws, one would expect a substantial rise across this period in the chance of a defendant receiving a prison sentence. In fact, *there was barely any change at all.* In 1986, 46% of convicted felony defendants in state courts received a prison sentence, 21% received a jail sentence, and 33% received non-incarcerative punishments (usually probation).¹³⁹ In 2006, 41% of convicted felony defendants in state courts received prison sentences, 28%

¹³⁷ Langan, *supra* note 136, at 1572.

¹³⁸ Langan seems to cast doubt on these explanations in his 1991 study, citing prison surveys. However, such surveys do not necessarily capture all changes in the pool of convicted defendants, nor do they consider how plea bargaining might obscure a rise in serious crime admittances while still impacting incarceration chances. *Id.*

¹³⁹ Joseph Bessette, *Felony Sentences In State Courts*, BUREAU OF JUSTICE STATISTICS (Feb. 1989).

received jail sentences, and 31% received non-incarcerative sentences.¹⁴⁰ The chance of receiving a prison sentence *actually declined* even as the prison population surged over this 20-year period. Even considering all incarcerative sentences more broadly, there was no significant change in the use of incarcerative vs. non-incarcerative sentences for convicted defendants. This suggests *if punitive sentencing policy significantly contributed to incarceration increases, it did not do so through greatly increasing the chance of a convicted offender receiving a prison sentence.*

2. Changes in Time Served in Prison for an Offense

Even if sentencing laws do not appear to have had a large effect on the chance of receiving a prison sentence, perhaps they increased the length of prison sentences enough to still greatly increase incarceration levels as the mass incarceration narrative assumes. Before analyzing this claim, it is important to draw a distinction between sentence length and time served. Any analysis that simply cites sentence length data is practically worthless as what matters for both punishment and prison populations is the actual time served in prison for sentenced offenders, not the sentences publicly imposed in court that are dramatically reduced by early release on parole or “earned credit” schemes that give prisoners more than one day credit for each day served. Overall, state prisoners on average serve only 44% of their maximum sentence length.¹⁴¹

Time served data comes in two varieties: mean data and median data. Median data is most representative of the punishment served by the “average” offender, while mean data is sensitive to changes in punishment for offenders at the extreme end of the sentencing range. Given that mandatory minimums and repeat offender laws only apply to part of the prison population, it is reasonable to assume mean data would be most likely to confirm the mass incarceration narrative.

Table 4 shows mean time served in state prison for a selection of years from 1923 to 2018. The results are striking. *The average time served for all offenders in 2018 was 32 months—the same length as in 1953 long before mass incarceration was a concern.*¹⁴² Moreover, it is only 4 months longer than in 1960. Even as the prison population surged between 1960 and 1990, the mean time served among state prisoners did not change at all (staying at 28 months). The supposedly draconian sentencing laws passed from the 1970s onward appear to have barely made a dent in time served. (One explanation is that when faced with a mandatory minimum sentence for one

¹⁴⁰ Matthew Drurose & Patrick A. Langan, *Felony Sentences In State Courts, 2006 – Statistical Tables*, BUREAU OF JUSTICE STATISTICS (Dec. 2009).

¹⁴¹ Danielle Kaebler, *Time Served In State Prison, 2018*, BUREAU OF JUSTICE STATISTICS (Mar. 2021).

¹⁴² *Id.*

offense, defendants strategically plead guilty to an offense without a mandatory minimum.¹⁴³⁾

Table 4. Mean Time Served of State Prisoners Upon First Release in Months¹⁴⁴

Year	All Off.	All Vlt.	Mdr.	Rpe.	Rbr.	SA	As.	Drg.	Brg.	Frd.	Auto
1923 ¹⁴⁵	27	N/A	77 ¹⁴⁶	42	37	26	26	11	26	21	N/A
1935 (m) ¹⁴⁷	22	N/A	54	40	43	28	20	14	20	14	18
1945 (m)	39	N/A	117	52	70	39	34	23	45	29	31
1953	32	N/A	116	51	49	38	28	23	30	23	24
1960	28	N/A	121	45	42	N/A	25	31	25	17	21
1986 ¹⁴⁸	33	N/A	N/A	66	57	N/A	41	N/A	31	N/A	N/A
1990 ¹⁴⁹	28	46	92	62	48	36	30	20	29	20	20
1992 ¹⁵⁰	N/A	43	71	65	44	35	29	N/A	N/A	N/A	N/A
1996 ¹⁵¹	30	45	95	66	46	45	33	24	31	22	24
2000 ¹⁵²	30	56	158	88	55	58	38	23	29	17	17
2002 ¹⁵³	29	48	93	80	54	45	31	22	31	17	21
2007 ¹⁵⁴	29	50	143	92	56	49	32	21	27	17	17
2018 ¹⁵⁵	32	58	214	115	58	60	30	21	27	17	15
Terminology Key											

¹⁴³ “Most mandatory minimum penalty offenses result in a negotiated disposition whereby the defendant pleads guilty to a lesser charge or other offense not subject to a mandatory minimum penalty.” *Mandatory Minimum Sentences*, PRISON POLICY INITIATIVE 5 (2005), https://www.prisonpolicy.org/scans/cga/mandatory_minimum_sentences_finding_and_recommendations.pdf.

¹⁴⁴ For both mean and median data, “first release” refers to the time served when first granted parole and does not include any additional time served because of parole revocation. The data also counts deaths as a first release, so it includes life sentences and death sentences.

¹⁴⁵ 1923-1960 data from Margaret Werner Cahalan, *Historical Corrections Statistics in the United States 1950-1984*, BUREAU OF JUSTICE STATISTICS 52 at table 3-23 (1986).

¹⁴⁶ 1923, 1935, and 1992 data includes manslaughter offenses.

¹⁴⁷ M means that the data is for males only.

¹⁴⁸ *Felony Sentences in State Courts 1986*, BUREAU OF JUSTICE STATISTICS at table 4.

¹⁴⁹ Paula Ditton & Doris Wilson, *Truth in Sentencing in State Prisons*, U.S. DEPT. OF JUSTICE table 7 (Jan. 1999), <https://bjs.ojp.gov/content/pub/pdf/tssp.pdf>.

¹⁵⁰ Lawrence Greenfeld, *Prison Sentences and Time Served for Violence 1*, BUREAU OF JUSTICE STATISTICS (1995).

¹⁵¹ Pfaff, *supra* note 80, at 40.

¹⁵² Matthew Durose & Patrick A. Langan, *Felony Sentences in State Courts 2000*, BUREAU OF JUSTICE STATISTICS table 4.

¹⁵³ *National Corrections Reporting Program: Time served in state prison, by offense, release type, sex, and race*, BUREAU OF JUSTICE STATISTICS (2002), <https://bjs.ojp.gov/library/publications/national-corrections-reporting-program-time-served-state-prison-offense>.

¹⁵⁴ *National Corrections Reporting Program: Time served in state prison, by offense, release type, sex, and race*, BUREAU OF JUSTICE STATISTICS (2007), <https://bjs.ojp.gov/library/publications/national-corrections-reporting-program-time-served-state-prison-offense>.

¹⁵⁵ Danielle Kaeble, *Time Served in State Prison 2018*, BUREAU OF JUSTICE STATISTICS 2 (2021).

All Off. = All Offenses All Vlt. = All Violent Offenses Mdr. = Murder Rpe. = Rape	Rbr. = Robbery SA = Sexual Assault As. = Assault Drg. = Drug Offenses	Brg. = Burglary Frd. = Fraud Auto = Auto Theft
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There are, of course, exceptions for specific crimes. The mean time-served for certain crimes of violence (murder, rape, sexual assault, and robbery) appears to have increased. Most dramatically, the mean time served for rape jumped from 3.75 years to 9.58 years. (Many people will see this as a desirable change). Mean time served for murder in 1960 was 10 years; in 2018, it was 17.8 years. (Similarly, 10 years for intentionally taking another person’s life may be seen as wholly inappropriate by many.) Robbery increased from 3.5 to 4.8 years. At least for these crimes, the mass incarceration narrative has a kernel of truth as punishments really did increase. But this does not show “mass incarceration” by a “carceral society” but rather reflects societal changes regarding the seriousness of a short list of serious offenses. The question of whether these changes were desirable or undesirable, just or unjust, is addressed in the next subsection.

If mean time served data fails to confirm the mass incarceration narrative’s central claim regarding the effect of punitive sentencing changes, median time-served data does much worse. Table 5 presents median time-served data for state prisoners. The results are extraordinary compared to the expectations one might reasonably have if one believed states moved to a far more punitive sentencing policy. *Median time served for all state prisoners in 1960 was 21 months compared to 15.6 months in 2018, a 25% decrease.* Moreover, the data is remarkably consistent across the entire period—there was no surge in median time-served during the period of surging incarceration from the 1970s through the early 2000s.

Table 5. Median Time Served for State Prisoners Upon First Release in Months

Year	All	Mur- der	Rob- bery	Rape	Agg. As- sault	Bur- glary	Lar- ceny
1926 ¹⁵⁶	19		31	24	17	20	17
1930	19		35	27	17	21	18
1935	17		38	30	17	19	14
1940	21	90	47	31	19	21	15
1945	30	102 ¹⁵⁷	55	38	25	30	21
1953 ¹⁵⁸	22	89	37	36	27	24	18

¹⁵⁶ STEPHANIE MINOR-HARPER AND LAWRENCE A. GREENFELD, PRISON ADMISSIONS AND RELEASES, 1982, at 8 tbl. 13 (1985), <https://bjs.ojp.gov/content/pub/pdf/par82.pdf>.

¹⁵⁷ MARGARET W. CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, at 52 tbl. 3-23 (1986), <https://bjs.ojp.gov/content/pub/pdf/hcsus5084.pdf>.

¹⁵⁸ *Id.* at 58-59 tbl. 3-25.

1960	21	121.3 ¹⁵⁹	34	30	20	20	17
1967	19		31	34	15	17	13
1970	18		30	35	18	16	13
1974	18		27	32	16	16	14
1978	18		25	34	20	15	13
1982	16		25	36	15	14	10
1986 ¹⁶⁰	17	66	29	38	16	15	11
1993 ¹⁶¹	12	81	25	44	15	13	9
1997	17		31	48	19	19	13
2000	17		36	63	20	19	12
2005	16		39	72	19	16	12
2009	16	94 ¹⁶²	35	74	18	15	11
2018 ¹⁶³	15.6	210	38.4	86.4	16.8 ¹⁶⁴	17	11

Once again, there are exceptions for individual crimes. The median time served for rape increased from 38 months in 1960 to 86.4 in 2018. Murder increased from 121.3 months in 1960 to 210 in 2018. However, these large changes in median do not appear for other violent crimes as they did in the mean data. The change for robbery was a movement from 34 months in 1960 to 38.4 months in 2018, and median time-served for assault decreased from 20 months in 1960 to 16.8 in 2018.

Considered together, mean and median time-served data suggests those prisoners receiving the harshest sentences have indeed experienced an increase in time served even as most prisoners have not. Why? One contributing factor was likely increased statutory or guideline sentences for serious offenders, an effect trumpeted by the mass incarceration narrative, but there is an important confound in criminal histories as already noted above in the section on non-sentencing factors. Even if the exact same guidelines and sentencing practices from the 1960s were in effect in the 1990s or 2000s, criminals would receive longer sentences because the criminals themselves had changed—i.e., they had been convicted of more previous crimes meaning

¹⁵⁹ Issac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 45 tbl. 1 (1996).

¹⁶⁰ CRAIG PERKINS, NATIONAL CORRECTIONS REPORTING PROGRAM, 1986, at 29 tbl. 2-6 (1992), <https://bjs.ojp.gov/content/pub/pdf/ncrp86.pdf>.

¹⁶¹ THOMAS P. BONCZAR ET AL., NATIONAL CORRECTIONS REPORTING PROGRAM: TIME SERVED IN STATE PRISON, BY OFFENSE, RELEASE TYPE, SEX, AND RACE (2011), <https://bjs.ojp.gov/library/publications/national-corrections-reporting-program-time-served-state-prison-offense>.

¹⁶² SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 6.0027.2009 (2009), <https://wayback.archive-it.org/org-652/20230414120320/https://www.albany.edu/sourcebook/pdf/t600272009.pdf> (last visited Mar. 10, 2024).

¹⁶³ DANIELLE KAEBLE, TIME SERVED IN STATE PRISON, 2018, at 2 tbl. 1 (2021) <https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf>.

¹⁶⁴ 2018 data does not distinguish between aggravated assault and simple assault. *See Id.*

they would be sentenced as hardened recidivists. Recall that in 1990, 64% of felony defendants in large urban counties had no prior felony conviction, but in 2009, only 40% had no such conviction.¹⁶⁵ Moreover, the proportion with 10 or more such convictions jumped from 1% to 14% during that period. Such changes in criminal histories are bound to increase time served and prison populations, but they are not the result of increased punitiveness.

Even if one ignores worsening criminal histories as part of the explanation for longer sentences for serious crimes, the increased mean and median sentences for some serious offenses hardly supports the core claim of the mass incarceration narrative that increased punitiveness caused America's incarceration rise. While these changes at the highest end of the sentencing distribution likely contributed to America's elevated prison population compared to 1960, their contribution appears minor compared to the significant contributions of non-sentencing factors, as discussed above.

3. How Unjust Were These Sentencing Changes?

There is no question that changes to sentencing law were made from the 1970s through the 1990s and that these changes made some contribution to lengthening time served for at least some offenders. But how should we view this change—as the sinister fruit of exceptional and unjustified punitiveness? Or as a move toward more just sentencing for the most serious offenses?

Consider the time served data. Were the changes in time served from the 1960s through today largely unjust or undesirable? The answer appears to be no. The two crimes for which punishment increased the most are rape and murder. As suggested above, it seems unlikely that the increase in time-served for rape suggests something problematic about current punishment practices. In 1960, the median imprisoned rapist received less punishment (2.5 years) than the median imprisoned robber (2.8 years). We are confident in saying few reasonable people in America today would feel comfortable with such a punishment scheme in which seizing the cash register from a store clerk is punished more harshly than forcibly raping her. The fact that the median imprisoned rapist in 2018 spends 7.2 years behind bars while the robber spends only 3.2 is testament to progress in America, and likely due in no small part to women claiming more equal power in society. Would any person who truly cares about justice seek to reduce incarceration in the U.S. at the price of returning the punishment for rape to what most women (not to mention men) would rightly see as a slap on the wrist for such a serious crime? We think not.

Similarly, it seems unlikely that the community would see the 2018 mean punishment for murder—17 years in prison—as an injustice. People would likely see a 10-year punishment for intentionally killing another person (the

¹⁶⁵ BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES, 8 (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf>; see also *supra* discussion accompanying note 89.

mean in 1960) as inappropriately lenient, undervaluing both human life and the suffering brought upon the victim's family and community. Considering the fact that the country still debates the question of the death penalty versus life imprisonment, it seems almost certain most Americans would prefer the 17-year punishment for willfully ending another's life over a 10-year sentence.

The increase in time served for other crimes is much smaller, or even negative. It is difficult to say what exact time served in prison people would find just for a given crime. There is certainly variation, and mitigating or aggravating circumstances mean there is no single just punishment for a general offense type. High-quality opinion research has not recently been done on the topic (perhaps because progressive academic researchers fear the results may show the public does not support their desire for laxer punishments). However, the U.S. Sentencing Commission conducted a study in 1994 that attempted to determine representative public opinion on how federal criminal cases should be sentenced. The study involved face-to-face interviews and 40 vignettes describing various criminal cases.¹⁶⁶ The results were striking, as *mean public-recommended sentences were higher than guidelines sentences for almost all crimes, and median public-recommended sentences were also higher than guideline sentences for most crimes.*¹⁶⁷ The mean public-recommended sentence for street robbery was 9.2 years, for example.¹⁶⁸ The public would likely have been disappointed to learn the mean time served for robbers in 1996 was 3.8 years and has only risen to 4.8 years in 2018. Unfortunately, the study did not ask for recommended murder or rape sentences, but it is virtually certain both would have been much longer than actual time served.

Of course, the American public may have become less punitive over time as total crime has fallen from its peak in the 1990s. However, it is unlikely their perceptions of a just sentence have shifted so dramatically that current time served for most crimes would appear to be an injustice—if anything, it is far more likely, *if they were shown the time served data, most Americans would feel many criminals are getting unjustly lenient sentences.*

One of the only recent data points is a 2021 poll which found that 28% of the public believed convicted criminals spent too much time in prison while 32% believed they did not spend enough, and 37% believed they spent “about the right amount of time.”¹⁶⁹ Unfortunately, such a question is so nuanced as to be practically meaningless. For one, the public's view on the

¹⁶⁶ RICHARD P. CONABOY, SURVEY OF PUBLIC OPINION ON SENTENCING FEDERAL CRIMES, 19 (1997), <https://www.ussc.gov/research/research-reports/survey-public-opinion-sentencing-federal-crimes>.

¹⁶⁷ *Id.*

¹⁶⁸ RICHARD P. CONABOY, SURVEY OF PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 63 (1997), <https://www.ussc.gov/research/research-reports/survey-public-opinion-sentencing-federal-crimes>.

¹⁶⁹ JOHN GRAMLICH, U.S. PUBLIC DIVIDED OVER WHETHER PEOPLE CONVICTED OF CRIMES SPEND TOO MUCH OR TOO LITTLE TIME IN PRISON (2021), <https://www.pewresearch.org/short-reads/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison/>.

question is shaped by perceptions of how much time prisoners spend behind bars and not by realities. Without showing respondents actual time served data, it would be impossible to get a reliable assessment of their view of current practice.

Indeed, given the drumbeat of "mass incarceration," one might expect that at least some significant portion of the population (those exposed to the false narrative) have a grossly exaggerated view of the system's current punitiveness. A person hearing the generally accepted narrative would believe the system routinely throws first-time, non-violent offenders behind bars for many years—which would be more than enough reason to say prisoners spend too much time behind bars. One could also imagine that a person on the political right might answer "not enough time" simply from watching politicized coverage about "soft on crime" policies in left-leaning jurisdictions. Additionally, people's judgements are likely to differ depending on the crime. For example, it is almost certain that what the public perceives as a just sentence for drug dealing or possession has shifted in the direction of leniency (or even outright legalization) since the '90s. By contrast, this is likely not the case for the public's perception of what is a just punishment for murder or rape.

Our point is not to argue that the American public would demand longer incarceration terms for many prisoners if they were aware of time served data (though that may be the case), but rather to show that most of the post-1960 increases in time-served punishments are unlikely to be seen as an injustice by society. A rise in the per capita incarceration rate caused by an increase in time-served punishments that bring prison terms closer to what the public views as just deserts is not a sign of a punitive overreaction—it is simply a sign of the justice system catching up to where it should have been all along.¹⁷⁰

It seems likely that many promoters of the mass incarceration narrative fully understand that most American punishment practices are not unjust in the eyes of society. That, presumably, is why they blame "American public punitiveness" for the incarceration increases. Ironically, as shown previously, public desires for longer sentences—no matter how strong they may have been—actually had little effect on incarceration, as most of the incarceration increase was caused by non-sentencing factors. But what public opinion does indicate is that reforms designed to reduce the level of punishment across most crimes are unlikely to gain widespread support. This is why, in our view (see Part III), working to change the form of punishment, as opposed to the level of punishment, is a more useful reform program.

¹⁷⁰ Of course, many in the mass incarceration movement believe their elite notions of a "just" sentence should take precedence over the public's. We do not seek to change their private views of justice (or lack thereof); we merely note that the justice system is meant to do justice as society sees it or it loses its legitimacy among the very people it is supposed to satisfy and protect. *See infra* discussion and citations at note 204.

None of this is to say that changes to sentencing policy post-1960 did not result in many unjustly harsh sentences in absolute terms or that there is no room for reform in the direction of leniency. Even if we acknowledge, as seems likely, that many mandatory minimum sentencing laws brought time served punishments closer in line with public views of justice, this does not mean such laws are ideal or do not cause serious injustices. For example, three-strikes laws and other mandatory minimum sentencing for repeat offenders may result in many offenders getting their “just deserts,” which they would not have previously received, but it also means that there will be some William Rummels who receive life sentences for stealing \$230.¹⁷¹ The use of mandatory minimums short-circuits the important assessment of each defendant’s moral blameworthiness.

Additionally, it is undeniable that some sentencing changes in the post-1960 period were driven by utilitarian crime-control thinking that sought to reduce crime through sheer deterrence instead of providing a just punishment (with deterrence as a fruitful byproduct). This too routinely generated sentences unproportional to a careful analysis of the offender’s blameworthiness. (More on this in the next subsection.)

In other words, we share many common criticisms of the system’s punishment practices over the last several decades, but none of those reservations take away from the falsity of the standard mass incarceration narrative. The prevailing narrative of punitive changes to sentencing policies resulting in massive increases in time served and surging prison populations is wildly misleading at best.

4. Who Bears Responsibility for Punitive Excesses in Punishment Post-1960?

To the extent that some changes in sentencing practices in the post-1960 period produced excessive sentences—which we do believe is the case—who should bear the blame? Does primary responsibility lie with an “exceptionally punitive” American public, as the mass incarceration narrative suggests? This is certainly the prevailing academic narrative, but the truth is more complicated and much more damning to academics. Policymakers adopted and the public accepted a number of explicitly utilitarian crime-control sentencing laws in the post-1960 period. These laws produced some sentences that clearly and regularly conflicted with the delivery of just deserts (such as mandatory minimums for drug crimes, which could lead to certain drug dealers or possessors spending more time in prison than some rapists or murderers). But why did policymakers pursue such utilitarian solutions in the face of rising crime? The fundamental reason is because *academics in the first half of the 20th century successfully unmoored the criminal justice system from the concept of “just deserts” in favor of utilitarian crime-control models that*

¹⁷¹ See *Rummel v. Estelle*, 445 U.S. 263, 295 (1980) (Justice Powell dissenting).

shifted the criminal justice system to distributive principles for punishment based upon general deterrence, incapacitation of the dangerous, or rehabilitation.

Academics pushed a “scientific” utilitarian-based system of punishment that sought to free society from the “barbaric” notion of retributivist just deserts.¹⁷² This meant the legal system could give grossly inadequate punishment under a theory of utilitarian rehabilitation, as with rapist-turned-serial-killer William Bonin, who was let loose to kill after spending only five years in prison for more than a half-dozen brutal rapes of young men and boys.¹⁷³ The utilitarian perspective also justified life imprisonment for William Rummel for a minor fraud offense under a “three-strikes” law because, as a repeat offender, he needed to be incarcerated for as long as he was dangerous, despite the fact that a life sentence was grossly disproportionate to his moral blameworthiness.¹⁷⁴ Most academics were unwilling to face up to the truth that their support of such distributive principles of “coercive crime-control” left the criminal “justice” system’s doors wide open to terrible injustices and failures of justice. The “barbaric” notion of just deserts that they derided was the only principle capable of defending equally from excesses of leniency and harshness.

Of course, there is plenty of blame to go around for the unjustly harsh utilitarian punishments of the “War on Drugs” and the “War on Crime” more broadly, but it is only fair that the lion’s share goes to the academics and experts who first suggested “justice” had no place in the justice system. Far from being a lesson in exceptional and unjustified American punitiveness, the passage of unjustly harsh utilitarian punishments should more rightly be seen as a lesson in the folly of letting misguided academic ideas corrupt the justice system by disconnecting it from the community’s shared notions of justice. Today’s anti-punishment activists in academia should take note to avoid repeating the mistakes of the past.

D. American vs. Foreign Countries’ Prison Populations: A Problem on Which Side of the Ocean?

The mass incarceration narrative’s central myth of exceptional and unjustified American punitiveness does not simply claim American criminal punishments are unjustly punitive but also that they are exceptionally deplorable compared to other more enlightened countries. America’s per capita

¹⁷² PETER FRENCH, *THE VIRTUES OF VENGEANCE* 207 (2001); Barbara H. Fried, *Beyond Blame*, Bos. Rev. (Jun. 28, 2013), <https://www.bostonreview.net/forum/barbara-fried-beyond-blame-moral-responsibility-philosophy-law/>; VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATION OF CRIMINAL LAW* 61 (2011) (“Until the recent revival of retributivism, the common view was that retributivism is barbaric in treating the suffering of human beings as good.”).

¹⁷³ Cal. Dep’t of Corr. and Rehab., *EXECUTED INMATE SUMMARY – WILLIAM GEORGE BONIN*, <https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/william-george-bonin/> (last visited Mar. 17, 2024).

¹⁷⁴ See *Rummel*, 445 U.S. at 276.

incarceration rate is routinely criticized by comparing it to other countries, but what do such comparisons actually reveal? There is certainly some truth to the mass incarceration narrative's comparisons: America does appear to use prison as a punishment more often than other Western democracies, and America should take note of the wider use of non-incarcerative punishments in some foreign countries. However, the mass incarceration narrative rarely pauses to consider the confounding factors that make prison population comparisons difficult, and it never stops to question whether America's higher per capita incarceration rate compared to many other countries reveals a problem in foreign countries instead of America's justice system. Such motivated comparisons often fail to see how flawed foreign justice systems are and how much they may have to learn from the U.S.

1. The Claims of American vs. Foreign Countries' Incarceration Practices

The fact that America has such a high prison population is cited as a compelling justification for reform by mass incarceration proponents: "By virtually every measure, the United States incarcerates more of its people than any other nation in the world."¹⁷⁵ Similarly:

Not only does the U.S. have the highest incarceration rate in the world; every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth. To be sure, states like New York and Massachusetts appear progressive in their incarceration rates compared to states like Louisiana, but compared to the rest of the world, every U.S. state relies too heavily on prisons and jails to respond to crime.¹⁷⁶

Some mass incarceration researchers see America's exceptionally high prison populations as a legacy of slavery and a general barbarity in America as compared to Europe. Consider James Cullen writing for the Brennan Center:

Of course, de Tocqueville also saw much to criticize in the young United States, including its commitment to slavery. That legacy continues to haunt the country today, even as most of the world has adopted punishment systems more in line with what de Tocqueville hoped to find. Today, the U.S. incarceration rate is nine times higher

¹⁷⁵ Alexandria Ocasio-Cortez, *Alexandria Ocasio-Cortez on her Catholic faith and the urgency of criminal justice reform*, OCASIO CORTEZ HOUSE (June 27, 2018), <https://ocasio-cortez.house.gov/media/in-the-news/alexandria-ocasio-cortez-her-catholic-faith-and-urgency-criminal-justice-reform>.

¹⁷⁶ Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POLICY INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

than Germany, eight times higher than Italy, five times higher than the U.K., and 15 times higher than Japan.¹⁷⁷

The mass incarceration narrative views America’s high prison population as resulting from the punitiveness of the American public, and crime rate differences are only mentioned to refute a potential difficulty in drawing comparisons:

The United States actually has a crime rate that is lower than the international norm, yet our incarceration rate is six to 10 times higher than other countries’ around the world. It’s not crime that makes us more punitive in the United States. It’s the way we respond to crime and how we view those people who have been labeled criminals.¹⁷⁸

These claims do capture a general truth: America does have one of the highest absolute and per capita prison populations in the world (although it does not have the highest per capita prison population, contrary to widely stated claims).¹⁷⁹ Table 6 constructed with data from the World Prison Brief shows America’s per capita prison and jail (including pretrial prisoners) population vs. a sample of other countries in recent years. While the inclusion of jailed offenders inflates the number, the basic picture remains the same even if only offenders sentenced to prison are examined.¹⁸⁰

Table 6. Per Capita Incarceration Rates in Different Countries

Country ¹⁸¹	Incarceration Rate/100k residents
El Salvador	1086
Cuba	794
Turkmenistan	576
United States	531
Argentina	254
Poland	201

¹⁷⁷ James Cullen, *The History of Mass Incarceration*, BRENNAN CENTER FOR JUSTICE (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

¹⁷⁸ Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control,”* FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>.

¹⁷⁹ *Highest to Lowest - Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Mar. 16, 2024) (showing that America has the sixth highest incarceration rate).

¹⁸⁰ *Ibid.* (showing that even excluding jailed populations, America does not have the highest per capita incarceration rate, although it remains close to the top).

¹⁸¹ *Ibid.*

United Kingdom	146
Italy	102
Canada	88
Sweden	82
Norway	54

But is America’s higher per capita incarceration rate due to exceptional and unjustly punitive laws or are there other factors at play?

2. *Important Factors: Crime, Criminal Justice Effectiveness, Institutionalization, and Criminal Histories*

While American sentencing policies do substantially contribute to America’s higher per capita incarceration rate compared to many foreign countries, other factors should also be remembered when making international comparisons.

Crime Rate

The most obvious complicating factor is differing crime rates. Countries with lower per capita crime rates *should* have lower per capita incarceration rates, all else equal (of course, all else is not equal in the real world). For example, America has a homicide rate 6.2 times that of the European Union, a fact which may contribute to America’s higher rate of prisoners serving LWOP and other extra-long sentences.¹⁸² But contrary to the assumptions of some mass incarceration critics, crime rates actually do not provide an explanation of America’s higher per capita incarceration rate compared to Europe because, with the exception of homicide, America enjoys lower violent and total crime rates than Europe.¹⁸³ This fact often goes unrecognized in public perceptions of safety (likely because homicide levels are used—incorrectly—as a heuristic for total crime). As one study finds:

In 1970 the aggregate crime rate in the seven European countries we consider was 63% of the corresponding U.S. figure, but by 2007 it was 85% higher than in the United States. This striking reversal

¹⁸² A clear factor is greater availability of guns in America. See Warren Fisk, *Fact Check: Is Gun Violence 23 Times Higher in the U.S. than in the EU?*, WRAL NEWS, (Jan. 10, 2023), <https://www.wral.com/story/fact-check-is-gun-violence-23-times-higher-in-the-u-s-than-the-eu/20665571/> (showing that America’s gun homicide rate is 22 times that of the EU).

¹⁸³ “Europe” refers to a representative basket of countries that contain most of the European population—there are of course plenty of individual European countries that have much lower crime rates than the U.S., and for these countries, their lower crime rates do contribute to their lower per capita incarceration rates.

results from a steady increase in the total crime rate in Europe during the last 40 years, and the decline in the U.S. rate after 1990.¹⁸⁴

Although crime rates do not explain America's larger prison population compared to Europe, America's elevated incarceration levels compared to Europe do help explain why America enjoyed falling crime rates even as Europe suffered rising ones. As the same study finds: "back-of-the-envelope calculations based on our estimates indicates that the different dynamics of the prison populations in Europe and the United States explain 17% of the reversal of misfortunes for total crime, 33% for property crimes, and 11% for violent crimes."¹⁸⁵

In other words, if American incarceration policy mimicked Europe's, America would likely have substantially more crime. Conversely, if Europe had an American incarceration policy, it would likely have significantly less crime. These facts are completely ignored by mass incarceration activists who often try to paint Europe as a paradisaal state of low incarceration and low crime. To be clear, we do not seek to justify America's higher incarceration levels on utilitarian grounds of crime control, but we do feel it is only fair to acknowledge there is some level of tradeoff between crime and incarceration levels.

Criminal Justice System Effectiveness

While crime rates alone do not explain much of America's higher per capita incarceration rate compared to many countries, criminal justice system effectiveness may. The mass incarceration narrative sometimes compares America's incarceration rate with developing countries around the world with significantly higher crime and lower incarceration. But this is enormously deceptive. The fact that it may be easier to get away with crimes in other parts of the world does not mean those countries' low incarceration levels should be praised. For example, Mexico's per capita incarceration rate is less than a third of America's, but that is largely because of the ineffectiveness of the Mexican justice system.¹⁸⁶ 93% of crime goes unreported in Mexico, and the chance of conviction in the case of an arrest is also tiny, leading to a practically non-existent chance of punishment.¹⁸⁷ By contrast, over 40% of violent victimizations and over 30% of property victimizations are reported in the US, and conviction and punishment rates are also

¹⁸⁴ Paolo Buonanno, Francesco Drago, Roberto Galbiati & Giulio Zanella, *Crime in Europe and the United States*, 26 ECON. POLICY, 349, 350 (2011).

¹⁸⁵ *Id.* at 376.

¹⁸⁶ See World Prison Brief, *Mexico*, INSTITUTE FOR CRIMINAL POLICY RESEARCH (last visited Apr. 2, 2024), <https://www.prisonstudies.org/country/mexico>.

¹⁸⁷ Ana Campoy, *Only 1% of crimes are punished in Mexico*, QUARTZ (Feb 5, 2016), <https://qz.com/610369/only-1-of-crimes-are-punished-in-mexico>.

significantly higher than in Mexico.¹⁸⁸ Many developing countries like Mexico have incarceration levels wildly below what they should have given their crime rates. Only a lack of justice system effectiveness prevents such countries from having higher per capita incarceration rates than the U.S. While the U.S. obviously has a more effective justice system than many developing countries, and this explains much of the U.S.’s higher per capita incarceration rate compared to them, the mass incarceration narrative also points to European countries with more developed justice systems.

Unfortunately, precisely comparing the effectiveness of criminal justice systems across the world, even among developed countries, is difficult—and sometimes impossible—due to differences in what data is collected and published. Any researcher would desire all countries to publish victimization surveys, total reported crimes, arrests, convictions, and imprisonments (ideally with subcategories by offense), but governments around the world (including in the U.S.) routinely hide or refuse to collect such statistics. But the data that does exist suggests that the U.S. may have a more effective justice system than at least some European countries. Table 7 shows data from a BJS report comparing criminal justice systems in the 1990s. Interestingly, the US seemed to have a more effective justice system than England for most crimes, and a more effective system than the Netherlands and Sweden for at least some crimes. While the data is old, the trend in the U.S. since the 1990s has been lower crime and higher justice system effectiveness, while the trend in many European countries has been higher crime, making it even more likely America’s justice system is significantly more effective than at least some European countries today.¹⁸⁹ But without better data and further research, it is hard to quantify how much this factor affects relative incarceration levels.

Table 7. Convictions per Thousand Recorded Offenders

Convictions per 1000 Recorded Offenders ¹⁹⁰	U.S. (1996)	England and Wales (1995)	Netherlands (1995)	Sweden (1995)
Homicide	554	555.22	455	673.7
Rape	155	99.7	190	86.1
Assault	34	14.44	46.6	22.7
Robbery	24	6.12	19.32	65.2
Vehicle Theft	13	11.66	112	7.6
Burglary	16	5.78	11.4	7.2

¹⁸⁸ John Gramlich, *Most violent and property crimes in the U.S. go unsolved*, PEW RESEARCH CENTER (Mar. 1, 2017), <https://www.pewresearch.org/short-reads/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved>.

¹⁸⁹ See *supra* II.B.4 (for trends in American justice system effectiveness); see also *supra* note 184 (for the European crime trend).

¹⁹⁰ Laurence Greenfeld, *Cross-National Studies in Crime and Justice*, at 31-34, 75-83, 191-195 (2004), <https://bjs.ojp.gov/content/pub/pdf/cnsdj.pdf>.

Civil Commitment of the Mentally Ill; Criminal Histories

Another overlooked factor that may contribute to prison population differences is differing rates of institutionalization among the mentally ill and differences in whether mentally ill offenders are sent to prisons or non-prison mental institutions. It is possible some foreign countries hide portions of their incarcerated population in non-prison mental institutions.¹⁹¹ We make no claims that they do, but merely note this is yet another factor that must be explored when drawing comparisons between countries.

One potentially important factor completely ignored in international incarceration comparisons is differing average criminal histories between countries. If one country's offenders have more serious criminal histories when sentenced than another's, one would expect the country with the more serious offender histories to have a higher per capita incarceration rate, all else held equal. While data is hard to find, the higher rate of recidivism in the U.S. compared to some foreign countries suggests that the average U.S. offender may have a more severe criminal history, at least compared to those countries with lower recidivism.¹⁹²

All these factors are important to consider, but they do not prevent all useful comparisons of incarceration policies. Nor do they invalidate the claim that many countries have lower per capita incarceration rates than the U.S. due to different sentencing policies.

3. *How Exceptional Are American Sentencing Policies?*

How exceptional are American sentencing policies compared to other countries? This question has two components: First, how does the chance of a convicted offender receiving a prison sentence compare? And second, for those sentenced to prison, how does the time served in prison compare? Existing data is unideal for answering these questions, but at least some conclusions can be drawn. As a general statement, the claim that America gives out a higher percentage of prison sentences and that those prison sentences are longer in time served does appear to be true when compared to most other Western countries. There are important exceptions for certain crimes and certain countries, but while it is unnuanced, the generalization is not false. However, the mass incarceration narrative often exaggerates the difference with

¹⁹¹ There is some evidence that hints at this. *See Id.* at 168 (Greenfield felt it necessary to include prisoners sent to mental institutions in some European countries when calculating incarcerated offenders). However, the effect of this factor is likely quite small.

¹⁹² While measures of recidivism can differ, making data comparison difficult, data suggests the US has a higher rate of recidivism than many other Western countries. *See* Denis Yukhnenko, Leen Farouki & Seena Fazel, *Criminal recidivism rates globally: A 6-year systematic review update*, 88 J. CRIM. JUST., at 3, 8 (2023) (Table 1 and Appendix C).

other countries (and ignores the possible contributions of the many non-sentencing factors discussed in section II.B.). It also fails to ask whether it might be foreign countries that have problematic punishment practices.

Chance of Convicted Offenders Receiving a Prison Sentence

Table 8 shows data on the percentage of convicted offenders receiving a custodial sentence (including jail sentences) in America, England and Wales, Australia, the Netherlands, and Sweden in 1995/96. More recent data is not readily available, but since America’s percentage of convicted offenders receiving incarceration has stayed largely the same since the 1990s, and since there have been no massive changes to European incarceration policies (to our knowledge), the comparison is likely still approximately accurate today.

Table 8. Percentage Receiving Custodial Sentences in Different Countries

% of convicted receiving custodial sentence¹⁹³	U.S. (1996)	England and Wales (1995)	Australia (1995)	Netherlands (1995)	Sweden (1995)
Homicide	94.5	94.3	96.0	92.0	96.75
Rape	75.6	94.5	41.0 ¹⁹⁴	63.0	91.67
Assault	59.3	27.0	6.0 ¹⁹⁵	11.12	29.56
Robbery	75.0	66.8	53.0	70.0	61.17
Vehicle Theft	54.7	29.6	17.0	44.0	24.39
Burglary	54.9	49.9	19.0	66.0	47.54

When it comes to the percentage of convicted offenders incarcerated for a specific crime, America is unexceptional for certain crimes but an outlier for others. When it comes to homicide and rape, and to a lesser extent burglary and robbery, America is within the normal variation among the countries surveyed, a fact seemingly inconsistent with America running an out-of-control “carceral state.” But America does incarcerate a higher percentage of convicted assault offenders (59.3%) compared to Sweden (29.5%), the next highest country in the comparison. It also incarcerates a higher

¹⁹³ David P. Farrington, Patrick A Langan & Michael Tonry, *Cross-National Studies in Crime and Justice*, U.S. DEP’T OF JUST. (Sep. 2004), <https://bjs.ojp.gov/content/pub/pdf/cnscj.pdf>.

¹⁹⁴ This number includes only adult offenders, whereas other countries do not make this distinction.

¹⁹⁵ This includes only crimes categorized as “serious assault,” which despite its name, does not include many assaults causing grievous injury. As a result, it may not be comparable to other forms of assault in the table.

percentage of convicted vehicle theft offenders (54.7%) compared to the Netherlands (44%), the next highest country in the comparison.

Time Served in America vs. Other Democracies

The mass incarceration narrative often compares average *sentences imposed* in America with other countries to prove how much more punitive America is in sentencing. However, it is *time served* data that is meaningful. Comparing sentences imposed, which are rarely, if ever, fully served, is pointless. Different countries have dramatically different early release policies that can drastically change the actual punishment meted out to offenders.

While U.S. time served data from 2018 exists, European data is more difficult to come by. For example, a report on mass incarceration published in December 2022, "Long Sentences: An International Perspective," is forced to rely on time served data for comparative purposes from around 2000.¹⁹⁶ Table 9 shows sentences and time served data for different crimes in America and several comparison countries for the years 1995/96 (we use the same years as in Table 8 to provide a consistent snapshot of incarceration policy—slightly later data reveals the same general picture). The data shows that while the U.S. indeed had significantly longer *sentences* than any of the other studied countries, that is not the case with actual *time served*, at least for many comparisons of specific crimes in specific countries. For example, time served for murder in America was comparable to England and Wales, below Australia, and higher than the Netherlands and Sweden. The situation for rape is similar: U.S. time served is comparable to Australia, slightly higher than England and Wales, and noticeably more than the Netherlands and Sweden. (But, as discussed in the next section, many will think this represents inappropriate rape sentences in Europe.) When it comes to other crimes such as assault and burglary, America is comparable to Australia, but does appear to have longer time served than most countries, although a difference in offenders' criminal histories might be a contributing factor. While these results place America on the upper-end of the time served range, they also reveal the unnuanced nature of the mass incarceration narrative's foreign comparisons.

¹⁹⁶ See Lila Kazemian, *Long Sentences: An International Perspective*, COUNCIL ON CRIMINAL JUSTICE TASK FORCE ON LONG SENTENCES (Dec. 2022), <https://counciloncj.foleon.com/tfls/long-sentences-by-the-numbers/an-international-perspective>.

Table 9. Sentences and Time Served in Different Countries for Specific Offenses

<i>Sentences & time served (in months) by offense & country¹⁹⁷</i>	America (1996)	England and Wales (1995)	Australia (1995)	Netherlands (1995)	Sweden (1995)
<i>Homicide sentence</i>	250.0	229.9	171.5	109.7	93.17
<i>Homicide time served</i>	126.2	99.8	129.4	73.1	46.65
<i>Rape sentence</i>	115.5	77.0	78.2	26.7	30.8
<i>Rape time served</i>	59.2	44.2	57.3	19	15.66
<i>Assault sentence</i>	40.4	13.7	34.5 ¹⁹⁸	6.2	5.24
<i>Assault time served</i>	21.6	6.1	27.0	6.1	3.35
<i>Robbery sentence</i>	76.4	40.3	73.7	17.1	29.78
<i>Robbery time served</i>	37.4	20.5	32.8	14.3	15.31
<i>Vehicle theft sentence</i>	20.7	8.6	27.6	8.5	4.14
<i>Vehicle theft time served</i>	10.1	3.4	8.9	8.1	2.93
<i>Burglary sentence</i>	35.0	14.9	31.0	12.7	11.03
<i>Burglary time served</i>	15.2	7	16.3	11.4	6.58

¹⁹⁷ Farrington, *supra* note 193.

¹⁹⁸ These numbers are for a subcategory of assault labeled "serious assault."

4. Are the Lenient Sentencing Practices of Foreign Countries Desirable?

If the justice system's goal is to deliver justice based upon a nuanced assessment of each offender's conduct and circumstances, one may wonder whether a thoughtful liberal society should find the sentencing practices of many foreign countries desirable or even acceptable. The answer would appear to be no. For example, who in America would consider Sweden's time served punishment for murder of less than 4 years acceptable? Should the average punishment for rape really be 1.5 years spent in prison as in the Netherlands? Should 59% of convicted rapists avoid prison time as is the case in Australia? It is fair to say that the average member of the American public across the political spectrum would be shocked by many if not most of the punishment practices in Table 9, considering them instead to be gross failures of justice.¹⁹⁹

Nor do these lenient punishments seem unjust to only the supposedly "exceptionally punitive" Americans. Despite Europe being held up as a model by the mass incarceration narrative, large public majorities in many European countries are dissatisfied with how lenient sentencing is in their criminal justice systems. For example, a 2023 survey by the House of Commons Justice Committee found that 71% of respondents in England and Wales thought criminal sentencing was too lenient, including 38% who thought it was "much too lenient." By contrast, only 4% thought sentencing was too tough.²⁰⁰ A study published in 2010 measuring Swedish public opinion found that 69% of respondents believed sanctions were "too mild" and only 2% thought they were too severe. A Swedish focus group study came to almost identical conclusions (67% believing punishments to be too mild). 59% of telephone respondents and 66% of focus group participants were in favor of longer prison sentences.²⁰¹ A 2022 poll showed that 65% of French respondents believed criminal punishments were not strict enough, with majorities from the political right and left wanting stricter punishments.²⁰² A Eurobarometer survey in 2015 found that 58% of respondents across the EU "totally agreed" with the statement "criminals should be punished more severely" and another 28% "tended to agree," meaning an overwhelming 86%

¹⁹⁹ See section II.b.6 for a discussion of American punishment levels and the views of ordinary people.

²⁰⁰ *Sentencing Poll—House of Commons Justice Committee—March 27, 2023*, Table 46, Savanta, <https://savanta.com/knowledge-centre/published-polls/sentencing-poll-house-of-commons-justice-committee-27-march-2023>.

²⁰¹ Kristina Jerre, *Public's Sense of Justice in Sweden – a Smorgasbord of Opinions*, 42 (2013) (Ph.D. dissertation, Stockholm University), <http://su.diva-portal.org/smash/get/diva2:643158/FULLTEXT01.pdf>.

²⁰² *Public Opinion on the Severity of Sentences in France in 2022, by Political Preference*, Statista, (Mar. 11, 2024), <https://www.statista.com/statistics/1364050/opinion-severity-justice-penalties-france-political-preference>.

of the European public wanted tougher criminal punishments.²⁰³ As a result, there have been moves to toughen punishments and to build more prisons in some European countries.²⁰⁴

Clearly, European publics believe something is not right in the supposedly paradisaical state of European incarceration policy. The mass incarceration narrative completely ignores the failures of foreign, particularly European, sentencing systems. Sentencing policy in Europe is neither popular nor democratic. It also appears to have done a relatively poor job at dealing with Europe's historical crime problems. It is worth asking: *if Europeans do not want their own sentencing policies, should Americans want them?* However, the mass incarceration narrative is not generally interested in providing a punishment policy that the public finds acceptable, and so Europe, a place where anti-democratic sentencing policies have led to chronic public dissatisfaction, is held up as the goal American sentencing should strive to reach. The facts suggest that *the dispute over incarceration practices is more of a dispute between the elites and the community than a dispute between the U.S. and other democracies.*

Recognizing the serious flaws in foreign punishment practices does not mean there is nothing worth emulating about foreign sentencing or incarceration policies. In fact, the more creative and widespread use of non-incarcerative sanctions in Europe and other parts of the world provides a fruitful starting point for considering how the U.S. might find just punishment alternatives to prison. As the next section shows, we believe America has significant room to reduce its prison population. The crucial point, however, is that the resulting sentences must be just, and recognized by the public as such, instead of being seen as acceptable only to a group of rarified experts and policymakers, many of whom reject the notion of punishment altogether.

III. AIMING REFORM AT REAL INCARCERATION PROBLEMS RATHER THAN MYTHS

Some might be inclined to argue that the previous sections show American incarceration policies are in little need of reform and that proponents of lowering prison populations are utterly wrong. After all, if non-sentencing factors largely explain the rise of America's per capita incarceration rate, is there any need to change sentencing and incarceration policies? We believe this view is mistaken. For all its myths, the mass incarceration narrative is correct that American incarceration policy is long overdue for an overhaul. Correcting the myths of the mass incarceration narrative is a necessary first

²⁰³ STATISTA, *To What Extent do you Agree with the Following Statement: "Criminals should be Punished more Severely"* (Dec. 15, 2015), <https://www.statista.com/statistics/549254/public-opinion-about-punishment-of-criminals-in-the-netherlands>.

²⁰⁴ Jacqueline Beard, *What is the Government doing to Reduce Pressure on Prison Capacity?*, UK PARLIAMENT (Oct. 19, 2023), <https://commonslibrary.parliament.uk/what-is-the-government-doing-to-reduce-pressure-on-prison-capacity>.

step in clarifying what parts of incarceration policy need reform and why, not an excuse for endorsing the status quo.

The central mistake of the mass incarceration narrative is assuming that high prison populations are a result of the American public's exceptionally and unjustifiably punitive sense of justice. If this were true, the natural remedy would be to recommend repressing public intuitions of justice in favor of reducing prison populations no matter the cost or consequences. The only constraint acknowledged by the more reasonable wing of the mass incarceration movement is public safety, which is de facto assumed to be the only legitimate reason why punishment would be enacted. For example, a Brennan Center report finds that nearly 40% of the U.S. prison population could be safely released in the interests of ending mass incarceration. In describing its plan to reduce incarceration and sentence lengths, the report explains: "This approach is grounded in the premise that the first principle of 21st century sentencing should be to protect public safety."²⁰⁵

At first glance, this may sound attractive. But we think it is clearly wrong, for both moral reasons and effective crime-control reasons. The first principle of any society's sentencing policy should be to deliver a just punishment proportional to the offender's blameworthiness. A murderer should not escape any punishment simply because he is extremely unlikely to harm someone again (as the Brennan Center would have it). A shoplifter should not be sentenced to life in prison because the evidence suggests that he is likely to become a serial killer. Sentencing policy should not be the playground of social policy, no matter how noble the goals. We have written at length elsewhere on the importance of the justice system having its first goal being the doing of justice, operationally defined in terms of delivering punishments based upon a community's shared intuitions of justice.²⁰⁶ While a just sentence may serve many goals—deterrence, incapacitation, or rehabilitation—it should be imposed because it is a just sentence and not because of its coercive utilitarian benefits. Any attempt to pursue those coercive utilitarian goals in a way that conflicts with shared community intuitions of justice will undermine the criminal law's moral credibility with the community and thereby undermine its capacity to harness the powerful forces of social and normative influence.²⁰⁷ Thus, even those who are unconcerned about doing justice and focused strictly on public safety should care about avoiding serious conflict with the community's shared intuitions of justice.

²⁰⁵ Lauren-Brooke Eisen, *How Many Americans are Unnecessarily Incarcerated*, BRENNAN CENTER FOR JUSTICE (Dec. 9, 2016), <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>.

²⁰⁶ Robinson, *supra* note 32, ch. 3.

²⁰⁷ PAUL ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* (2013); PAUL ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (2008); Paul Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277, 309 (2022); Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y. UNIV. L. REV. 1940 (2010).

Since America's public does not find most current criminal punishments unjust, this means that "soft on crime" policies of simply reducing punishment levels generally are not productive long-term solutions. But the overriding commitment to doing justice, nothing more, nothing less, opens wide reform possibilities, including a chance to convince the public—regardless of political persuasion—to support meaningful reform. This is because *the public can support the use of just non-incarcerative sentences for many of offenders who would currently receive prison sentences*. We strongly support reducing the use of incarceration where consonant with desert, and we suspect the American public does too. What we oppose—and what the American public will always react against—is an attempt to slash incarceration at the price of foregoing just punishment.

With justice as the priority, there are several promising avenues for reforming incarceration. First, policymakers must ensure criminal codes accurately reflect the community's belief of what is and is not criminally condemnable behavior. Second, policymakers should abolish unnuanced sentencing policies such as mandatory minimums and three strikes (typically passed on utilitarian grounds of coercive crime control) in favor of liability and punishment rules that track people's nuanced judgments of justice. Third, policymakers should explore the wider use of non-incarcerative sanctions that still satisfy public demands for just punishment. Fourth, policymakers should focus on experimenting to make the prison environment genuinely rehabilitative.

A. Decriminalizing or Reducing Penalties as Needed to Track Shifting Community Views

Much, if not most, of the persuasive force behind the mass incarceration narrative comes from public discontent with the "War on Drugs." A 2021 poll found that more than 83% of Americans believe the "War on Drugs" is a failure, and 66% support some legalization of drugs.²⁰⁸ A clear majority of the public supports the legalization of marijuana for medical and recreational purposes.²⁰⁹ And while a majority of the public may not support legalizing all "hard" drugs, a majority does appear to view the private possession of such drugs as constituting no more than a civil offense on par with a traffic ticket as opposed to a felony.²¹⁰ It is fair to say the public views the possession, and perhaps even the sale, of many illicit drugs as far less serious than

²⁰⁸ Aila Slisco, *Two-Thirds of American Voters Support Decriminalizing All Drugs: Poll*, NEWSWEEK (June 10, 2021), <https://www.newsweek.com/two-thirds-american-voters-support-decriminalizing-all-drugs-poll-1599645>.

²⁰⁹ Ted Van Green, *Americans Overwhelmingly say Marijuana should be Legal for Medical or Recreational Use*, PEW RESEARCH (Nov. 22, 2022), <https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/>.

²¹⁰ Emily Ekins, *Poll: 55% of Americans Favor Decriminalizing Drugs*, CATO INSTITUTE (Oct. 2, 2019), <https://www.cato.org/blog/poll-55-americans-favor-decriminalizing-drugs>.

current criminal laws suggest. As a result, opposition to America's drug laws serves as a catalyst for the mass incarceration narrative, which paints America's high prison population as resulting from a mass of drug possessors behind bars. As previously discussed, this myth of prison composition is false, as drug offenders make up only 15% of the prison population, and most of these offenders are traffickers and commonly repeat offenders. If America truly wants to eliminate its prison population of drug offenders, it will have to change the way dealers are punished, a question on which there has been much less public opinion research.

This is not an article on drug policy, but justice and common sense require lawmakers to revise criminalization that conflicts with prevailing societal views of what is sufficiently condemnable conduct to justify criminalization. Public concerns should not be addressed with haphazard attempts at prosecutorial decriminalization aimed at reducing prison populations. The worst of all worlds is a law that says one thing (mandating strict punishments for drug offenses) and a legal system that says another (prosecutors refusing to prosecute drug crimes).²¹¹ Such a disconnect erodes the moral credibility of the law even faster and fuels the crime economy by encouraging a black-market trade whose profits end up in the hands of gangsters often involved in broader crime. Laws and punishments against drugs should be based on societal views of what is just, not concerns about prison populations. More broadly, lawmakers should conduct regular reviews of the entire criminal code to make sure it aligns with public views and does not lead to what most in society would see as unjust incarceration.

B. Abolishing Unnuanced Punishment Policies in Favor of Rules That Capture People's Nuanced Judgments of Justice

In addition to revising criminalization to match public views, policymakers must also make sure statutory punishments reflect nuanced public views of desert. The mass incarceration narrative draws force from anecdotes of horribly unjust punishments meted out by mandatory minimum sentencing laws in three-strike statutes that ignore factors that can be highly relevant to an offender's blameworthiness. As we have argued elsewhere, we support efforts to repeal such clumsy punishment provisions in favor of nuanced and binding sentencing guidelines, preferably guidelines that preserve judicial sentencing discretion in unusual cases (subject to appellate review).²¹² Such reforms fortunately have already made some progress. Between 2000 and 2014, at least 29 states and the federal government have moved to modify or

²¹¹ Paul H. Robinson & Sarah M. Robinson, *AMERICAN CRIMINAL LAW: IT'S PEOPLE, PRINCIPLES, AND EVOLUTION* 302 (2023) (discussing the problem of having a criminal offense that is rarely if ever enforced).

²¹² Robinson, *supra* note 32, ch. 11.

eliminate some of their mandatory minimum sentencing laws.²¹³ For example, California changed its three strikes laws so as to avoid application to non-violent, non-serious offenses.²¹⁴ We support reforms that continue this trend. However, reformers should recognize the need to update statutory punishments and guidelines in both directions of punishment. Overly lenient punishments can also be unjust, and ignoring their presence in the justice system invites a punitive backlash. Many of the mandatory minimums passed in the 1990s might never have been proposed if previous policymakers had made sure punishments reflected shared community intuitions of justice.

C. Employing More Non-Incarcerative Punishments Consonant with Desert

The reform that could perhaps do the most to reduce America's prison population is to replace prison sentences (or portions of prison sentences) with non-incarcerative punishments that would still do justice as the community sees it. Using more non-incarcerative sentences should be attractive to policymakers across the political spectrum, and supporters of the mass incarceration narrative should fully endorse attempting to turn many prison sentences into non-prison alternatives. What differentiates our proposal from those of some existing anti-prison reformers is that we call for research and tailoring of non-incarcerative sentences to public views of what amounts to a just punishment, not simply abolishing the punishment as many mass incarceration reformers would urge.

A creative approach to non-incarcerative sanctions can produce a wide range that can legitimately be said to provide sufficient punitive severity to substitute for incarceration. Some non-incarcerative sanctions include home-confinement, Intensive Supervision Programs (ISPs), weekends in local jail, community service, restrictions on travel, and day fines. Each non-incarcerative sanction may have a slightly different punitive effect, but it is easy enough for social scientists to reliably assess the different amount of "punishment credit" that an offender should receive for each kind of non-incarcerative sanction. In other words, one can satisfy the requirements of just punishment without prison. Studies of lay people show that there is an intuitive agreement that the right combination of non-incarcerative sanctions can equal the punitive "bite" of many prison sentences.²¹⁵ For example, one study found that respondents perceived a (2023 inflation adjusted) \$50,000 fine as being more punitive than a one-year prison sentence (for certain offenders). Meanwhile, weekends in jail, ISPs, or home confinement for two years were

²¹³ Ram Subramanian & Ruth Delaney, *PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY MINIMUM SENTENCES* 8 (2014).

²¹⁴ *In-Prison Credit-Earning Opportunities*, CAL. DEP'T CORR. REHAB., <https://www.cdcr.ca.gov/proposition57/> (last visited Mar. 20, 2024).

²¹⁵ Robinson, *supra* note 207, at 165.

seen as more punitive than six months in prison.²¹⁶ These findings show it is possible to construct scalable non-incarcerative punishments that would still be seen by the community as doing justice. Implementing such reforms would allow devoting greater resources to prosecuting and punishing more serious crimes, such as murder or rape, while allowing many offenders a better chance at societal reintegration than prison would provide.

Consider a sample range of possible non-incarcerative sanctions, many of which are already used (including use in other countries):

1. Verbal sanctions, such as public admonitions, reprimands, warnings or unconditional discharges accompanied by a formal or informal verbal sanction.

2. Conditional discharges that set out a series of restrictions on the offender post release, enforced by the threat of reincarceration upon a violation.

3. Status penalties that deny the offender specified rights in the community. Such a penalty might, for example, prevent someone convicted of fraud from holding a position of trust as a lawyer or director of a company.

4. Fines are among the most common and effective alternatives to keeping offenders out of prison.

5. Asset forfeiture in cases where the court has evidence showing that money found in the possession of the offender is the product of the crime.

6. Restitution to the victim.

7. Community service, which can involve a wide range of required activities.

8. Government work requirements, which would require offenders to engage in certain work for the government for a certain period of time, such as work on state park maintenance crews or the like, but without incarceration.

9. Participation in a treatment or training program.

10. Referral to an attendance center, a facility where the offender spends the day, returning home in the evenings. Attendance centers, also known as day-reporting centers, may provide a centralized location for a host of therapeutic interventions, training programs, or drug treatment.

11. House arrest.

12. Location monitoring through GPS tracking, sometimes combined with travel restrictions, such as allowing an offender to be only at a list of locations or traveling between them.

13. Location monitoring (without location restriction) and contact availability requirements, which means the offender's location would be tracked and recorded at all times and the offender would be obliged to answer his government-issued phone at any time.

One can also imagine a variety of other possibilities. For many of these and other options, one could imagine offering offenders one or many of these as an alternative to incarceration that they could accept or reject. (And those

²¹⁶ Ibid.

selection decisions might help over time to produce more accurate equivalency measures among the punishment method alternatives.) Given the possibility of altering the length and intrusiveness of monitoring conditions and sanctions, such a rich selection of possibilities makes it possible to construct a non-incarcerative sentence that matches the punitive bite of many incarcerative sentences.

One limitation of non-incarcerative sanctions is their ability to preserve public safety, an essential factor to consider when choosing a punishment method. This limitation can be overcome by imposing non-incarcerative sanctions in the context of an “electronic prison” sentence where a combination of location monitoring, audio/visual surveillance (via body camera), device monitoring software, and physiological monitoring (e.g., wearable drug patches) would allow authorities to carefully monitor and restrict an offender’s behavior at all times, providing security similar to a physical prison but without the same damaging costs of incarceration.²¹⁷ Location monitoring has already been shown to reduce recidivism, and stricter monitoring conditions, such as body cameras, would likely yield even greater results as recidivism goes down as the chance of detection goes up.²¹⁸ Electronic monitoring, and the restrictions on freedom enforced by such monitoring, can also be adjusted to match the offender and crime, helping to create a just and safe sentence. Where probation-type monitoring may be enough for some offenders, house arrest, GPS tracking, and phone or video surveillance via body camera might be required for other higher-risk felons.²¹⁹

Additionally, public concerns over safety can be addressed by introducing this non-incarcerative sentencing scheme slowly over increasingly broad categories of more serious offenders and monitoring the recidivism rate to determine which offenders should be given which non-prison alternatives to guarantee an acceptably low recidivism rate. While such a scheme would likely take decades to fully implement (and fine-tune based on recidivism data), the possible reduction in the prison population is significant—perhaps 50% or more. Importantly, reducing incarceration through using non-incarcerative sanctions should not be rushed by ignoring public concerns over justice and safety.

Some countries, such as Japan, are well ahead of the U.S. in their reliance on non-incarcerative sanctions. Japan has an incarceration rate 17 times smaller than the U.S. (though much of this is due to Japan’s lower crime rates

²¹⁷ Paul Robinson & Jeffrey Seaman, *Electronic Prison: A Just Path to Decarceration*, (forthcoming 2025).

²¹⁸ Barry Latzer, *It’s Possible to Reduce Imprisonment and Crime Rates*, WALL ST. J., (Oct. 27, 2022, 6:15 PM), <https://www.wsj.com/articles/its-possible-to-reduce-incarceration-and-crime-gps-ecarceration-parolee-probationer-prison-ankle-bracelet-privacy-offender-recidivism>.

²¹⁹ Modern surveillance technology allows for greater control of non-imprisoned offenders today than at any time in the past while still granting such offenders more liberty than they would have in prison. Of course, some offenders would simply never be given non-incarcerative punishments—where the exact line should be drawn requires public research and experimentation.

and other factors).²²⁰ Japan codified its use of non-incarcerative sanctions in what is now called the Tokyo Rules.²²¹ The rules state that "The selection of non-custodial measures shall be based on an assessment of established criteria in respect of both the nature and gravity of the offense and the personality, the background of the offender, the purposes of sentencing and the rights of victims."²²² Such guidelines are meant to restrict the use of non-incarcerative punishments to those cases in which the public finds such sanctions appropriate and satisfactory to justice.

We believe much more can be done in the U.S. to create non-incarcerative sentences that are sufficiently punitive to justly substitute for many prison sentences. In fact, we have written at length elsewhere on the possibility of pursuing decarceration justly through an electronic prison scheme.²²³ Of course, to the extent mass incarceration activists are not really interested in reducing incarceration, but rather eliminating punishment, none of these reforms will be of interest. Thus, a person's willingness to pursue higher levels of non-incarcerative punishment is a useful test of their true goals in opposing incarceration.

D. Reforming Prison to Make It Less Destructive to Prisoners

The mass incarceration narrative often rightly points out that prisons are poor environments for rehabilitating offenders. "Correction" rarely happens at correctional facilities. Unfortunately, prisons can serve as criminal bootcamps where violence is normalized and offenders learn the tricks of the criminal trade. A study examining released state prisoners from 2005 to 2014 found that "An estimated 68% of released prisoners were arrested within 3 years, 79% within 6 years, and 83% within 9 years."²²⁴ Recidivism statistics are dismal and should be a spur to reform.

One downside to the mass incarceration narrative is that it has shifted policymakers' attention to reducing the use of prison instead of reforming the prison environment to encourage rehabilitation. For example, mass incarceration activists have repeatedly attempted to block the construction of new

²²⁰ David McNeill, *Life in Japan: The softer corners and harder edges of the Japanese justice system*, The Mainichi (Apr. 3, 2022), <https://mainichi.jp/english/articles/20220402/p2a/00m/0op/017000c>; See generally Mari Kita, *Proxy Punishment: Consequences of Informal Sanctions among Families of Offenders In Japan*, 6 Qualitative Criminology (2018) (illustrating reasons underlying Japan's incarceration rate).

²²¹ See generally U.S. DEP'T OF JUST., NATIONAL INSTITUTE OF JUSTICE, COMMENTARY ON THE UNITED NATIONS STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES (THE TOKYO RULES) (1993).

²²² UNITED NATIONS OFFICE ON DRUGS AND CRIMES, HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT 41 (2007).

²²³ Paul Robinson & Jeffrey Seaman, *Electronic Prison: A Just Path to Decarceration* (forthcoming 2025).

²²⁴ Mariel Alper, Matthew R. Durose & Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-year Follow-up Period I*, BUREAU OF JUSTICE STATISTICS (May 2018).

prisons in an attempt to limit incarceration,²²⁵ when the real result is increased overcrowding and worse prison environments, leading to more recidivism and more incarceration. Improving prison conditions requires more financing, but multiple studies confirm that better prisons lead to less recidivism, making it a potentially sound investment of public funds.²²⁶ In addition to better funding of prisons, governments should experiment with different prison models. Prison bureaus are in a perfect position to run controlled scientific studies on which prison environments, resources, and programs can maximize rehabilitation—yet these studies are almost never done. And they are even less likely to be done when activists focus their energy on simply closing prisons.

Reforming the post-prison environment is also promising, as post-release programs for prisoners are often currently unavailable or ineffective. Making it easier for released prisoners to find and hold jobs can also help as the current system actively shunts released felons back into a life of crime. Instead of attempting to prevent anyone from going to prison in the first place, anti-incarceration activists should spend more time making sure those entering prison do so for the last time.

IV. CONCLUSION

The mass incarceration narrative—the claim that America is suffering from exceptional and unjustified levels of incarceration due to overly punitive punishment policies—is accepted by many academics and policymakers without critique or question. Despite hundreds of researchers publishing on incarceration, practically none have seriously examined the assumptions of the narrative, a disturbing fact showcasing the dangers of ideological conformity in academia. This lack of curiosity is damaging since reformers are ill-served by a narrative that draws so generously upon myths.

Especially troubling is reliance upon the myth that draconian U.S. sentencing changes are responsible for America's 300% per capita incarceration rate rise compared to 1960. In fact, non-sentencing factors explain most of that rise, and where punishments have increased the most, such as for murder and rape, the public is likely to see such changes as moving the system closer to just sentencing. And while foreign countries' lower prison populations can offer some useful reform ideas, they do not provide a copyable template for the American justice system the way that the mass incarceration narrative suggests. Many of the non-sentencing factors that determine current U.S.

²²⁵ Ezra Kleinbaum, *Activists Unite to Protest Against a new Women's Prison*, THE CYPRESS (Apr. 10, 2023), <https://thecypressonline.com/49153/news/activists-unite-to-protest-against-a-new-womens-prison>; Henry K. Lee, *Bay Area Activists File Lawsuit to Stop Construction of Delano Prison*, SFGATE (July 11, 2000), <https://www.sfgate.com/bayarea/article/Bay-Area-Activists-File-Lawsuit-to-Stop-2749372.php>.

²²⁶ Cf. M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach*, 9 AM. AM. L. AND ECONOMICS REV. (2007).

prison populations—such as crime rates, deinstitutionalization of the mentally ill, criminal justice system effectiveness, and criminal histories of sentenced offenders—differ across countries, making meaningful comparisons difficult. Moreover, many of the lenient sentencing practices in some foreign countries have inspired chronic and widespread dissatisfaction abroad and would clearly be seen as unjust in America. Instead of showcasing a draconian America versus a paradisaical Europe, differing punishment policies are often better characterized as the result of elitists wishing to force their punishment preferences upon the larger community on both sides of the Atlantic, with differing levels of success.

All that said, America's incarceration policies do require reform, but that reform must be guided by doing justice instead of jettisoning just punishment in favor of slashing incarceration for its own sake. Setting the record straight on the many myths of "mass incarceration" is the first step toward solving the real problems with America's use of prison.

Article

THE UNDEVELOPED LAW OF MARITIME DRUG INTERDICTIONS

Nicholas J. Gonnerman*

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I. INTRODUCTION

Illicit drug trafficking is an international problem of growing proportions. Unphased even by the coronavirus pandemic's disruption of global supply chains, manufacture of cocaine reached an all-time high in 2020,¹ surpassing another record-breaking year in 2018.² Much of this cocaine—and massive quantities of other substances like heroin and its synthetic counterparts—are bound for markets in the United States.³ Upon reaching the U.S., these drugs wreak devastation. Substance abuse costs an estimated \$193 billion annually.⁴ And the corresponding social harms to communities, families, and individual lives are inestimable.

Traffickers are creative and resilient. They employ varied shipping methods and develop new trading patterns to evade U.S. border security. Many of these shipping routes are by sea. In 2021, cocaine trafficked via ocean routes accounted for 90 percent of cocaine seized globally.⁵ Cocaine traffickers have developed networks of “motherships” to carry cocaine from Colombia to distribution points in the Pacific Ocean, where smaller “go-fast” vessels ferry the illegal cargo to shore. Other smugglers dash their go-fasts directly into the U.S. from nearby coastlines in Latin America or the Caribbean. Traffickers in recent years have also deployed homemade submarines and semi-submersibles to evade detection.

Interdicting these vessels is an important component of modern drug enforcement policy. Each year, the United States Coast Guard removes more cocaine via maritime interdiction than all other domestic and border enforcement efforts combined.⁶ The advantages of heading off drugs en route are manifold. Not only do at-sea interdictions enable the government to “seize drugs in bulk before they are broken into smaller packages inside the United States,” but maritime seizures also “use drug law enforcement assets much more efficiently than trying to pursue smaller, less pure drugs closer to the end user.”⁷

¹ U.N. OFF. ON DRUGS AND CRIME, WORLD DRUG REP. 2022 BOOKLET 1, at 34, U.N. No. E.22.XI.8 (2022).

² U.N. OFF. ON DRUGS AND CRIME, WORLD DRUG REP. 2020 BOOKLET 3, at 21, U.N. No. E.20.XI.6 (2020).

³ U.N. OFF. ON DRUGS AND CRIME, WORLD DRUG REP. 2020 BOOKLET 1, at 8-9, U.N. No. E.20.XI.6 (2020).

⁴ *Addiction and Substance Misuse Reports and Publications*, U.S. DEP'T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/index.html> (last visited Apr. 28, 2023).

⁵ WORLD DRUG REP. 2022, *supra* note 1, at 34.

⁶ U.S. COAST GUARD, FISCAL YEAR 2019 PERFORMANCE REP., at 34 (2019).

⁷ *Western Hemisphere Drug Interdictions: Why Maintaining Coast Guard Operations Matter: Hearing Before the H. Subcomm. on Coast Guard and Mar. Transp. of the H. Comm. on Transp. and Infrastructure*, 116th Cong., at v (2019).

Interdiction agencies like the United States Coast Guard (USCG) rely on the Maritime Drug Law Enforcement Act (MDLEA)⁸ to perform their work. The MDLEA grants broad jurisdiction to the government, making it illegal to possess controlled substances on certain “covered” vessels anywhere on the high seas.⁹ A covered vessel includes vessels registered to the United States, registered to a consenting foreign power, traveling within the American contiguous zone, and vessels “without nationality” (i.e., the ship’s master fails to name a nation of registry upon request or the master asserts registry to a nation that fails to confirm registry).¹⁰ Notably, MDLEA jurisdiction applies “even though the act is committed outside the territorial jurisdiction of the United States.”¹¹ The MDLEA essentially allows the United States to conduct drug interdictions anywhere on global waters, in some cases even in the territorial seas of other nations.

The jurisdictional scope of the MDLEA has generated an enormous amount of litigation. However, I am concerned here with an aspect of interdictions about which the MDLEA (and the law generally) is strangely silent or laissez-faire. Since 2017, reports have emerged of interdictees¹² enduring horrendous conditions while captive aboard U.S. ships. These reports doubtless concern a minority of the approximately 600 people interdicted each year by the Coast Guard for drug smuggling.¹³ But the stories expose a frightening legal reality of interdiction work—even though interdictees are kept aboard-ship for weeks or even months at a time, the legal community appears reluctant to apply procedural protections or even to critically examine the legal justifications for these prolonged detentions.

Many judges are concerned by stories of inhumane confinement. As a concurring judge on the U.S. Court of Appeals for the Eleventh Circuit (forced to find no plain error in upholding an interdiction) lamented about a seven-week confinement aboard ship:

But seven weeks! That’s a long time. Christopher Columbus’s first voyage across the entire Atlantic Ocean, from the Canary Islands to the Bahamas, took only roughly five weeks. . . . Jules Verne contemplated a voyage around the whole world (by sea and rail) [that] would take only 80 days. In fact, Nellie Bly beat his estimate in 1890 by

⁸ 46 U.S.C. §§ 70501–70508.

⁹ 46 U.S.C. § 70503(a)(1).

¹⁰ *See* 46 U.S.C. § 70502(c)(1)(A)–(F) (listing the different types of vessels falling under the definition of “[v]essel subject to the jurisdiction of the United States”); 46 U.S.C. § 70502(d)(1)(A)–(C) (listing the different types of vessels falling under the definition of “[v]essel without nationality”).

¹¹ 46 U.S.C. § 70503(b).

¹² I use the term “interdictee” rather than “detainee” because, as I will show in Part III, it is unclear whether the Coast Guard is merely detaining or actually arresting those held on U.S. ships. Given the ambiguity, for my purposes “interdictee” or “interdicted person” are the most accurate terms.

¹³ *See, e.g.*, U.S. COAST GUARD, 2021 BUDGET OVERVIEW 15 (2021) (noting 611 persons detained for prosecution that year); U.S. COAST GUARD, 2020 BUDGET OVERVIEW 23 (2020) (noting 602 persons detained for prosecution in 2018).

completing the journey in 72 days, six hours, eleven minutes, and fourteen seconds. *It's hard to believe that the Coast Guard, nearly 126 years later, needed 70% of Bly's travel period to go only between Central and North America.*¹⁴

Although courts are troubled by accounts of poor treatment, existing law often presents a prohibitively “steep burden” for defendants bringing post-arrest litigation.¹⁵ Even though the MDLEA has generated an immense amount of recent litigation, almost all of it focuses on the question of whether the Constitution empowers Congress to pass such a law in the first place.¹⁶ Likewise, even the most recent cycle of MDLEA litigation concerns constitutional vagueness issues rather than procedural touchpoints.¹⁷ Courts have generally declined to buttress the MDLEA with the kinds of procedural safeguards common to most other aspects of American criminal law.

Courts are reluctant not because defendants' claims lack factual merit, but for two other reasons. First, legal doctrine in this area is especially undeveloped and limited. For example, Fourth Amendment rights do not apply to

¹⁴ United States v. Cabezas-Montano, 949 F.3d 567, 613-14 (11th Cir. 2020) (Rosenbaum, J., concurring) (emphasis added) (footnotes omitted) (citation omitted).

¹⁵ Laura Pitter, *National Security and Court Deference: Ramifications and Worrying Trends*, in REIMAGINING THE NAT'L SEC. STATE 89, 99 (Karen J. Greenberg, ed., 2020) (quoting United States v. Mero, No. 4:17-CR-00067, 2017 U.S. Dist. LEXIS 180567, at *10-11 (E.D. Tex. Sep. 27, 2017)).

¹⁶ See, e.g., United States v. Davila-Reyes, 84 F.4th 400, 415-16 (1st Cir. 2023) (outlining the defendants' argument that Congress exceeded its constitutional authority when enacting § 70502(d)(1)(C) of the MDLEA because “the Felonies Clause does not give Congress the power to criminalize drug trafficking by persons on a vessel on the high seas” unless the United States could regulate under international law); United States v. Antonius, 73 F.4th 82, 86 (2d Cir. 2023) (noting that the defendants argue “Congress exceeded its authority under Article I of the Constitution in enacting the MDLEA”); United States v. Payba Lacayo, 2023 WL 6116142, at *2 (M.D. Fla. Sept. 19, 2023) (“[Defendant] argues that § 70502(d)(1)(C) is facially unconstitutional because it exceeds Congress's Felonies Clause authority.”); United States v. Tenorio, 2023 WL 8877890, at *2 (M.D. Fla. Dec. 22, 2023) (noting that the defendant “challenges the constitutionality of MDLEA,” but stating that its “constitutionality is well established by precedent”); United States v. Puello-Morla, 2023 WL 7185323, at *4 (D.P.R. Nov. 1, 2023) (outlining the defendants' “constitutional arguments” against MDLEA); United States v. Martinez-Felipe, 2023 WL 5290124 (D.P.R. Aug. 17, 2023); United States v. Chalwell, 2023 WL 6346107, at *2 (D.P.R. Sept. 29, 2023) (“[Defendant argues] . . . because the alleged offence took place within British territorial waters . . . the allegations in the indictment fall outside of Congress's enumerated powers. . . .”); United States v. Lopez, 2023 WL 5089362, at *2 (S.D. Fla. Aug. 9, 2023) (Defendants argue, however, that the MDLEA is unconstitutional as applied to [them] because they were not interdicted, and the crimes with which they are charged did not occur, on the high seas. . . .”); United States v. Barbosa-Rodriguez, 2023 WL 4230143, at *6 (D.P.R. June 28, 2023) (“Because there is no strong evidence that the Felonies clause is to be read as strictly as the defendants propose, the presumption that Congress has acted constitutionally is not overcome.”); United States v. Mariani-Romero, 2023 WL 4162902, at *2 (D.P.R. June 22, 2023) (Because Article I cannot substantiate a criminal prosecution for acts committed within a foreign state's EEZ, [defendants] argue, the MDLEA is unconstitutional as applied to them.”).

¹⁷ See, e.g., United States v. Morales, 2023 WL 6160085, at *5-6 (D.V.I. Sept. 21, 2023) (finding that the MDLEA is not unconstitutionally vague in defining a vessel “outfitted for smuggling”); United States v. Sanchez-Matos, 2023 WL 5088929, at *6 (D.P.R. Aug. 9, 2023) (finding that the MDLEA provision governing procedure for verifying a claim of registry by a vessel's master was not unconstitutionally vague); United States v. Hernandez-Gamboa, 2023 WL 5199393, at *6 (D.P.R. Aug. 14, 2023) (same).

non-citizens outside of the United States.¹⁸ Therefore, those safeguards that are applicable must most likely come from the Federal Rules or the intrinsic power of courts. Second, civilian courts seem more comfortable on land than at sea—often proclaiming institutional incompetence to justify reluctance to intervene in maritime operations.

This paper examines a few of these underdeveloped legal areas and proposes minor but practically important tweaks to strengthen interdiction procedural law. Part II explores the central difficulty of interdiction work: overcoming immense logistical obstacles while preserving the rights of interdictees. Part III delves into the history of the MDLEA and of maritime interdiction operations, which inform some of the legal problems behind interdictions today. Part IV investigates the underdeveloped legal justifications for holding interdicted persons in the first place. Parts V and VI examine two legal doctrines that, theoretically at least, should have application to maritime interdictions: the federal presentment rule and the doctrine of outrageous government conduct. I will also propose changes to these doctrines; changes that will encourage the legal flexibility at-sea detentions require while revitalizing these laws from their current dead-letter status. My analysis focuses mostly on litigation in the 5th, 9th, and 11th U.S. Courts of Appeals, since those jurisdictions are where MDLEA prosecutions take place most frequently.¹⁹

II. THE INTERDICTION TEETER-TOTTER: BALANCING EFFICACY AND RIGHTS

Coast Guard interdictions have resulted in many successes. In November 2023, the Coast Guard intercepted six vessels, including homemade submersibles, laden with a total of 18,219 pounds of cocaine worth more than \$239 million.²⁰ Other at-sea busts are even larger. Just one Coast Guard cutter alone can prevent hundreds of millions of dollars in drugs from reaching the United States.

For example, in 2018 the USC *Legare* returned after a 67-day deployment in the Pacific with 24,886 pounds of cocaine and 2,664 pounds of marijuana, a bounty valued at \$390 million.²¹ Then, in 2022, *Legare* bagged about the same amount of cocaine and 1,000 pounds more of marijuana,

¹⁸ United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990) (“Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”).

¹⁹ TRACREPORTS, *Prosecutions for 2022: Lead Charge 46 U.S.C. 70503*, at 2 (generated Feb. 1, 2023).

²⁰ Thao Nguyen, *Over \$239M Worth of Cocaine, Including from Narco-submarine, Seized in November, Coast Guard says*, USA TODAY (Dec. 7, 2023), <https://www.usatoday.com/story/news/nation/2023/12/07/united-states-coast-guard-cocaine-submarine-seizure/71844609007/>.

²¹ Press Release, U.S. Coast Guard 5th District Mid-Atlantic Public Affairs, Coast Guard Cutter *Legare* Returns After \$400 Million Drug Bust (Apr. 30, 2018), https://www.militarynews.com/news/active-duty/coast-guard-cutter-legare-returns-after-400-million-drug-bust/article_7f170361-9c79-56a9-b594-59fb721a98fe.html.

which combined totaled \$475 million.²² Seizures of this size are not atypical; the Coast Guard netted nearly 208 metric *tons* of cocaine in 2019 alone.²³



Image 1. The crew of the USC *Legare* display drugs seized during a single 67-day deployment in the Eastern Pacific Ocean. Photo by Petty Officer 3rd Class Brandon Murray.²⁴

Interdiction success stories are especially impressive in light of the immense logistical difficulties faced by Coast Guard crews. Illicit drugs travel through a vast Western Hemisphere “transit zone,” which stretches for more than seven million miles over the Caribbean, the Gulf of Mexico, the eastern Pacific Ocean, and the coastal waters of Central America and Mexico.²⁵ As one USCG admiral despaired to a journalist in 2016: “Imagine a police force trying to cover the entire U.S. with three cars. That’s the tactical problem we’re trying to solve.”²⁶

²² Press Release, Coast Guard Atlantic Area Public Affairs, Coast Guard Offloads More Than \$475 Million in Illegal Narcotics in Miami (Sept. 19, 2022), <https://www.southcom.mil/MEDIA/NEWS-ARTICLES/Article/3163066/coast-guard-offloads-more-than-475-million-in-illegal-narcotics-inmiami/>.

²³ FISCAL YEAR 2019 PERFORMANCE REP., *supra* note 6, at 33.

²⁴ U.S. Coast Guard 5th District Mid-Atlantic Public Affairs, *supra* note 21.

²⁵ See Kendra McSweeney, *Reliable Drug War Data: The Consolidated Counterdrug Database and Cocaine Interdiction in the “Transit Zone,”* 80 INT’L J. OF DRUG POL’Y, June 2020, at 1, (explaining that a joint task force meets to discuss smuggling through “the Western Hemisphere ‘transit zone’—the more than seven million square mile area that encompasses the Caribbean and Gulf of Mexico, Central America, Mexico and the eastern Pacific Ocean”).

²⁶ Hunter Atkins, *Drug War on the High Seas*, MEN’S JOURNAL (Dec. 4, 2017), <https://www.mensjournal.com/adventure/drug-war-on-the-high-seas-behind-the-coast-guards-billion-dollar-busts-w213087>.

This massive patrol territory means that even though ships like *Legare* return to port laden with tons of drugs, their catch barely scratches the surface of the total tonnage of narcotic imports. According to the

Vast patrol areas mean that the *Legare* and her sister ships are put to sea for long periods of time—weeks or even months. These vessels run multiple interdictions on a single voyage, collecting contraband and smugglers at each one. New interdictions mean new interdictees, who must be watched, housed, and fed by Coast Guard personnel. By trip’s end, some Coast Guard ships will have apprehended as many as 35 people or more.²⁷ Coast Guard vessels do not have space below deck for these additional bodies. Each interdictee is housed on deck (usually in a hanger or makeshift structure), where they are provided basic amenities and food.

Held for weeks at a time, some interdictees report abysmal living conditions aboard U.S. ships, leading one former Coast Guard lawyer to describe these vessels as “floating Guantanamos.”²⁸ The story of Jamaican fisherman Robert Weir illustrates these conditions. After a storm blew Weir and his crew off course in September 2017, his vessel was intercepted and searched by the Coast Guard. Weir told Coast Guard officers that his crew was heading to Jamaican waters to fish, when in fact the storm had spun them towards Haitian waters. Although a search of the boat turned up no drugs, the Coast Guard detained Weir and his crew, destroyed their boat, and held them aboard ship for a month without charging them with a crime or notifying their families.

The men were chained to the ship deck, where it is alleged that “they were denied access to shelter, basic sanitation, proper food, and medical care. The men’s skin burned and blistered in the sun, and they were drenched and chilled by rain and sea water.”²⁹ Initially, the government charged them with drug trafficking offenses, which it later dropped. Weir eventually pled guilty to lying to a federal officer about his vessel’s destination and earned 10 months in prison. Weir and his crew returned to Jamaica “financially ruined and [their] livelihoods [had been] destroyed.”³⁰

government’s own estimates, the Coast Guard intercepts just ten percent of cocaine shipments from Central and South America. See Joshua Goodman, *New Ruling Threatens Coast Guard’s High Seas Counter-drug Mission*, NAVY TIMES (May 5, 2022). Some in the Coast Guard have even proposed abandoning the drug interdiction effort and diverting resources to other Coast Guard programs like fisheries regulation. See, e.g., Noah Miller, *Rethink Coast Guard Priorities*, 145 PROCEEDINGS 8, 1398 (2019) <https://www.usni.org/magazines/proceedings/2019/august/rethink-coast-guard-priorities>.

²⁷ See Atkins, *supra* note 26 (“[Petty Officer First Class Phil Lago] later recalled a time when two hangars were filled with 35 detainees.”).

²⁸ This phrase comes from a former USCG officer. See Seth Freed Wessler, *The Coast Guard’s ‘Floating Guantanamos’*, NEW YORK TIMES MAGAZINE (Nov. 20, 2017), <https://www.ny-times.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html>.

²⁹ Steven M. Watt, David Cole & Aaron Madrid Aksoz, *The Coast Guard Destroyed Their Livelihoods. Will the Supreme Court Hear Their Case?* American Civil Liberties Union (Mar. 23, 2022), <https://www.aclu.org/news/human-rights/the-coast-guard-destroyed-their-livelihoods-will-the-supreme-court-hear-their-case>.

³⁰ Press Release, American Civil Liberties Union, ACLU Petitions Supreme Court on Behalf of Wrongly Convicted Jamaican Fishermen (Feb. 28, 2022) <https://www.aclu.org/press-releases/aclu-petitions-supreme-court-behalf-wrongly-convicted-jamaican-fishermen>.

III. HISTORICAL DEVELOPMENT OF MODERN MARITIME DRUG INTERDICTION LAW

Many of the logistical problems with modern maritime interdictions—as well as with the MDLEA and the legal theory upon which it rests—trace their roots to the 1980s, a time of international crisis. The story of the MDLEA’s enactment and of the maritime operations it authorizes is a story of two historical themes: meeting the exigency of a world in crisis, and preoccupation with issues like jurisdiction and powers rather than procedural or rights-based safeguards for detained persons.

The 1970s and 80s were decades of international drug trafficking on a monumental scale, one that surpasses even today’s staggering statistics. As the United Nations reported, a “review of the threshold of the 1980’s shows that the situation has never been more serious and complex.”³³ Contemporary studies by the UN indicated that illicit drug production and trafficking “engenders serious consequences for the countries concerned by undermining their financial, economic, social, and political stability.”³⁴ In the United States, proceeds from illegal drug sales exceeded \$800 billion per year, with much of the drugs and money flowing through Miami. In fact, Miami’s Federal Reserve Bank housed so much drug money that it possessed “a currency surplus of \$5 billion . . . more than the combined holdings of the nation’s twelve federal reserve banks.”³⁵

The government reacted with a national call to arms, vowing to “vigorously . . . interdict and eradicate illegal drugs, wherever cultivated, processed and transported.”³⁶ Much of these efforts focused on Miami and Florida, where the federal government gathered a “veritable army” of law enforcement agents and prosecutors.³⁷ To this day, Florida remains a government stronghold of interdiction operations, a fact that may explain why some interdictees endure long transit times as they travel from the Pacific Ocean to Florida courtrooms (*see* Part V, *infra*).

Despite the massive influx of money and personnel throughout the 1970s and 80s, the legal framework for combating maritime drug trafficking suffered a major structural defect. The main law on the books at the time was the Comprehensive Drug Abuse Prevention and Control Act—Congress’ effort in 1970 to overhaul drug laws into a single statute. But the Comprehensive Act “inadvertently contained a section repealing the criminal provision under which drug smugglers apprehended on the high seas were prosecuted,”

³³ Rep. of the Int’l. Narcotics Control Bd., ¶ 5 U.N. DOC. E/INCB/52 (1980).

³⁴ *Id.* at ¶ 174.

³⁵ Ron Chepesiuk, *HARD TARGET: THE UNITED STATES WAR AGAINST INTERNATIONAL DRUG TRAFFICKING* 29 (1999).

³⁶ *Id.* at 27.

³⁷ *Id.* at 32.

and it did so “without creating a new provision to replace it.”³⁸ Thus, the government could not prosecute smugglers for possession, but only for *importation*, a crime for which evidence was virtually “impossible to obtain.”³⁹

Congress corrected its mistake in 1980 with the Marijuana on the High Seas Act, which established the modern-day interdiction laws later incorporated into the MDLEA. The Marijuana on the High Seas Act illegalized the possession of controlled substances on stateless, domestic, and foreign vessels within the customs waters of the United States. The new law gave no mention to any expectations of confinement conditions, nor did it incorporate any procedural rights for interdicted individuals.

In 1986, during an “explosion of drug legislation,” Congress enacted the MDLEA.⁴⁰ The MDLEA “essentially mirror[ed]” its predecessor, the Marijuana on the High Seas Act, but expanded the government’s jurisdiction on the high seas.⁴¹ Like that earlier law, Congress adopted the MDLEA in the face of a growing crisis, formally finding as part of the adoption process that drug trafficking was a “serious international problem” that “presents a specific threat to the security and societal well-being of the United States,” one that “facilitates transnational crime, including . . . terrorism.”⁴² Congress used the MDLEA to implement significant expansions of jurisdiction. In addition to the jurisdiction incorporated from the Marijuana on the High Seas Act, Congress empowered the Coast Guard to interdict vessels on the high seas if the flag-state consented to the interdiction. Prior to the MDLEA, the Coast Guard’s jurisdiction beyond U.S. customs waters was limited to a specific distance off the coast; it had never before “extended to the high seas generally.”⁴³

Two implications attended this expansion of jurisdiction. First, the law authorized the Coast Guard to conduct interdiction operations further from the U.S. mainland than ever before. Second, distant operations meant that interdicted persons would spend longer times aboard ship than they did

³⁸ Lauren R. Robertson, *Blood in the Water: Why the First Step Act of 2018 Fails Those Sentenced Under the Maritime Drug Law Enforcement Act*, 78 WASH. & LEE L. REV. 1613, 1624 n.74 (2021) (quoting S. Rep. No. 96-855, at 1 (1980)).

³⁹ *Id.* at 1624; see also Joseph R. Brendel, *The Marijuana on the High Seas Act and Jurisdiction Over Stateless Vessels*, 25 WM. & MARY L. REV. 313, 314 (1983) (“Upon boarding drug-laden vessels, Coast Guard authorities often found that crewmembers had destroyed any evidence that might have supported a conspiracy [to import] prosecution, such as charts marked with United States destinations. Narcotics traffickers further exploited the Comprehensive Act loophole by successfully employing a ‘mother ship’ technique, anchoring large vessels loaded with marijuana just beyond the territorial waters of the United States. Under the cover of darkness, smugglers transferred the marijuana to smaller pleasure craft capable of unloading the cargo . . . along the coastline. Although the Coast Guard seized many mother ships, the government often could not gather sufficient evidence to prove that the crewmembers had conspired to import the drugs into the United States.”) (citations omitted).

⁴⁰ Robertson, *supra* note 38, at 1625.

⁴¹ Mary B. Neumayr, *Maritime Drug Law Enforcement Act: An Analysis*, 11 HASTINGS INT’L AND COMPAR. L. REV. 487, 491 (1988).

⁴² 46 U.S.C. § 70501 (setting forth “findings and declarations” of the MDLEA).

⁴³ Neumayr, *supra* note 41, at 492.

previously. Despite this major revision to jurisdiction, the MDLEA remained silent about the all-important procedural issues surrounding seizures at sea, conditions of confinement, or other issues inherent to hailing interdicted persons into court.

Contemporary developments in international law reflected a similar preoccupation with jurisdiction rather than procedure. Two years after Congress passed the MDLEA, nearly 200 nations gathered in Vienna, where they built upon the MDLEA's framework and adopted a system for international cooperation to combat trafficking. The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances encouraged nations to enter agreements with one another to enable seizure of vessels in international waters. As a complement to the MDLEA's granting jurisdiction where the vessel's flag state consents, the 1988 Convention formalized a similar system in international maritime law.⁴⁴ According to the formal Convention agreement:

A party which has reasonable grounds to suspect that a vessel . . . is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

Additionally:

The flag State may authorize the requesting State to, *inter alia*: (a) Board the vessel; (b) Search the vessel; (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.⁴⁵

Note the vagaries of the Convention language: the "appropriate measures" a government may take if the search of an interdicted ship reveals illegal drugs is further defined as "appropriate action." This circularity applies explicitly to "persons and cargo on board," that is to say, to the *detention* or other confinement of interdicted persons.

Furthermore, the above-quoted provisions "dissociate[d] the right of visit . . . with the enforcement jurisdiction over the illicit cargo and the offenders."⁴⁶ In other words, the enforcement of maritime law by capturing and holding suspected smugglers rests on a different doctrinal basis from the act

⁴⁴ After enactment of the MDLEA, the international community undertook a flurry of treaty-writing, whereby states agreed to procedures establishing or waiving consent to the search of the states' registered vessels. See generally Douglas Guilfoyle, SHIPPING INTERDICTION AND THE LAW OF THE SEA, ch. 5 (2009) (analyzing "the 1988 UN Narcotics Convention, a 1990 Spanish-Italian treaty, the 1995 Council of Europe Agreement, and numerous US bilateral agreements with neighbouring states") (citations omitted).

⁴⁵ U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, U.N. Doc. E/CONF.82/15, art. 17.317.4 [hereinafter 1988 Convention].

⁴⁶ Efthymios Papastavridis, THE INTERCEPTION OF VESSELS ON THE HIGH SEAS 212 (2013).

of boarding and searching vessels in the first place. This uncoupling of doctrine and procedure is especially unfortunate given that the right to detain, and other enforcement measures, are themselves not clearly defined in international law.⁴⁷

Despite its ambiguity, the text of the 1988 Convention actually went further than the MDLEA in elaborating on the conditions of post-interdiction confinement (although not by much). Unlike the MDLEA, which is devoid of detention protocols, Paragraph 5 dictates that “Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.”⁴⁸ The phrase “safety of life at sea” is not defined, nor is it given much weight against the other commercial and governmental interests articulated in this provision. But its appearance in the text at least differs from the MDLEA’s silence regarding rights and protections of those confined aboard ship.

Commentaries to the Convention do little to elaborate on the conditions of confinement expected by the international community. Much of the commentary makes explicit that “there is no absolute language” or “no greater specificity” with respect to confinement protocols.⁴⁹ Indeed, the commentary to Paragraph 5 about the need not to endanger life at sea “explains” this language by simply recounting verbatim the language of Paragraph 5 itself. Only one section of the commentaries goes further: “In the discharge of their obligations, intervening States will need to ensure that law enforcement personnel receive appropriate training and guidance and that procedures are put in place to secure compliance with accepted international norms.”⁵⁰ But this inexact language is only elaborated upon with examples like use of force for self-defense and prompt communication between countries, not detention at sea.

Thus, like its U.S. contemporary the MDLEA, the international interdiction laws set forth in the 1988 Convention did little to establish an international understanding or even a legal framework for how the actual confinement of interdicted persons should operate. In such a void, most legal developments surrounding interdiction law concerned efficacy of operations

⁴⁷ See *id.* at 208 (“[I]t bears repeating that the right to visit stateless vessels does not *ipso jure* entail the right to seize the illicit cargo or exert any further enforcement jurisdiction over the persons on board the vessel”). Indeed, few legal bodies have bothered to set up concrete expectations for treatment of detained persons at sea. The European Court of Human Rights goes further than most, and even then posits only that “any detention must be in accordance with a procedure prescribed by law, which must be accessible, foreseeable and must afford legal protection to prevent arbitrary interferences of the right to liberty.” *Id.* at 80.

⁴⁸ 1988 Convention *supra* note 45, at art. 17.5.

⁴⁹ U.N. Secretary-General, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Done at Vienna on 20 December 1988*, art. 17.17-17.18, U.N. Doc. E/CN.7/590.

⁵⁰ *Id.* at art. 17.40.

and jurisdictional problem-solving. Considerations for procedures and standards to ameliorate the conditions of detention were relegated to the background.

IV. MODERN JUSTIFICATIONS FOR EXTENDED CONFINEMENT: DETENTIONS OR ARRESTS?

The early days of Coast Guard interdictions presented little need to consider justifications for extended periods of confinement. Less expansive jurisdiction, as well as technological limitations, kept interdictions close to shore.⁵¹ But as the MDLEA extended interdiction jurisdiction across the globe, and as the Coast Guard developed better blue-water capability, seizures of vessels and persons started happening thousands of nautical miles from the nearest American port. Of course, this increased range meant longer periods of confinement.

U.S. courts have not kept pace. The precise rationale for extended confinements is murky legal territory. Courts cannot even agree on what to call interdicted persons: are they arrested or merely detained? This question matters; it dictates when certain procedures or rights apply, such as the right to be promptly brought before a magistrate (known as “presentment”). Here, I explore two possible legal theories that purport to justify confinement aboard ship.

A. Detentions

The government commonly justifies its power to confine interdictees based on a detention rationale.⁵² Under this theory, interdictees are merely *detained*, not arrested. Therefore, none of the rights or procedural safeguards that attend an actual arrest—such as presentment—kick in until the interdictee reaches U.S. shore and is placed under formal arrest.

Some courts go along with this rationale, at least on a semantic level. For example, in the 2021 case *United States v. Arboleda-Quinones*, the Middle District of Florida held that a defendant detained in the Pacific Ocean 87

⁵¹ See, e.g., *United States v. Lee*, 274 U.S. 559, 560 (1927) (a prohibition-era case in which the smuggling schooner *L'Homme* anchored a mere 24 miles off Boston Harbor, delivering liquor to smaller vessels in a strip of water known as “Rum Row”); *The Marjorie E. Bachman*, 4 F2d 405, 405-06 (D. Mass. 1925) (same, but smuggling ship anchored 21.2 miles from the coast).

⁵² See Wessler, *supra* note 28 (“[P]rotracted detention is justified by Coast Guard officials and federal prosecutors alike, who argue that suspects . . . are not formally under arrest when the Coast Guard detains them.”); see also Thomas Bardenwerper, *Pushing or Overstepping? Legal Boundaries in the Fight Against Maritime Drug Smuggling, Part 2*, CTR. FOR INT’L MAR. SEC. (2022) <https://cimsec.org/pushing-or-overstepping-legal-boundaries-in-the-fight-against-maritime-drug-smuggling-pt-2/> (“Rarely, if ever, will these individuals be formally placed under arrest while at sea”); for more on detention justifications, see generally Martin Fink, *MARITIME INTERCEPTION AND THE LAW OF NAVAL OPERATIONS*, ch. 11 (2018) (specifying as examples criminal suspects, members of organized crime groups, and counter-piracy operations).

nautical miles off Panama was simply that: detained.⁵³ His *arrest* did not take place until the Coast Guard cutter docked in the Florida everglades. The court cited no authority for this proposition, apparently viewing the issue as settled law.

But the detention rationale suffers from three major failings. First, while a minority of courts might refer to at-sea confinement as non-arrest detention, few courts, if any, actually analyze the confinement accordingly. Even the court in *Arboleda-Quinones*—although stating that the defendant was not arrested until reaching shore—analyzed the legal issues quite differently. The court held that the defendant’s extended time at sea did not deprive him of his right to a timely presentment under Federal Rule of Criminal Procedure 5 (the presentment rule).⁵⁴ But Rule 5 only applies after *arrest*, not at the point of detention: “A person making an *arrest* within the United States must take the defendant without unnecessary delay before a magistrate judge.”⁵⁵ The court essentially spoke out of both sides of its mouth by holding that the defendant was not arrested until reaching shore, yet starting the presentment clock while the defendant was still at sea. Other courts take a similar approach to analyzing time at sea for presentment violations.⁵⁶ Some courts have outright rejected arguments by the government that the time to start counting a presentment delay does not start until the defendant reaches shore.⁵⁷ This is indicative of the confusion that encumbers the detention rationale.

Second, confinement aboard ship looks an awful lot like arrest. In *Dunaway v. New York*, the U.S. Supreme Court articulated several factors to determine when “detention” became “indistinguishable from a traditional arrest.”⁵⁸ Such factors include the length of confinement, the ability to leave custody, the use of physical restraint, whether the person was moved to another location, and the method of transportation.⁵⁹ These factors indicate when confinement departs from “brief and narrowly circumscribed intrusions” of personal liberty to become a full-blown arrest. Any reasonable observer of the confinement aboard a Coast Guard vessel must conclude that the same factors are met aboard ship. Interdictees are confined for an average of 18 days; they are obviously not free to leave, are restrained on deck for almost their entire time aboard ship, and are transferred from one transport

⁵³ *United States v. Arboleda Quinones*, 2021 WL 4619575, at *7 (M.D. Fla. 2021).

⁵⁴ *Id.* at *8.

⁵⁵ Fed. R. Crim. P. 5(a) (emphasis added).

⁵⁶ *See, e.g., United States v. Cabeza-Montano*, 949 F.3d 567 (11th Cir. 2020); *United States v. Zakharov*, 468 F.3d 1171 (9th Cir. 2006).

⁵⁷ Pitter, *supra* note 15, at 100 (citing *United States v. Giler*).

⁵⁸ *Dunaway v. New York*, 442 U.S. 200, 212 (1979); *see also Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (reaffirming the principles set out in *Dunaway*).

⁵⁹ *Dunaway*, 442 U.S. at 212.

ship to another as they journey toward an American jail.⁶⁰ Revealingly, the experiences of interdictees mirror in important ways the experience of the arrested defendant in *Dunaway*, who was “‘never informed that he was ‘free to go’; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.’”⁶¹

Third, the Coast Guard’s statutory authority to intercept vessels makes little textual sense if the Coast Guard is not actually arresting interdicted persons by taking them aboard ship. The U.S. Code authorizes the Coast Guard to “make inquiries, examinations, inspections, searches, *seizures*, and *arrests* upon the high seas and waters over which the United States has jurisdiction.”⁶² By definition, a detention must be either a seizure or an arrest. If detentions fall only under the “seizure” part of this statute, it is hard to imagine what a full-blown “arrest” looks like.⁶³

B. At-Sea Arrests

The more promising legal rationale for confinement subsequent to interdiction is that the Coast Guard *does* make arrests at sea, but that at-sea arrests differ in kind from arrests on land. In other words, arrests in the Eastern Pacific Ocean are not accompanied by the same set of rights as arrests made in the local 7-Eleven parking lot.

Not only does this theory resolve some of the problems highlighted above, but it also accords with the historical attitude of courts. Since the 19th century, courts have approached the question of rights aboard U.S. ships differently from rights applied on land. As early as 1891, the U.S. Supreme Court held that American vessels do not carry with them into open waters the same rights regime as exists on the mainland. In *Ross v. McIntyre*, the Court recognized that “the deck of a private American vessel, it is true, is considered, for many purposes, constructively as territory of the United States.”⁶⁴ However, said the court, “persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United

⁶⁰ Wessler, *supra* note 28. (“[O]ver the years federal judges have allowed for progressively longer periods of detainment: five days in the Caribbean in 1985; then 11 in 2006; in 2012, 19 days in the Pacific. Average detention time is now 18 days. An official told me that men have been held up to 90 days.”).

⁶¹ *Dunaway*, 442 U.S. at 212.

⁶² 14 U.S.C. § 522(a).

⁶³ The only other possible explanation for “arrest” as used in 522(a) is that it refers to the Coast Guard’s power to make *civil* arrests of *vessels*. (In maritime law, ships themselves are subject to arrest.) But the text of the statute precludes such a reading of “arrest.” When 522(a) mentions arrest, it does so via reference to the “individual”; yet when the text refers to vessels, it does so not via the term “arrest,” but rather the more object-appropriate terms “forfeiture” or “seizure.”

⁶⁴ *Ross v. McIntyre*, 140 U.S. 453, 464 (1891); *see also* *United States v. Aybar-Ulloa*, 987 F.3d 1, *7 (1st Cir. 2021) (applying *McIntyre* in an MDLEA context).

States.”⁶⁵ The court reaffirmed this reasoning almost 100 years later in 1990, holding that in the context of Fourth Amendment rights, “there is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens . . . in international waters.”⁶⁶ The legal-historical record makes clear that, at least as a descriptive matter, at-sea arrests could be considered a unique kind of “rightless arrest,” or at least an arrest that does not implicate the same rights as one made on land.

Of course, as a *normative* matter, the government justifying rightless arrests at sea presents its own host of problems. Most notably, the government can make maritime seizures based only on reasonable suspicion, as opposed to the higher standard of probable cause constitutionally required on land (at least generally). According to international conventions and bilateral treaties, interdictions can proceed based on a “reasonable belief” that the interdicted vessel is engaging in trafficking—a standard that is “quite similar, if not identical, to the ‘reasonable suspicion’ standard of U.S. law.”⁶⁷

On land, reasonable suspicion justifies at most the brief detention and pat down of a suspect.⁶⁸ It does not allow access inside any vehicle. But at sea the rules are different. True, a Coast Guard boarding party can establish probable cause *during* a search, thereby justifying the rest of the search on a higher standard of proof. But the point here is that government agents are not required to do so as justification for the search in the first place. After all, the Fourth Amendment does not apply in most MDLEA interdictions.⁶⁹ Only in the maritime interdiction context, it seems, is the implementation of what are normally constitutional rights regarded merely as a matter of government preference and office policy—policies that, it is important to note, are not public.

More alarming still, the implication of a rightless arrest means that the government is not required to inform detainees of basic rights that will attach

⁶⁵ *McIntyre*, 140 U.S. at 464. *McIntyre* opens up another interesting point that should play a larger role in the current discussion of at-sea interdiction: how far off the U.S. coast do the rights of interdictees kick in? Only on American soil? Or whenever the Coast Guard vessel enters American territorial waters? The language in *McIntyre* suggests the former, since passengers aboard U.S. ships can only invoke their legal rights upon entering “the actual territorial boundaries of the United States.” *Id.* But there is no clear reason why this should be so. In many other contexts, U.S. law applies within its territorial waters or even the contiguous zone.

⁶⁶ *United States v. Verdugo-Uriquidez*, 494 U.S. 259, 267 (1990).

⁶⁷ Papastavridis, *supra* note 46, at 228 n.100 (citing *United States v. Reeh*, 780 F.2d 1541, 1544 n.3 (1986)). Interestingly, reasonable suspicion was not always the standard to justify searches of vessels on the high seas. Maritime searches in the early 20th century required probable cause. The U.S. Supreme Court noted in 1927: “Officers of the Coast Guard are authorized. . . to board and search such vessels when there is probable cause to believe them subject to seizure for violation of revenue laws, and to arrest persons thereon engaged in such violation.” *United States v. Lee*, 274 U.S. 559, 562 (1927) (citation omitted). The right to search a vessel based on a standard less than probable cause was reserved for government ships boarding the enemy during times of war. *Id.*

⁶⁸ See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

⁶⁹ See *Verdugo-Uriquidez*, 494 U.S. at 267.

later during the criminal process, rights that include the Fifth Amendment right to remain silent.⁷⁰ Nor does the law require the government to tell interdictees basic information like the duration of travel or their final destination (in fact, many assume that they are bound for their home country). The government has in some cases read a “Detainee Bill of Rights” to confined persons,⁷¹ but the point is that government sailors are *not required to do so*, unlike when land-bound law enforcement make an arrest.

Other than historical reasons, it is not entirely clear why arrests at sea should differ so drastically from those made on land. Courts have not come up with a satisfying response—perhaps because interdictees’ lack of rights limits the amount of litigation upon which courts can develop procedural doctrine in the first place. Even were there more opportunities to develop this area of constitutional law, courts have another juridical cop-out known as the *Ker-Frisbee* doctrine. The doctrine holds that “nothing in the Constitution . . . requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”⁷² While courts have developed a few exceptions to *Ker-Frisbee*, none readily apply to defendants who are brought to the United States subsequent to a maritime interdiction. For the foreseeable future, “the Supreme Court has made clear that unlawful arrests [outside of the United States] will seldom (if ever) preclude a subsequent criminal trial.”⁷³ This is too bad, not just because it prevents otherwise meritorious litigation from advancing, but also because it debilitates the judiciary’s ability to clarify and refine maritime interdiction as a field of law.

V. PRESENTMENT

The federal rules require the government to bring arrested persons before a magistrate judge “without unnecessary delay.”⁷⁴ On land, this rule usually means that the government has 48 hours to present defendants. While courts have correctly held that the logistical difficulties of at-sea interdictions make

⁷⁰ The Fifth Amendment does not apply beyond the sovereign territory of the United States. *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950).

⁷¹ See, e.g., Appellants’ Consolidated Opening Brief at *16-17, *United States v. Dominguez-Caicedo*, 2020 WL 3621099, (“The Bill of Rights claimed the men would be ‘safe and cared for,’ but previewed the harsh conditions the men were about to endure for more than three weeks. . . . The Bill of Rights came with a few warnings too. If the men did not do what the Coast Guard asked, they would be ‘treated accordingly,’ including further restraint and isolation. The Coast Guard did not know how long they would be aboard the vessel, and the Bill of Rights twice told them not to ask the crew questions about where they were being taken or when.”) (citation omitted).

⁷² Stephen I. Vladeck, *Terrorism Prosecutions and the Problem of Constitutional “Cross-Ruffing,”* 36 CARDOZO L. REV. 101, 105 (2014) (quoting *Frisbie v. Collins*, 342 U.S. 519, 522 (1952)).

⁷³ *Id.* at 104.

⁷⁴ Fed. R. Crim. P. 5(a).

the land-based 48-hour rule inapplicable,⁷⁵ courts have struggled to devise a meaningful alternative in a maritime context.

Since the 1980s, federal courts have permitted progressively longer periods of confinement aboard Coast Guard vessels. As reported by the *New York Times*, delays in presentment have increased from five days in 1985 (when operations centered mostly in the Caribbean) to an average of 18 days today.⁷⁶ Presumably, this is because interdiction operations have expanded over increasingly distant territory, necessitating longer travel time on return voyages. Courts, no doubt recognizing limits to their institutional competence, are reluctant to wade into these complicated international operations. However, a full explanation for extended presentment delays takes account of the legal, and not just logistical, realities of interdiction work. Fundamentally, the test that courts use to determine whether a presentment violation has occurred creates a high hurdle for defendants to overcome, and in the context of interdictions, renders the federal presentment rule a toothless text. It does not have to be so.

To determine if the government has violated presentment requirements, courts usually balance a number of factors, summed up nicely by the Eleventh Circuit's *Purvis* test: the distance between the location of arrest in international waters and the U.S. port at which the interdictee arrived, the time between arrival at port and actual presentment before a magistrate judge, any evidence of mistreatment or improper interrogation during the delay ("interrogation" seems the key word here, more so than "mistreatment"), and exigent circumstances that might justify the delay.⁷⁷

This test is difficult for MDLEA defendants to meet; as we will see, delays as long as seven weeks have passed the test without complaint from the reviewing court. Part of the difficulty is the test's focus on the government's intent motivating the delay. Most courts ground the purpose of the presentment rule in "prevent[ing] oppressive police interrogations and other 'third-degree' tactics before bringing the accused [to trial]."⁷⁸ That is to say, the heart of the *Purvis* test and its cousins in other circuits is to prevent the government from using presentment for some nefarious purpose. But proving government intent is a difficult task. Through these tests, courts have

⁷⁵ See *United States v. Cabezas-Montano*, 949 F.3d 567, 594 (holding that the 48-hour rule does not apply to MDLEA defendants because the Fourth Amendment does not reach non-citizens in international waters, and because the 48-hour rule contains an exception for "extraordinary circumstances").

⁷⁶ Wessler, *supra* note 28.

⁷⁷ *United States v. Purvis*, 768 F.2d 1237, 1238 (11th Cir. 1985); see also *United States v. Cabezas-Montano*, 949 F.3d 567, 591 (11th Cir. 2020) ("In *United States v. Purvis*, . . . This Court held that various factors are considered in determining whether a delay was unnecessary, including: (1) the distance between the location of the defendant's arrest in international waters and the U.S. port he was brought to; (2) the time between the defendant's arrival at the U.S. port and his presentment to the magistrate judge; (3) any evidence of mistreatment or improper interrogation during the delay; and (4) any reason for the delay, like exigent circumstances or emergencies.").

⁷⁸ *Id.*

essentially assured the failure of all presentment violation claims by MDLEA defendants—even those whose time at sea tallied multiple months.

A. Satisfying the Current Presentment Rule With Venue Shopping

Undoubtedly, some MDLEA presentment delays have given prosecutors a tactical advantage. Defendants interdicted on the high seas may be tried in any federal district court.⁷⁹ But from the government's point of view, not all district courts rank equally. For example, "American law-enforcement officials have developed a clear preference for prosecuting maritime smuggling cases in Florida."⁸⁰ The Sunshine State has a long history of maritime drug prosecutions, stemming back to the nascent days of the war on drugs in the 1980s (see Part III, *supra*). Federal agencies in Florida have long-standing drug task forces, meaning that prosecutors and law enforcement there enjoy "expertise on maritime drug cases."⁸¹

Similarly, different federal districts apply different laws, some of which make prosecution more difficult. In particular, the Ninth Circuit requires that prosecutors prove not only jurisdiction under the MDLEA, but also "constitutional jurisdiction."⁸² That is to say, the government must show not only the elements of the crime, but also "a sufficient nexus" to the interests of the United States "such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant."⁸³ (There is one exception: the government does not have to prove constitutional jurisdiction when prosecuting defendants seized from stateless vessels.) By contrast, the Fifth and Eleventh Circuits have expressly held that the government does not have to prove an additional nexus requirement.⁸⁴

All this is to say that, depending on the port at which interdictees are offloaded, prosecutors could better their odds at trial or increase leverage during plea negotiations. While such "venue shopping" is not per se unlawful, in certain circumstances venue shopping could give rise to the malintent needed to violate the federal presentment rules.

Venue shopping could especially serve as grounds for a presentment violation if the standard is tweaked slightly from its current, government-intent-focused form. The argument goes something like this. First, we slightly expand the purpose of the presentment rule beyond simply preventing "third degree" tactics. Instead, we should construe the rule in line with other "speedy process"-type rights, such as the Sixth Amendment. Viewed through such a lens, the statutory presentment rule also embraces government

⁷⁹ 46 U.S.C. § 70504(b)(2).

⁸⁰ Wessler, *supra* note 28.

⁸¹ *Id.*

⁸² *United States v. Perlaza*, 439 F.3d 1149, 1161 (9th Cir. 2006).

⁸³ *Id.* at 1160 (citing *United States v. Medjuck*, 48 F.3d 1107, 1111 (9th Cir. 1995)).

⁸⁴ *See, e.g., United States v. Suerte*, 291 F.3d 366, 370-375 (5th Cir. 2002); *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003).

conduct that is designed as “a deliberate device to gain advantage over [the defendant].”⁸⁵ Under this expanded interpretation of presentment, taking a defendant to a prosecutor-friendly jurisdiction could conceivably be a device used by the government to gain tactical advantage, and therefore would violate the purpose of the presentment requirement.

B. Giving the Presentment Rule Teeth with Presumption Requirements

To really give the presentment rule meaningful effect, courts or Congress should consider developing a presumption mechanism, either to the federal presentment rule generally or built into the MDLEA itself. This mechanism would activate under extreme or suspicious circumstances, shifting the burden away from defendants to prove improper delay and onto the government to *disprove* improper delay.

Such a shifting of proof, while alleviating the difficult evidentiary burden on defendants, would not overburden the government. In theory, the government could easily justify delays due to storms, long patrol distances, or logistical issues like refueling. Especially given courts’ obvious deference to maritime operators and sympathy for the difficulties of interdiction work, a presumption will not prevent prosecutors from moving forward with meritorious cases.

Similar presumptions pervade American criminal law. For example, the Sixth Amendment sometimes presumes that a pretrial delay is prejudicial to a defendant, and the Fourteenth Amendment sometimes presumes vindictive prosecution.⁸⁶ These two presumptions are especially relevant to the presentment requirement in the federal rules, since they each concern components under which the courts already assess presentment violations: length of the delay and prosecutorial intent. Based on these components, two possible circumstances unique to the drug interdiction context might provide an effective basis for an MDLEA presumption regime⁸⁷:

1. Presumption based on the interdicting vessel’s return route

One line of possible presumptions examines the route of the Coast Guard vessel as it returns to port. The port of return is an important decision—one that is sometimes made with the input of prosecutors—because the port of

⁸⁵ *United States v. Gouveia*, 467 U.S. 180, 193 (1984).

⁸⁶ *See Doggett v. United States*, 505 U.S. 647, 652 (1992) (regarding pretrial delay); *Blackledge v. Perry*, 417 U.S. 21, 25-26 (1974) (regarding vindictive prosecution).

⁸⁷ At least one federal appeals judge has voiced support for attaching presumptions to maritime drug interdiction travel time, *see United States v. Cabezas-Montano*, 949 F.3d 567, 614 (11th Cir. 2020) (Rosenbua, J., concurring) (“Surely at some point a delay becomes presumptively ‘unnecessary,’ even by plain-error standards. Perhaps we cannot say definitively that seven weeks for this trip is presumptively ‘unnecessary,’ but what if the Coast Guard had taken an extra month? What about an entire year? The government might be able to explain such delays—and again, we have no record in this case—but a lengthy trip like this raises more than a few questions.”).

return establishes which federal district court will hear the case. As explained above, some jurisdictions favor prosecutors more than others. And while prosecutors can transfer cases or work out travel arrangements across land, by-and-large the cases tend to proceed in the district of arrival.

This presumption should kick in if the return vessel takes a more circuitous or substantially longer route to the port of prosecution than needed. This does happen. For example, in *United States v. Aragon*, the government ship sailed from the Pacific-side of Costa Rica, through the Panama Canal, to deposit its interdicted passengers not in Florida, South Carolina, or Virginia—but in the Southern District of New York.⁸⁸ Similarly, in *United States v. Aguino-Ramos*, the Coast Guard spent extra time and fuel traveling from the Eastern Pacific to the Florida everglades.⁸⁹ These counterintuitive routes should raise judicial eyebrows, and at least require an explanation by the government for keeping interdictees locked aboard ship for the extra travel time.

Courts are clearly capable of conducting this kind of analysis.⁹⁰ Already, some courts examine the route of the vessel when scrutinizing presentment violations. The Ninth Circuit, for example, concluded in a 2006 case that because the Coast Guard ship made no additional stops and sailed directly to the nearest port, it did not violate the presentment rule.⁹¹ It is a short analytical step from this reasoning to conclude that there might be a presentment violation if a Coast Guard vessel chooses an indirect route to home port.

2. Presumption based on the duration of confinement

Another potential trigger for a presumed presentment violation considers the length of time interdictees are kept aboard ship. In 2020, the Eleventh Circuit upheld the legality of a whopping 49-day post-interdiction voyage over only 200 nautical miles. The court did not address the actual merits of the defendant's claim that this delay violated presentment. Instead, the court held (with virtually no analysis) that the lower court did not plainly err in finding no presentment violation, since “no case . . . has addressed a 49-day delay or held what circumstances or reasons would make such a delay unnecessary.”⁹² Similarly, delays of 90 days have been reported.⁹³ Delays of 20 days to a month are not uncommon.⁹⁴ By showing sweeping deference to the

⁸⁸ *United States v. Aragon*, 2017 WL 2889499, at *14 (S.D.N.Y. 2017).

⁸⁹ *United States v. Aguino-Ramos*, 406 F. Supp. 3d 1308, 1311 (S.D. Ala. 2019).

⁹⁰ Historically, courts have felt comfortable making this kind of analysis. *See, e.g.*, *The Marjorie E. Bachman*, 4 F.2d 405, 406 (1925) (“It was the duty of the officers, having seized the vessel, to send her with her crew on board promptly to the nearest port. Instead, this vessel, with her master and crew removed and her open hold full of liquor, was held at anchor for two days, during which she was freely visited by the officers and men of the Coast Guard Service.”).

⁹¹ *United States v. Zakharov*, 468 F.3d 1171, 1180 (9th Cir. 2006).

⁹² *Cabezas-Montano*, 949 F.3d at 593 (11th Cir. 2020).

⁹³ Wessler, *supra* note 28.

⁹⁴ *See, e.g.*, *Mot. to Suppress Evid.* at 5, *United States v. Giler*, Case No. 17-60032-CR-COHN, (S.D. Fla. 2017) (31 days); *United States v. Torres-Iturre*, 2016 WL 2757283, at *3 (S.D. Cal. 2016) (21 days);

legality of these extended delays, courts have largely removed whatever spine the presentment rule might have had in the interdiction context. And courts have also reduced the effect of what is surely an important component of the presentment rule: to deter the government from operations that risk exposing defendants to long periods of pre-indictment confinement.

Having some cut-off point after which the government must justify extended travel time makes good sense and accords with analogous criminal law. A presumption triggered after, say, 30 days would reflect the spirit of other procedural statutes. The Speedy Trial Act, for instance, “establishes time limits for completing the various stages of a federal criminal prosecution.”⁹⁵ Under the Act, charges must be filed against defendants within 30 days from the date of arrest, though special circumstances may warrant extension.⁹⁶ At least one court has applied the Speedy Trial Act to an MDLEA prosecution.⁹⁷

The real issue with a duration presumption is not the point after which the presumption will apply, but rather what the government will have to prove to meet their burden. Whatever the point at which the presumption triggers, be it 30 days after at-sea arrest or something else, under the federal presentment rule, the government will need to prove that the delay was “necessary.”⁹⁸

In one sense, this burden of proof is relatively light. The government should have no problem justifying delays due to legitimate reasons like bad weather, need to refuel, or similar logistical concerns. For example, in *United States v. Klimavicius-Viloria*, defendants were not presented in court for three weeks due to a tropical storm delaying travel.⁹⁹ In cases like this, the government’s delay is legitimate and easily proven; the parties could doubtless resolve the issue without even the need for a formal hearing. In this sense, the presumption would serve to catch only facially improper delays.

In another sense, the duration presumption could be used to force the government to prove a more robust meaning of “necessary” as that word is used in the federal presentment rule. The government might need to prove that patrolling thousands of nautical miles away from the U.S. mainland was necessary to effectively execute their drug interdiction mission in the first place. Or the government might need to prove that their operations were necessary in the sense that the delay in presentment was unavoidable even given the ability to present the defendant by satellite link or other technological means. At least one court has expressed concern that, in our modern age, defendants could be arraigned while still at sea. As the magistrate who

United States v. Arboleda Quinones, 2021 WL 4619575, at *3 (M.D. Fla. 2021) (23 days); United States v. Santana, 2022 WL 16845104 (S. D. Fla. 2022) (22 days); Watt *supra* note 29 (over 30 days).

⁹⁵ U.S. DEP’T. OF JUST., CRIMINAL RESOURCE MANUAL § 628 (2020).

⁹⁶ 18 U.S.C. § 3161(b).

⁹⁷ See Pitter, *supra* note 15, at 100.

⁹⁸ Fed. R. Crim. P. 5(a).

⁹⁹ United States v. Klimavicius-Viloria, 144 F.3d 1249, 1256 (9th Cir. 1998).

received the presentment in *United States v. Mero* noted, “If the government is determined to detain defendants found in international waters and spend a long journey to bring them to the United States in order to prosecute them, some adjustments arguably should be made—particularly with the advancements in available technology.”¹⁰⁰

Although this second burden would be marginally more difficult for the government to meet, maybe that’s not such a bad result. The virtue of a presumption mechanism is that it allows the courts to regulate rights in a space where they have previously declined to exercise their judicial duty with meaningful scrutiny. By interjecting more assessment of interdiction policy and procedure into pre-trial issues like presentment, courts might finally realize their obligations to enforce presentment rules at sea just as vigorously as they do on land.

VI. OUTRAGEOUS GOVERNMENT CONDUCT DOCTRINE: IS THE NINTH CIRCUIT SAYING GOODBYE?

Another doctrine upon which some MDLEA litigants have relied is the outrageous government conduct (“OGC”) doctrine. The doctrine states that government conduct in bringing a defendant to trial can be so extreme that it voids subsequent indictment. As applied to MDLEA prosecutions, the doctrine is available only to defendants in the Ninth Circuit. And even there, the court has recently restricted its use in MDLEA actions, even in extreme cases. This is an unfortunate trend and one that could be rectified with a simple doctrinal tweak.

The OGC doctrine derives from dicta in *United States v. Russell*. In *Russell*, Chief Justice Rehnquist posited that there may be some situations “in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”¹⁰¹ Note two things. First, OGC is a *due process* doctrine. Second, the government conduct actually at issue in *Russell* was the alleged entrapment of the defendant in a methamphetamine manufacturing ring (the government supplied the defendant with chemicals to cook the drug). Today, most circuits limit *Russell* only to cases in which the defendant asserts an entrapment-type defense.¹⁰² A district court judge in the Eleventh Circuit summed up well the majority approach to outrageous conduct: conduct is prohibitively outrageous when it “somehow caused

¹⁰⁰ *United States v. Mero*, 2017U.S. Dist. LEXIS 180567, at *10-11 (E.D. Tex. 2017).

¹⁰¹ *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

¹⁰² See *Brown v. Doe*, 2 F.3d 1236, 1242 (2d Cir. 1993) (limiting OGC to “this limited context” of entrapment); accord *United States v. Smith*, 940 F.2d 710, 715 (1st Cir. 1991); *United States v. Jannotti*, 673 F.2d 578 (3rd Cir. 1982); *United States v. Hunt*, 749 F.2d 1078 (4th Cir. 1984); *United States v. Yater*, 756 F.2d 1058 (5th Cir. 1985); *Sosa v. Jones*, 389 F.3d 644 (6th Cir. 2004); *United States v. Kienast*, 907 F.3d 522, 530 (7th Cir. 2018); *United States v. Spivey*, 508 F.2d 146, 149 (10th Cir. 1975); *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir. 1987); *United States v. Burkley*, 591 F.2d 903 (D.C. Cir. 1978).

[defendants] to participate in crimes they weren't otherwise predisposed to commit."¹⁰³ Unsurprisingly under such a strict standard, which essentially mirrors an entrapment defense, "neither the Supreme Court nor the Eleventh Circuit has *ever* dismissed an indictment under this doctrine."¹⁰⁴

But the Ninth Circuit took *Russell's* language and ran with it. First, the court broadened OGC to cover *all* situations that are "so grossly shocking" or offend a "universal sense of justice," not just matters of entrapment.¹⁰⁵ Second, the court divorced the doctrine from due process (which, as explained above, does not extend to aliens in international waters) by making the doctrine part of the court's supervisory powers.¹⁰⁶ By doing so, the court created a doctrine that tantalizes MDLEA defendants as theoretically applicable but practically unsuitable to their cases. At first glance, the doctrine should protect interdictees who experience extreme confinement: these incidents certainly "shock the conscience," and they are applicable to aliens through the court's supervisory powers. But all is not what it seems.

In reality, the doctrine has proved inhospitable to MDLEA defendants. The Ninth Circuit has declined to apply OGC to any conditions aboard Coast Guard vessels engaged in drug interdiction. In the 2022 case *United States v. Dominguez-Caicedo*, the defendants were brought aboard and warned about the "harsh conditions" they were about to endure.¹⁰⁷ Over the next 23 days, interdictees were: not told the destination or duration of travel; chained for 23 hours a day, with movement restricted to only a few feet and no chairs or benches available; made to stand in inches of water during a three-day storm; exposed to temperatures so hot during the day that the men could not bear even their thin plastic coveralls, and so cold at night that they lost feeling in their feet and hands; and fed mainly meals of only rice and beans, which irritated their stomachs to the point that they began to refuse food.¹⁰⁸ Psychologists diagnosed the men with PTSD. One of them bore a permanent ankle scar from his hundreds of hours in chains.

Dominguez-Caicedo seemingly presents the kind of case to which the Ninth Circuit's OGC doctrine readily applies: it involves mistreatment by government officials as well as universal values about bodily integrity, privacy, and humane care. But the Ninth Circuit declined to apply OGC in this case, holding that "in order to secure dismissal of an indictment due to outrageous government conduct, a defendant must show a nexus between the conduct and either 'securing the indictment or . . . procuring the conviction.'"¹⁰⁹

¹⁰³ *United States v. Gonzalez*, 2023 WL 4580901, at *4 (S.D. Fla. July 18, 2023).

¹⁰⁴ *Id.*

¹⁰⁵ *See United States v. Dominguez-Caicedo*, 40 F.4th 938, 948 (9th Cir. 2022).

¹⁰⁶ *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991).

¹⁰⁷ Appellants' Consolidated Opening Brief at *16, *United States v. Dominguez-Caicedo et al.* (2020) (No. 19-50268, 19-50271, and 19-50274), 2020 WL 3621099.

¹⁰⁸ *Id.* at *19-22.

¹⁰⁹ *Dominguez-Caicedo*, 40 F.4th at 949.

In other words, the court was looking for a particular *kind* of outrageous government activity. Specifically, it seemed to be looking for the entrapment-related nexus found in other jurisdictions' OGC cases. Although the *Dominguez-Caicedo* defendants argued that they had established nexus, it was apparently not of the right variety.¹¹⁰ The opinion suggests a narrow reading of OGC, one that signals the Ninth Circuit finally abandoning the doctrine it has been developing since the publication of *Russell*. The court wrote:

Indeed, the development of the outrageous government conduct concept suggests that it does not even apply to conditions of pre-trial detention . . . our circuit appears to have assumed without deciding that outrageous government conduct *could* apply to conditions of confinement, so long as there is a nexus between the conduct and securing the indictment or conviction. Because there is no nexus here, it is unnecessary to revisit that conclusion.¹¹¹

The court is wrong to distance itself from its earlier conception of OGC. At this point, the doctrine is the only way to afford alien interdictees (and virtually all interdictees are aliens) a semblance of legal protection during their time in transit. The Ninth Circuit's current doctrine allows courts to exercise their supervisory power to enforce a due-process-derived right. As events over the last decade have indicated, this is a necessary precaution even if reserved only for extreme cases.

The court is also wrong to layer a nexus requirement on a doctrine that is already difficult for defendants to satisfy. A "nexus" between the government's conduct in apprehending a subject and its efforts later on to prosecute him is, surely, irrelevant: either the government conduct is outrageous or it is not. As the Ninth Circuit itself has recognized, "the concept of outrageous government conduct focuses on the Government's actions."¹¹² Indeed, this fits the due process ancestry of the doctrine itself, since the Due Process Clause of the Fifth Amendment was intended to check the behavior and

¹¹⁰ *Id.* at 949 ("Defendants claim that the nexus between the Government's conduct and securing the indictment is satisfied because 'if the Coast Guard had chosen to treat Appellants and other detainees humanely, they simply couldn't have conducted their Pacific operations.' Specifically, [o]ne officer testified that feeding rice and beans [to the detainees] was the only affordable way for the Coast Guard to accomplish its mission. Another testified that the excessive restraint of defendants resulted from too few watchmen and too many detainees. Coast Guard [*sic*] testified that it couldn't get detainees to shore because its helicopters were old and didn't have long range. They claimed they couldn't wait for diplomatic clearance to get people off the cutters because it would upset the ability to patrol the ocean. This is not the type of nexus that we generally consider sufficient to establish outrageous government conduct requiring dismissal of an indictment.").

¹¹¹ *Id.* at 949-50 (citation omitted).

¹¹² *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991).

power of government officials from potential abuses of criminal defendants.¹¹³

Even if a nexus requirement persists, it should be satisfied by the U.S. government seizing the interdicted person. When such an arrest (or detention, or whatever one chooses to call it) happens, the government has directed its conduct at a future defendant in the American criminal justice system. As Justice Brennan once observed in dissent, the nexus between a defendant and the government is always satisfied *by the inherent nature of the law enforcement process*: “the ‘sufficient connection’ is supplied not by [the defendant], but by the Government.”¹¹⁴ After all, “our Government, by investigating [the defendant] and attempting to hold him accountable . . . has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.”¹¹⁵ Tellingly, other outrageousness-type doctrines that exist in other contexts have no nexus prerequisite.¹¹⁶

VII. CONCLUSION

Maritime drug interdictions present in stark terms the balance between the drive for efficacy in law enforcement and our commitment to the rights of criminal defendants. Since the war on drugs began in the 1970s, law enforcement has (understandably) approached the oceanic drug threat with a focus on operational efficiency. Unlike anti-drug operations on land, maritime interdiction law has not developed a corresponding commitment to defendants' rights. Massive patrol territory on the high seas presents major logistical challenges that, in rare cases but in cases nonetheless, have resulted in abysmal living conditions for some interdicted persons.

That some interdictees have experienced inhumane confinement is shocking enough; but the response of courts to these situations has revealed a legal area awash in confusion, judicial timidity, and toothless rules. Courts are uncertain about the underlying legal rationales behind long-term at-sea detention, and have failed to construe the federal presentment rule and other legal doctrines in ways that might give deserving interdicted persons relief. I have proposed tweaks to these lacking doctrines, changes that should take

¹¹³ See Legislative Reference Service, Library of Congress THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 960 (Norman J. Small & Lester S. Jayson eds., 1964) (“Until recently the due process clause in Amendment 5, in Amendment 14, and in State constitutions derived importance chiefly, not as consecrating certain procedures, but as limiting the substantive content of legislation”); see also Legislative Reference Service, Library of Congress THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANNOTATED 632 (Wilfred C. Gilbert, ed., 1938) (“[Due process] is a restraint on the legislative as well as on the executive and judicial powers of the Government.”).

¹¹⁴ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 283-84 (1990).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *Rochin v. California*, 342 U.S. 165, 173 (1952) (focusing on the offending government conduct rather than articulating a nexus requirement: “Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend ‘a sense of justice.’”).

into account government need with the importance of clearly delineated procedural safeguards. These proposals include adding a presumption mechanism to the federal presentment rule, and keeping intact the Ninth Circuit's outrageous government conduct doctrine as a last-resort remedy in extreme cases. With these changes, courts can more properly balance between their judicial duties, the limits on their institutional competence, the need to vigorously enforce anti-drug laws, and the rights of travelers on the high seas.

Article

STATUTORY SILENCE: RECONSIDERING ORDERS OF GRAND JURY WITNESS NON-DISCLOSURE AND JUDICIAL DISCRETION

Samantha S. Soter

ABSTRACT

The interplay between grand jury secrecy and witness non-disclosure orders is easily quite puzzling given the statutory silence on the issue.¹ Further, the exclusion of witnesses from the “cloak of secrecy”² granted by Federal Rule of Criminal Procedure 6(e)³ may seem as perplexing as it does common sense, depending on your views surrounding criminal investigations in the United States. Regardless, the main points of contention here lie amidst the tension between the efficiency and confidentiality of the investigative process as they are squarely met with countervailing First Amendment interests.

In 2017, the D.C. Circuit upheld a routine non-disclosure order (“NDO”) issued to Uber Technologies along with a subpoena for business records, preventing the company from alerting its customer, the subject of a grand jury investigation, of the existence or contents of the subpoena for 180 days.⁴ The Government asserted, as it routinely does, that disclosure would compromise the investigation by giving targets the chance to flee or

¹ Non-disclosure orders—judicial orders that prevent a witness from disseminating information pertaining to the existence or facts of the accompanying judicial order (usually a subpoena)—are routinely issued to witnesses during federal grand jury investigations, even though witnesses are not obliged to secrecy under Federal Rule of Criminal Procedure 6(e)(2)(B). *See In re Grand Jury Proceedings*, 417 F.3d 18, 25–28 (1st Cir. 2005); *See also In re Subpoena* 2018R00776, 947 F.3d 148, 154–59 (3d Cir. 2020) (holding that, in sum, the NDOs’ gag effect “remains the least restrictive means of maintaining the government’s interest” in grand jury secrecy, therefore sufficing the strict scrutiny standard); *See generally* FED. R. CRIM. P. 6(e).

² GEORGE J. EDWARDS, JR., *THE GRAND JURY* 28 (1906).

³ *See* FED. R. CRIM. P. 6(e)(2)(B) [hereinafter “Rules” or “Federal Rules”].

⁴ *See In re Application of the U. S. for an Ord. Pursuant to 28 U.S.C. § 1651(a)*, No. 17-mc-01604 (BAH), 2017 U.S. Dist. LEXIS 123841, at *1 (D.D.C. July 7, 2017) [hereinafter *In re United States* 2017].

*tamper with evidence.*⁵ In doing so, the Court emphasized three widely accepted notions among the U.S. Courts of Appeals: First, that grand jury secrecy underpins the “proper functioning of our grand jury system” (as recognized by the Supreme Court of the United States)⁶. Second, that district courts are at times afforded “the authority to ‘fill statutory interstices.’”⁷ And third, that nowhere in the Federal Rules does there exist an explicit prohibition on witness non-disclosure orders.⁸

Two years after *In re United States* 2017, the U.S. District Court for the District of Columbia backtracked and denied issuing a similar grand jury non-disclosure order on account of the D.C. Circuit’s altered interpretation of Rule 6(e) in *McKeever v. Barr*.⁹ Practically speaking, the decision considerably narrowed the availability of non-disclosure orders on grand jury witnesses to solely instances of explicit statutory authorization in the District of Columbia Federal courts.¹⁰

This article examines the varied administration of witness NDOs through a holistic review of the relevant historical, legislative, and judicial views of the grand jury, Federal Rules of Criminal Procedure, and the First Amendment to propose a uniform solution to the circuit split.¹¹

⁵ *Id.* at *8–9.

⁶ *Id.* at *3 (quoting *In re Sealed Case* No. 98-3077, 151 F.3d 1059, 1070 (D.C. Cir. 1998)).

⁷ *Id.* at *1 (quoting *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 42 n. 7 (1985)).

⁸ *See id.* at *2.

⁹ *See In re Application of USA for an Ord. Pursuant to 28 U.S.C. § 1651(a)*, No. 19-wr-10 (BAH), 2019 U.S. Dist. LEXIS 163505, at *12 (D.D.C. Aug. 6, 2019) [hereinafter *In re United States* 2019] (finding that, “under *McKeever*’s binding force, the government has lost the operational flexibility many courts have read Rule 6(e)(2) to permit”) (referencing *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020)).

¹⁰ *See McKeever v. Barr*, 920 F.3d 842, 850 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020).

¹¹ This comment solely considers the Federal Rules of Criminal Procedure as they apply to federal criminal grand jury investigations. No state-specific procedures are implicated in the author’s assessments, unless otherwise explicitly stated.

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BACKGROUND

At the heart of this debate is Federal Rule of Criminal Procedure 6, which procedurally regulates all federal grand juries.¹² Comprehensively, the Federal Rules of Criminal Procedure “govern the procedure in all criminal proceedings in the United States District Courts, the United States Courts of Appeals, and the Supreme Court of the United States.”¹³ First effective in 1946, the Rules are promulgated by the U.S. Supreme Court and are amended by the U.S. Congress.¹⁴ Their main purpose is to “provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”¹⁵

The establishment of the grand jury dates back to early English common law, “an English institution, brought to this country by the early colo-

¹² See generally FED. R. CRIM. P. 6 (“When public interest so requires . . . [a] grand jury must have 16 to 23 [legally qualified] members.”).

¹³ FED. R. CRIM. P. 1. The Rules apply to all criminal proceedings in the United States federal courts, except for “(A) the extradition and rendition of a fugitive; (B) a civil property forfeiture . . . (C) the collection of a fine or penalty; (D) a proceeding . . . governing juvenile delinquency . . . (E) a dispute between seamen . . . and (F) a proceeding against a witness in a foreign country . . .”

¹⁴ See 28 U.S.C. §§ 2072–74; See also FED R. CRIM. P. Historical Note (“The original Rules of Criminal Procedure . . . were prescribed by the Supreme Court . . . transmitted by the Chief Justice to the Attorney General on Dec. 26, 1944. . . . reported to Congress . . . on Jan. 1, 1945” and took effect March 21, 1946.). The Rules were most recently amended in October 2020. See Due Process Protections Act, Pub. L. 116–182, §2, 134 Stat. 894, 894 (2020).

¹⁵ FED. R. CRIM. P. 2.

nists and incorporated in the Constitution by the Founders.”¹⁶ In twelfth-century England, King Henry II organized a system of “local informers”¹⁷ who were tasked with secretly identifying individuals who had allegedly committed criminal acts and naming them to the local sheriff, who would in turn prosecute said individuals based on the information reported.¹⁸ While this early group essentially functioned “to accuse criminals and to extend the central government throughout England[,]” this notion evolved by the mid-seventeenth century when the grand jury additionally “became an institution capable of being a real safeguard for the liberties of the subject.”¹⁹

Consequently, from its inception, the grand jury has been fundamentally rooted in the value of secrecy.²⁰ Confidentiality lies at the heart of any grand jury investigation, so much so, that Congress codified a comprehensive procedural mechanism designed specifically to preserve the secrecy of all matters pertaining to the grand jury throughout the entirety of a criminal investigation.²¹ Today, Rule 6 preserves the essential considerations that the grand jury functions to serve: “(1) . . . the willingness and candor of witnesses called before the grand jury; (2) not alerting the target of an investigation who might otherwise flee or interfere with the grand jury; and (3) to preserv[e] the rights of a suspect who might later be exonerated.”²² Generally, the grand jury is considered to operate as “an arm of the court,”²³ exercising jurisdiction “under the authority and supervision of the court.”²⁴

The integrity of the grand jury investigation essentially relies on secrecy to protect the constitutional underpinnings of due process through liberty and impartiality within a criminal proceeding.²⁵ Today, the grand jury has

¹⁶ *Costello v. United States*, 350 U.S. 359, 362 (1956) (determining that history provides “every reason to believe that our Constitutional grand jury was intended to operate substantially like its English progenitor.”); See also Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 6–7 (1996).

¹⁷ Kadish, *supra* note 16 at 6. (citing SIR FREDERICK POLLOCK & FREDERICK MAITLAND, *THE HISTORY OF ENGLISH LAW* 557–59, 560 n. 28, (2d ed. 1952)). “[T]welve men from every one-hundred” were required to report all suspected instances of “murder, robbery, larceny, or harbouring criminals.”

¹⁸ *Id.* The twelve men were further entrusted with additional tasks from the monarchy, such as tax assessments and collecting information regarding public programs; regardless of the duty, the twelve men remained “sworn to secrecy” at all times. *Id.* at 7.

¹⁹ *Id.* at 5, 9.

²⁰ See generally *In re Grand Jury* 89–4–72, 932 F.2d 481, 483 (6th Cir. 1991) (noting that “the principle of grand jury secrecy has . . . been deeply ingrained in American legal jurisprudence”).

²¹ See FED. R. CRIM. P. 6(e).

²² *McKeever v. Barr*, 920 F.3d 842, 844 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); See also *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218–19 (1979) (Describing “distinct interests served by safeguarding the confidentiality of grand jury proceedings.”).

²³ *Marcus v. United States*, 310 F.2d 143, 146 (3d Cir. 1962).

²⁴ *In re Swearingen Aviation Corporation*, 486 F. Supp. 9, 11 (D. Md. 1979).

²⁵ See U.S. CONST. amend. V; See also U. S. CONST. amend. VI, See also HOWARD GOLDSTEIN, *GRAND JURY PRACTICE* § 3.04[2] (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681–82 n.6, (1958)). Grand jury secrecy serves an integral purpose to the grand jury function, namely:

(1) [t]o prevent the escape of those whose indictment may be contemplated;

retained its investigative and secrecy functions while also adopting a second: the indictment grand jury. As the name suggests, the investigative grand jury takes on the role of the traditional grand jury from English common-law to determine whether a crime has been committed and, if so, by whom.²⁶ By contrast, the grand jury during the indictment phase “determine[s] whether there is sufficient evidentiary support to justify holding the accused for trial on each charge.”²⁷ This article focuses on the grand jury as it pertains to the investigative phase of criminal proceedings.

The relevant provisions of Rule 6 to this article are offered as follows. Federal Rule of Criminal Procedure 6(e)(2)(A) precludes the obligation of *secrecy* on anyone who is not named in Rule 6(e)(2)(B).²⁸ Federal Rule of Criminal Procedure 6(e)(2)(B) outlines secrecy by stipulating a list of individuals who “must not disclose a matter occurring before the grand jury.”²⁹ Therefore, as is presently written in the rule, abridging *secrecy* implies that *disclosure* is made to persons outside those listed in Rule 6(e)(2)(B) (this terminology will become important in subsequent sections). The central issue of the Rule 6(e)(2)(B) list, an issue this article seeks to resolve, is that it is silent as to witnesses. Finally, Rule 6(e)(3) provides a laundry list of exceptions to the imposition of grand jury secrecy, which explicitly permits “disclosure of grand jury matters.”³⁰ The court may authorize disclosure of a grand jury matter “in a manner, and subject to any other conditions that it

(2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;

(3) to prevent subornation of perjury or tampering with the witnesses . . . [;]

(4) to encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes;

(5) [and] to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id.

²⁶ SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 1:7 (2nd ed. 2021).

²⁷ *Id.* [T]he grand jury acts as both shield and sword. When the indicting grand jury is screening cases to determine whether there is sufficient evidentiary support, the grand jury acts as a shield . . . In contrast, in its investigative role the grand jury acts . . . as a sword to discover and attack criminal conduct. *Id.*; *See also* *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

“Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function . . . of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.” *Id.*

²⁸ *See* FED. R. CRIM. P. 6(e)(2)(A) (“No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).”).

²⁹ *See* FED. R. CRIM. P. 6(e)(2)(B). Those confined to the obligation of secrecy include: “(i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).” *Id.*

³⁰ FED. R. CRIM. P. 6(e)(3). Disclosure of grand jury matters, “other than the grand jury’s deliberations or any grand juror’s vote,” is permissible, *inter alia*, to: “(i) an attorney for the government for use in performing that attorney’s duty; (ii) any government personnel . . . that an attorney for the government considers necessary . . . (iii) a person authorized by [statute].” *Id.*

directs,”³¹ and a third party may “petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i).” Fed. R. Crim. P. 6(e)(3)(F).

The norm of confidentiality in federal criminal proceedings may also be preserved through means beyond the cloak of grand jury secrecy, including via sealing orders and non-disclosure orders. Such judicial mechanisms do not serve to extend the reach of grand jury secrecy over the investigation itself but instead, limit disclosures made to the public altogether or by limiting a specific individual’s ability to disclose certain grand jury materials. A sealing order may be issued to keep certain portions of proceedings entirely out of the public record.³² An important distinction here is that sealing imposes a limit on public access rather than a direct restriction on speech; the United States Supreme Court has recognized a qualified First Amendment right of public access to criminal trials, including some pretrial proceedings.³³

While the Federal Rules of Criminal Procedure alone preclude the automatic obligation of grand jury secrecy over witnesses, they do not explicitly prohibit the use of a non-disclosure order on a witness.³⁴ During the pre-indictment investigation phase, certain *ex parte* motions are filed with magistrate judges to secure evidence (e.g., subpoenas, search warrants, etc.); depending on the type of evidence, the Government may move for sealing and non-disclosure, which prohibits the subpoenaed witness from disclosing information pertaining to the respective criminal proceeding.³⁵ A subpoena is a compulsory process issued by grand juries to “order the witness to produce any books, papers, documents, data, or other objects the subpoena designates.”³⁶ Exactly when grand juries began to exert compulsory processes against witnesses to criminal investigations remains difficult to pinpoint, but historic sources allude to as early as the 1600s.³⁷ Further,

³¹ FED. R. CRIM. P. 6(e)(3)(E).

³² See generally STEPHEN E. ARTHUR & ROBERT S. HUNTER, *FEDERAL TRIAL HANDBOOK: CRIMINAL* § 1:36 (2021-2022 Edition); See also FED. R. CRIM. P. 49.1; See generally *United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013) (citing *Colony Insurance Company v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012)) (“[A] court can order documents sealed if [the movant can] show ‘some significant interest that outweighs the presumption’ in favor of open access to judicial records” as traditionally held).

³³ *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 887 (S.D. Tex. 2008); See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 (1980) (finding that the news media and the public have a right to be present at criminal trial proceedings), See also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (finding that the qualified right of public access to criminal proceedings also applies to preliminary hearings).z

³⁴ See *In re Grand Jury Proc.*, 417 F.3d 18, 26 (1st Cir. 2005) (Finding that “the advisory note [of Rule 6] says that the [R]ule ‘does not impose’ secrecy obligations and does not say that it prohibits such obligations made by appropriate order”).

³⁵ See generally *In re Sealing*, 562 F. Supp. 2d at 878–79.

³⁶ FED. R. CRIM. P. 17(c)(1).

³⁷ See, e.g., *Blair v. United States*, 250 U.S. 273, 279–80 (1919) (finding that “as early as 1612 . . . Lord Bacon is reported to have declared that—’All subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery”) (“[P]arties indicted . . . were given the like process to compel their witnesses to appear as was usually granted to

available statutes that federal prosecutors presently utilize to seek witness non-disclosure orders will be discussed in depth in Part II of this article. Regardless, non-disclosure orders ultimately remain a tool of the courts to be issued under judicial discretion.³⁸

The silence of the Rules regarding witness non-disclosure orders and witnesses, plainly, under grand jury secrecy, has prompted polarized interpretations of whether courts may extend the guise of secrecy over grand jury witnesses.³⁹ This article will argue, however, that secrecy and [non]disclosure are not synonymous in this context and that temporary witness non-disclosure is imperative under the appropriate circumstances.

Several U.S. Courts of Appeals have reasoned that since the Federal Rules of Criminal Procedure do not explicitly preclude witness non-disclosure, a court may order so on a “particularized”⁴⁰ basis, considering the reasonableness of implementing non-disclosure under the factual circumstances of each case.⁴¹ Recently, however, a minority of circuit courts have declined to follow this test in lieu of a more exhaustive reading of Rule 6(e)(2)(B), which severely limits the use of NDOs.⁴²

In *McKeever v. Barr*,⁴³ the D.C. Circuit decisively sided with the exhaustive interpretation, straying from its own prior holdings under the more commonly-held discretionary approach, which embraces the court’s inher-

compel witnesses to appear against them, clearly evincing that process for crown witnesses was already in familiar use.”).

³⁸ See generally *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676 (8th Cir. 1986) [hereinafter “*In re Grand Jury 1986*”].

³⁹ See *In re United States* 2017, 2017 U.S. Dist. LEXIS 123841, at *3 (D.D.C. July 7, 2017) (Finding that witness non-disclosure orders may be issued in preservation of grand jury secrecy, the entire purpose of Rule 6(e), under “particular and compelling circumstances.”); Compare *In re United States* 2019, 2019 U.S. Dist. LEXIS 163505, at *3 (D.D.C. Aug. 6, 2019) (embracing the reading of Rule 6(e) from *McKeever v. Barr*, interpreting the phrases, “obligation of secrecy” and “non-disclosure” as interchangeable and therefore finding witness NDOs improper).

⁴⁰ See, e.g., *In re Grand Jury Subpoena*, No. 2:18-MJ-00085-NJK, 2018 U.S. Dist. LEXIS 12396, at *1 (D. Nev. Jan. 25, 2018) (citing *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 679 (8th Cir. 1986)), *In re Petition of Craig*, 131 F.3d 99, 104–05 (2d Cir. 1997), *In re Grand Jury Proc.*, 417 F.3d 18, 26–27 (1st Cir. 2005), *In re Swearingen Aviation Corp.*, 486 F. Supp. 9, 11 (D. Md. 1979), *In re Subpoena* 2018R00776, 947 F.3d 148, 156 (3d Cir. 2020)

⁴¹ *In re Grand Jury Subpoena*, 2018 U.S. Dist. LEXIS 12396, at *1 (finding that “courts must analyze the reasonableness and scope” of a potential witness NDO, “including the durational limit” . . . as “courts are especially disinclined to issue nondisclosure orders that a grand jury witness remain silent for a lengthy or indefinite period.”).

⁴² See *In re United States* 2019, 2019 U.S. Dist. LEXIS 163505, at *3 (embracing the exhaustive reading of Rule 6(e) from *McKeever v. Barr*, reading the “obligation of secrecy” and “non-disclosure” interchangeably as to find witness non-disclosure orders improper); See generally *McKeever v. Barr*, 920 F.3d 842, 845 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 597 (2020), See generally *Pitch v. United States*, 953 F.3d 1226, 1237 (11th Cir.), cert. denied, 141 S. Ct. 624, 208 L. Ed. 2d 230 (2020).

⁴³ *McKeever*, 920 F.3d at 845 (quoting *Carlisle v. United States*, 517 U.S. 416, 426 (1996)) (Failing to read Federal Rules of Criminal Procedure 6(e)(2)(B) and 6(e)(3) together as exhaustive “would render the detailed list of exceptions merely precatory and impermissibly enable the court to ‘circumvent’ or ‘disregard’ a Federal Rule of Criminal Procedure.”).

ent power to issue non-disclosure when the need is compelling.⁴⁴ In essence, the D.C. Circuit's interpretation limits the Rule 6(e)(3) exceptions to grand jury secrecy as the all-inclusive exceptions to the Rule 6(e)(2)(A) obligations of secrecy.⁴⁵ Because witnesses are not listed under the Rule's obligation of secrecy, secrecy, or non-disclosure (as used interchangeably by the court in *McKeever*), cannot be imposed via non-disclosure order on a grand jury witness without an *explicit* statutory grant.⁴⁶

Conversely, the discretionary view embraces the notion that both the Federal Rules of Criminal Procedure and evidence of congressional intent do not preclude the imposition of secrecy on a grand jury witness "in an appropriate case" as a method to prevent what would otherwise permit witnesses "unrestricted freedom" to disclose "the existence of [a] subpoena and the investigation," thus completely undermining the entire purpose of Rule 6(e)(2)(B) secrecy and nature of grand jury investigations.⁴⁷ The vital purpose that witness non-disclosure orders serve in preserving the principle of secrecy in a grand jury investigation cannot be understated. Their scope, however, is up for debate.

Considering this circuit split, this article argues that the Rule 6 silence with respect to grand jury witnesses does permit courts to discretionarily implement non-disclosure orders on grand jury witnesses under a revised standard than that which is currently employed. The article develops this idea in four parts: Part I examines the judicial and legislative backdrop behind both the function of the grand jury and the role of the Federal Rules of Criminal Procedure regarding the grand jury and its secrecy, as well as where non-disclosure orders fall amidst First Amendment considerations specific to this area of law. Part I also briefly weighs the competing interests behind witness NDOs and the scope of grand jury matters, while briefly introducing the circuit split at issue.⁴⁸ Part II discusses the application of witness NDOs by providing examples of existing statutory mechanisms that explicitly provide for witness non-disclosure, as well as by examining the judicial philosophies behind the circuit split and their implications in a practical sense. Part III is a two-part comment: part (a) offers considerations

⁴⁴ See *In re United States* 2017, 2017 U.S. Dist. LEXIS 123841, at *2; See also *In re Grand Jury Proc.*, 417 F.3d 18, 26 (1st Cir. 2005).

⁴⁵ *McKeever*, 920 F.3d at 845 (finding that "nothing in Rule 6(e)(3) . . . suggests [that] a district court has authority to order disclosure of grand jury matter outside the enumerated exceptions); See also *Pitch*, 953 F.3d at 1236 (finding that "[t]he text of Rule 6(e) is best understood as limiting the disclosure of grand jury materials to the circumstances carefully defined in Rule 6(e)(3)(E) . . . district courts may not rely on their inherent, supervisory power to authorize disclosure of grand jury materials outside the bounds of that rule").

⁴⁶ See *McKeever*, 920 F.3d at 845. "[P]ersons bound by grand jury secrecy must not make any disclosures about grand jury matters." *Id.*

⁴⁷ *In re Grand Jury* 1986, 797 F.2d 676, 680 (8th Cir. 1986). "[U]pon a proper showing in an appropriate case, the district court may direct a grand jury witness to keep secret from targets of the investigation the existence of a subpoena, the nature of documents subpoenaed, or testimony before the grand jury, for an appropriate period of time." *Id.*

⁴⁸ See FED. R. CRIM. P. 6(e)(2)(B).

for Congress for revising Rule 6(e), including a proposed amendment. Part (b) argues in support of the discretionary interpretation of Rule 6(e) while offering a more stringent judicial test for issuing witness NDOs that more appropriately balances the considerations on both sides of the split (in the alternative to an amendment to the Rule). Part IV concludes by arguing for the preservation of grand jury secrecy as a countervailing interest to the imposition of temporary silence on a witness to a federal criminal investigation by calling on Congress to amend Federal Rule 6(e).

I. PRIOR LAW

A. The Fourth Branch of Government

Traditionally, the grand jury has been thought of as an “arm of the court,”⁴⁹ armed with the authority to facilitate a judicial inquiry separate from the influence of the presiding judge and prosecutor.⁵⁰ The plenary authority of the grand jury, however, has shifted this tone. In *United States v. Williams*, the Supreme Court reasoned that the grand jury “has not been textually assigned”⁵¹ to any particular branch of the U.S. Government, finding that the grand jury is a “constitutional fixture in its own right.”⁵²

Keeping the grand jury at arm’s length from the Judiciary and the Executive Branch preserves its essential functions: namely, to determine where there is “probable cause that a crime has been committed and the protection of citizens against unfounded criminal prosecutions.”⁵³ These connotations apply to the grand jury in its investigative capacity, as opposed to its indictment function, especially in cases involving “business crime, political corruption, organized crime, and other criminal activity where there is no identifiable victim to report the offense and help investigative agencies.”⁵⁴

Considering the grand jury’s broad autonomy over federal criminal investigations, it has further been argued that the grand jury as an institution is “in effect a fourth branch of government.”⁵⁵ It cannot be understated that

⁴⁹ *Levine v. United States*, 362 U.S. 610, 617 (1960) (citing *Hale v. Henkel*, 201 U.S. 43, 66 (1906), overruled in part by *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 67 (1964)).

⁵⁰ *United States v. Navarro-Vargas*, 408 F.3d 1184, 1199 (9th Cir. 2005) (quoting *United States v. Dionisio*, 410 U.S. 16–17 (1972)). “The Fifth Amendment’s guarantee to indictment by a grand jury” presupposes an investigative body “acting independently of either prosecuting attorney or judge” whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.” *Id.*

⁵¹ *United States v. Williams*, 504 U.S. 36, 47 (1992) (citing *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977)).

⁵² *Williams*, 504 U.S. at 47 (Explaining that “the whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the Government and the people”).

⁵³ *United States v. Calandra*, 414 U.S. 338, 343 (1974) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972)).

⁵⁴ Beale, *supra* note 26 at § 1:7 (2021).

⁵⁵ SUSAN W. BRENNER & LORI E. SHAW, *FED. GRAND JURY* § 2:5 (2nd ed. 2022).

the function of the grand jury between the Executive and the Judicial Branches, therefore, exists in shades of gray. Given this context, the reach of grand jury secrecy over what constitutes “matters occurring before the grand jury”⁵⁶ requires further analysis before drawing any conclusions over witness non-disclosure orders.

B. The Congressional Take

The legislative backdrop to the Federal Rules of Criminal Procedure sheds imperative light on the intended purpose and scope of Rule 6, considering its textual gaps. For example, the Advisory Committee notes to the Rule 6 1977 Amendment note the *expectation* that the identity of any Government attorney or personnel to whom grand jury material is disclosed to will be provided to the court, despite no such requirement explicitly stated anywhere in Rule 6.⁵⁷

Further, the committee’s notes regarding the 1944 adoption of Rule 6 explicitly state that “[t]he [R]ule does not impose any obligation of secrecy on witnesses . . . the seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.”⁵⁸ Notably, however, the Committee nonetheless opted not to affirmatively exclude witnesses from grand jury secrecy, which is particularly emphasized by the Committee’s additional note that “the existing practice on this point varies among the districts.”⁵⁹ Note the First Circuit’s interpretation of the Rules in *In re Grand Jury Proceedings*: “[t]he advisory note says that the rule “does not impose” secrecy obligations and does not say that it prohibits such obligations made by appropriate order. There is no indication in the history of an intent to cut off the courts’ power to restrict disclosure based on extraordinary circumstances.”⁶⁰

As the committee evidently grappled with this very issue, it seems only appropriate that it precluded witnesses from the automatic bind of secrecy without outright precluding the existing practice of ordering witness non-disclosure in cases of clear necessity, thus, to defer to the courts as they similarly weigh the committee’s considerations.

Plainly embedded in the Advisory Committee’s notes is the statement that the 1944 adoption of Rule 6 “continues the traditional practice of se-

⁵⁶ FED. R. CRIM. P. 6(e).

⁵⁷ See FED. R. CRIM. P. 6(e)(3)(A)(i),(ii) (emphasis added).

⁵⁸ See FED. R. CRIM. P. 6. advisory committee’s note to 1944 adoption (note to subdivision (e) 2).

⁵⁹ See *id.*; See generally *In re Swearingen Aviation Corporation*, 605 F.2d 125, 127 (4th Cir. 1979) (finding the committee notes “show[s] that the prohibition against imposing an obligation of secrecy was intended to benefit the witness, should he desire to communicate with counsel or with an associate, and not . . . the subject of the grand jury investigation”) (emphasis added).

⁶⁰ *In re Grand Jury Proc.*, 417 F.3d 18, 26 (1st Cir. 2005) (citing *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004)).

crecy on the part of the members of the grand jury,”⁶¹ thus emphasizing the preservation of the historical role of the jury and its vital guise of secrecy. In enacting Rule 6 and before discussing any of the intricacies of the rule’s provisions, Congress deliberately maintains that secrecy is to be preserved above all else and, therefore, must be weighted heavily when weighing any concerns against witness NDOs.

C. Balancing Harm and Freedom of Speech Considerations

The First Amendment considerations regarding witness non-disclosure orders (colloquially referred to as a type of “gag order”) remain a compelling argument for considerably limiting their use.⁶² Freedom of speech, however, has never been outright, as there are traditional restrictions of speech where the Supreme Court has consistently upheld prescribed regulation and/or punishment for certain classes of speech.⁶³ Further, there is a distinction to be made between what are known as “content-neutral” and “content-based” restrictions on the freedom of speech.⁶⁴ The Supreme Court has held that a particular restriction on speech is content-neutral if it is “justified without reference to the content . . . of the regulated speech.”⁶⁵ Content-based restrictions on speech are those which limit or prevent speech “based on its communicative content.”⁶⁶ Content-based restrictions are subject to the strict scrutiny standard, while content-neutral restrictions are subject only to intermediate scrutiny.⁶⁷

Further, the specific form of restricted speech that concerns witness non-disclosure orders is prior restraint, which describes “judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.”⁶⁸ Presumptively unconstitutional, prior restraints on speech are considered “the most serious and the least tolerable

⁶¹ FED. R. CRIM. P. 6. advisory committee’s note to 1944 Adoption (note to subdivision (e) 1).

⁶² See generally Amanda R. Simmons, *Surveilling and then Shooting the Messenger: Intermediaries, Gag Orders, and the First Amendment*, 167 U. PA. L. REV. ONLINE 191, 227–29; See generally U.S. CONST. amend. I.

⁶³ See e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding that the First Amendment does not protect against the use of “fighting words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”); See also *Virginia v. Black*, 538 U.S. 343, 347 (2003) (finding that the First Amendment speech protection can be abridged by a state’s ban on “true threats . . . which encompasses those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence . . .”) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

⁶⁴ See *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 156 (2015).

⁶⁵ *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S. 661, 696 (2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989)).

⁶⁶ *Reed*, 576 U.S. at 163 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)).

⁶⁷ See *Turner Broadcasting System Inc. v. F.C.C.*, 512 U.S. 622, 636, 642 (1994); Content-based prior restraints on speech must be “narrowly tailored to prohibit only speech that would pose a clear and present danger or imminent harm to national security.” *Twitter, Inc. v. Sessions*, 263 F. Supp. 3d 803, 806 (N.D. Cal. 2017).

⁶⁸ See *Alexander v. United States*, 509 U.S. 544, 550 (1993).

infringement on First Amendment rights.”⁶⁹ As it follows, the witness non-disclosure order is a content-based prior restriction on speech, as it silences the witness based on the information to them which is revealed, and therefore must arise to the level of strict scrutiny by proving to be a narrowly-tailored means of achieving a compelling Government interest.⁷⁰

The order of non-disclosure on a grand jury witness is subject to a test that parallels the traditional strict scrutiny standard, as was used by the Supreme Court in *United States v. Proctor & Gamble Company* concerning disclosure of grand jury materials and later by the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*; “to impose an order of secrecy upon a grand jury witness, there must be a “compelling necessity . . . shown with particularity.”⁷¹ In employing this standard, multiple circuits have asserted that the First Amendment does not bar witness non-disclosure for the preservation of grand jury secrecy when such burden is met.⁷²

But witnesses are not powerless in this context; prior to breaching an NDO, a subpoenaed witness, along with any party who holds a “privilege, a property right, or any constitutional, common law, or statutory right that may be invaded by the subpoena”⁷³ has standing to challenge a subpoena (including the NDO attached to it). Further, Federal Rule of Criminal Procedure 17(c)(2) permits the subpoenaed party to move to quash or modify the subpoena “if compliance would be unreasonable or oppressive” as means for judicial review.⁷⁴

⁶⁹ *Tory v. Cochran*, 544 U.S. 734, 738 (2005) (quoting *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976)).

⁷⁰ *Reed*, 576 U.S. at 163 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)). “Content-based regulations are presumptively invalid.” *Id.*; See also *In re Subpoena* 2018R00776, 947 F.3d 148, 156 (3d Cir. 2020) (finding that “[b]ecause the NDOs are content-based restrictions and presumptively unconstitutional prior restraints, we apply strict scrutiny to determine whether they are constitutionally infirm.”).

⁷¹ *In re Grand Jury* 1986, 797 F.2d 676, 681 (8th Cir. 1986) (citing *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958)).

⁷² See generally *In re Grand Jury Proc.*, 417 F.3d 18, 25–27 (1st Cir. 2005) (Finding that the First Amendment does not “bar an appropriately tailored order” preventing a witness from disclosing the subject-matter of his testimony with any third parties, among whom the Government was suspicious of); See also *In re Grand Jury* 1986, 797 F.2d at 681 (The Eighth Circuit rested its non-disclosure inquiry on whether the U.S. had proven a “compelling necessity . . . shown with particularity”).

⁷³ Beale, *supra* note 26 at § 9:21 (2021); See also *id.* § 9:19 (explaining that “[a] witness subpoenaed to testify or produce evidence before the grand jury may obtain judicial review by seeking to quash the subpoena, or by refusing to answer specific questions, which will ordinarily precipitate a contempt proceeding”) (citing *id.* §§ 6:1–6:22, §§ 11:13–11:21); See generally *United States v. Coplon*, 339 F.2d 192, 193 (6th Cir. 1964) (quoting *Marcus v. U.S.*, 310 F.2d 143, 146 (3d Cir. 1962)) (stating that “a grand jury is an arm of the court, and that refusal to comply with an order of court directing a witness to answer proper questions before the grand jury is a contempt of court.”).

⁷⁴ FED. R. CRIM. P. 17(c)(2). If a witness fails to comply with the subpoena, “without adequate excuse,” contempt proceedings may follow. FED. R. CRIM. P. 17(g).

D. Scope of Grand Jury Matters

Rule 6 plainly states that secrecy applies to all “grand-jury matter[s]”⁷⁵ but leaves little hint as to the scope of such matters. The Third Circuit’s determination of the two main implications for matters before the grand jury are that Rule 6(e) secrecy applies to both (1) the contents of grand jury proceeding transcripts, and (2) “anything which may reveal what occurred before the grand jury . . . both direct and indirect disclosure of information are proscribed.”⁷⁶

From a strict adherence to textualism, grand jury *matters* concern solely those which “occu[r] before the grand jury,”⁷⁷ as stated in Rule 6(e)(2)(B). From a purposivism standpoint, disclosure or non-disclosure of grand jury matters is intended to preserve secrecy in all grand jury proceedings, of which is also mirrored in Congress’ intent as evidenced by the Advisory Committee’s notes on the 1944 adoption of Rule 6.⁷⁸ Further, the rule has commonly been applied to shield material that was “obtained through the grand jury process, though not [actually] presented to [a] grand jury” as subject to secrecy.⁷⁹ Regardless of the judicial philosophy employed, the message is clear that secrecy applies to all matters concerning the grand jury, that have not otherwise been made public.⁸⁰

⁷⁵ FED. R. CRIM. P. 6(e)(3)(A); *See also In re Grand Jury Matter*, 682 F.2d 61, 63 (3d Cir. 1982) (explaining that Rule 6(e) “is intended to preserve this norm of secrecy by preventing the disclosure of matters occurring before a grand jury”); *See generally* General rule or principle as to secrecy, 1 Orfield’s Criminal Procedure Under the Federal Rules § 6:118 (citing *United States v. Norian Corp.*, 709 F. App’x 138 (3d Cir. 2017)) (“Grand jury secrecy applies to all records, orders, and subpoenas relating to grand-jury proceedings, even if the materials were not presented to the grand jury.”).

⁷⁶ *In re Grand Jury Matter*, 682 F.2d 61, 63 (3d Cir. 1982).

⁷⁷ FED. R. CRIM. P. 6(e)(2)(B); *See also* WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIM. PROC. § 8.5(c), n. 82 (4th ed. 2017) (citing *In re Special February, 1975 Grand Jury*, 662 F.2d 1232, 1237–38 (7th Cir. 1981)) (“where subpoenaed witness [was] told that he could avoid grand jury appearance if he furnished truthful information in an office interview, [record] of that interview was grand jury matter even though it was not read to the grand jury”).

⁷⁸ *See* FED. R. CRIM. P. 6. advisory committee’s note to 1944 adoption (note to subdivision (e) 1) (noting that Rule 6 is designed to “continu[e] the traditional practice of secrecy on . . . members of the grand jury”).

⁷⁹ *See* LaFave et al., *supra* note 77 § 8.5(c), n. 82 (citing *People v. Tynan*, 701 P.2d 80, 82 (Colo. App. 1984)); *See generally* Judicial Watch, Inc. v. National Archives & Records Administration, 214 F. Supp. 3d 43, 53 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017) (finding that, while “there is no per se rule against disclosure of . . . information which has reached the grand jury” determining whether Rule 6(e) shields certain materials turns on “whether disclosure would ‘tend to reveal some secret aspect of the grand jury’s investigation,’ requiring some ‘nexus between disclosure and revelation of a protected aspect of the grand jury’s investigation.’”).

⁸⁰ *See* Judicial Watch, Inc. v. Tillerson, 270 F. Supp. 3d 1, 6 (D.D.C. 2017) (citing *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1138, 1140 (D.C. Cir. 2006) (noting “the common-sense proposition that secrecy is no longer ‘necessary’ when . . . grand jury matters . . . become public”).

II. ANALYSIS

A. Statutory Provisions for Witness Non-Disclosure Orders

Presently, there are two categories of statutes available for the Government to request witness non-disclosure orders, as opposed to a court signing off on an order of non-disclosure *sua sponte*: statutes that explicitly provide for non-disclosure (or similar language), and statutes that apply a broad grant for courts to issue any orders that it deems necessary, on the Government's request ("catch-all" statutes). For example, the Stored Communications Act (SCA), 18 U.S.C. §§ 2701–13, and the Right to Financial Privacy Act, 12 U.S.C. §§ 3401–23, each provide for courts to issue non-disclosure orders on witnesses to an investigation.⁸¹ Such orders are generally characterized as protective orders, to "extend only as long as necessary to satisfy the government's interest."⁸² Sections 2705(a)(A)–(B) of the SCA provide the Government an avenue to apply for orders delaying the notification of the existence of a particular subpoena for periods not exceeding ninety days, so long as an "adverse result" would occur as a result of notification of the subpoena.⁸³ Section 2705(b), however, allows for the preclusion of notice, entirely, to a subject the Government wishes to access via subpoena, search warrant, or other court order.⁸⁴ Section 2705(b) must only be granted upon the Government's successful showing that notifying the subject of an investigation of the existence of a particular subpoena will result in the "destruction of or tampering with evidence," or "otherwise seriously jeopardize[e] an investigation."⁸⁵ Importantly, Section 2705(b) does not impose a specific time constraint on the preclusion of notice.⁸⁶ Rather, the section leaves the door open for judges to preclude notice for any "period as the court deems appropriate."⁸⁷ Notably, this statutory grant of judicial discretion embraces the existing discretionary standard that is embraced by the

⁸¹ See 18 U.S.C. §§ 2705 et seq., 12 U.S.C. §§ 3409 et seq.

⁸² U.S. Dep't of Just., Just. Manual § 9-13.700 (2017).

⁸³ See 18 U.S.C. § 2705(a)(A)–(B). A delay of notification application may accompany a court order under certification of a "reason to believe that notification of the existence of the subpoena may have an adverse result[.]" including: "(A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial"); See also 18 U.S.C. § 2705(b). Section 2705(b) permits outright preclusion of notice, "for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order[.]" if the court deems that notification will result in any of the same enumerated risks stated in Section 2705(a).

⁸⁴ See 18 U.S.C. § 2705(b).

⁸⁵ 18 U.S.C. § 2705(b); See also *In re United States*, 41 F. Supp. 3d 1, 8 (D.D.C. 2014).

⁸⁶ See 18 U.S.C. § 2705(b). The Government "may apply to a court for an order *commanding* a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order." *Id.* (emphasis added).

⁸⁷ 18 U.S.C. § 2705(b).

majority of U.S. Courts of Appeals pertaining to witness non-disclosure orders.⁸⁸

Similarly, Section 3409 of the Right to Financial Privacy Act provides for delayed notice if the need is shown with “reasonable specificity”⁸⁹ for no longer than ninety days.⁹⁰ Section 3409(2) further imposes a mechanism for extension of the delay of notice provision; courts may extend the delay for periods “up to ninety days each . . . upon application, but only in accordance with this subsection.”⁹¹ The extension provision presumably preserves both an avenue for meaningful judicial review under the standards set by the statute (requiring the reviewing court to again weigh the necessity for an extension against the factors listed in § 3409(a)(1)–(3)),⁹² in addition to extending time to continue the investigation under the guise of complete secrecy.

The benefit of these explicit statutes is that courts no longer need to apply a complete discretionary approach when issuing a non-disclosure order on a witness, as Congress has skirted the Rule 6(e) considerations via another statute. This benefit, however, of course solely applies under the specific circumstances and/or to the specific type of evidence that the statute governs.

Conversely, there are catch-all statutes that serve as somewhat all-encompassing provisions under which courts may broadly issue orders, generally, without any explicit reference to a particular court order. Most relevant in this context, the Government has successfully utilized the All-Writs Act to issue witness non-disclosure orders along with grand jury subpoenas.⁹³ The All-Writs Act grants courts the power to “issue all writs nec-

⁸⁸ See *In re Grand Jury* 1986, 797 F.2d 676, 681 (8th Cir. 1986) (finding that an order of non-disclosure on a grand jury witness must be predicated by “compelling necessity . . . shown with particularity”).

⁸⁹ 12 U.S.C. § 3409(a).

⁹⁰ 12 U.S.C. § 3409(b)(1).

⁹¹ 12 U.S.C. § 3409(2).

⁹² See 12 U.S.C. § 3409(a)(1)–(3).

Upon application of the Government . . . the customer notice required under section 3404(c), 3405(2), 3406(c), 3407(2), 3408(4), or 3412(b) of this title may be delayed by order of an appropriate court if the presiding judge or magistrate judge finds that--

(1) the investigation being conducted is within the lawful jurisdiction of the Government authority Seeking the financial records;

(2) there is reason to believe that the records being sought are relevant to a legitimate law enforcement inquiry; and

(3) there is reason to believe that such notice will result in--

(A) endangering life or physical safety of any person;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceding subparagraphs.

12 U.S.C. § 3409(a)(1)–(3).

⁹³ *In re United States* 2017, 2017 U.S. Dist. LEXIS 123841, at *1 (D.D.C. July 7, 2017).

essary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”⁹⁴ Essentially, the Act can serve as a gap filler where Federal Rules and statutory framework have left a vacuum, on a very narrow basis, when Congress has not expressly authorized nor prohibited the issuance of non-disclosure orders.⁹⁵

All Federal Courts are endowed by the All-Writs Act, 28 U.S.C. § 1651, the “power to issue such commands . . . as may effectuate and prevent the frustration of orders . . . previously issued in [the] exercise of jurisdiction otherwise obtained[.]”⁹⁶ District courts are expected to exercise their broad authority under the Act solely in cases of “clear necessity and to balance the burden . . . required to render assistance against the necessity[.]”⁹⁷ somewhat mirroring the balancing act that is required under a strict scrutiny analysis.⁹⁸ While the Act is written as a sweeping provision, it cannot be contrived as transforming the power of the court “to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.”⁹⁹ The differences between statutory text and application are crucial as we revert back to the circuit split at issue, primarily considering the exhaustive reading of Rule 6 as interpreted by the court in *McKeever v. Barr*.¹⁰⁰

B. Examining the Exhaustive Interpretation of Rule 6

On its face, *McKeever v. Barr* limited the *disclosure* of grand jury materials solely to those individuals listed under Rule 6(e)(3).¹⁰¹ At issue in the case were grand jury materials concerning the mysterious 1956 disappearance of Columbia University Professor Jesús de Galíndez Suárez, who

⁹⁴ 28 U.S.C. § 1651(a); *See also* 18 U.S.C. § 3512(a)(1) (indicating that, upon proper application, “a Federal judge may issue *such orders as may be necessary* to execute a request” for international mutual legal assistance matters) (emphasis added).

⁹⁵ *See In re United States* 2019, 2019 U.S. Dist. LEXIS 163505, at *2 (D.D.C. Aug. 6, 2019) (citing *Carlisle v. U.S.*, 517 U.S. 416, 429 (1996)); *See also* *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 173 (1977) (Finding that the authority to issue orders under the Act may be exercised in the court’s “sound judgment” when necessary “to achieve the rational ends of law”); *See also* *Pa. Bur. of Corr. v. Marshals Svc.*, 474 U.S. 34, 43 (1985) (reasoning that the Act provides a “residual source of authority to issue writs that are not otherwise covered by statute”).

⁹⁶ *New York Tel. Co.*, 434 U.S. at 172–73.

⁹⁷ *Id.* at 165, n. 5.

⁹⁸ *See also In re Subpoena* 2018R00776, 947 F.3d 148, 156 (3d Cir. 2020) (citing *United States v. Marcavage*, 609 F.3d 264, 286 (3d Cir. 2010)) (explaining that strict scrutiny is the proper standard to apply to non-disclosure orders, requiring the government to show “that the restriction on speech “(1) serve[s] a compelling governmental interest; (2) [is] narrowly tailored to achieve that interest; and (3) [is] the least restrictive means of advancing that interest.”).

⁹⁹ *In re United States* 2017, 2017 U.S. Dist. LEXIS 123841, at *1 (D.D.C. July 7, 2017) (quoting *Pa. Bur. Of Corr.*, 474 U.S. at 43).

¹⁰⁰ *See McKeever v. Barr*, 920 F.3d 842, 846 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020) (explaining that the court’s own “understanding of Rule 6(e) . . . require[s] a district court to hew strictly to the list of exceptions to grand jury secrecy,” as listed in Rule 6(e)(3)).

¹⁰¹ *See id.* at 850; *See generally* FED. R. CRIM. P. 6(e)(3).

has since never resurfaced publicly.¹⁰² In 1957, a grand jury was appointed to investigate the incident, but records of its findings were not publicly released.¹⁰³ In 2013, a researcher and writer named Stuart McKeever, who had been investigating the disappearance of Galíndez Suárez, unsuccessfully petitioned the United States District Court for the District of Columbia to disclose the records from the investigation.¹⁰⁴ The D.C. Circuit affirmed and further concluded that disclosure of grand jury materials is permitted solely to the exceptions listed in Rule 6(e)(3), joining the Sixth Circuit in ceasing to permit disclosure of such materials to third parties even in extraordinary circumstances of public or historical need.¹⁰⁵

Considering the issue of disclosing grand jury materials, the U.S. courts of appeals fall along the same lines of either limiting disclosure to the enumerated list in Rule 6(e)(3) or permitting disclosure in circumstances where a third party successfully shows “a need for disclosure with particularity [such] that the secrecy of proceedings may be lifted only to the extent necessary to fulfill narrowly tailored and compelling need.”¹⁰⁶

Disclosure and, conversely, non-disclosure of grand jury materials represent two sides of the same coin. Limiting disclosure to the enumerated exceptions is both efficient and commonsense for the sake of preserving grand jury secrecy. Practically, however, the effect of *McKeever* raises concerns regarding the need for witness non-disclosure orders in efforts to preserve the same ideal. We saw this play out in the fallout of *McKeever*. Recall, in *In re United States 2017*, the court issued a witness non-disclosure order on Uber Technologies, utilizing the All-Writs Act.¹⁰⁷ In *In re United States 2019*, however, the D.C. Circuit denied an order, also under the All

¹⁰² See *McKeever*, 920 F.3d at 846.

¹⁰³ Elizabeth B. Wydra, Gorod, Brianne J. and Phatak, Ashwin, *Rule of Law, McKeever v. Barr*, CONST. ACCT. CTR., <https://www.theconstitution.org/litigation/mckeeper-v-barr/>.

¹⁰⁴ See *McKeever*, 920 F.3d at 850; But see *In re* Petition of Kutler, 800 F. Supp. 2d 42, 50 (D.D.C. 2011) (Holding that “the relevant factors weigh in favor of unsealing President Nixon’s grand jury testimony” on the “basis of historical interest”).

¹⁰⁵ See *McKeever*, 920 F.3d at 850 (holding that, despite that its holding “differs from that of other circuits,” the court “agrees with the Sixth Circuit, which has turned down an invitation to craft an exception to grand jury secrecy outside the terms of the Rule”) (citing *In re* Grand Jury 89-4-72, 932 F.2d at 488-89 (6th Cir. 1991)).

¹⁰⁶ *In re* Grand Jury 89-4-72, 932 F.2d 481, 489 (6th Cir. 1991); See also *United States v. Fox*, 520 F. Supp. 3d 904, 905 (W.D. Mich. 2021) (“a party requesting disclosure under the exceptions found in Rule 6(e) usually must satisfy a two-step process: (1) demonstrating the exception is met; and (2) a particularized need”).

¹⁰⁷ See *In re United States 2017*, 2017 U.S. Dist. LEXIS 123841, at *3 (D.D.C. July 7, 2017) (holding that there was “‘compelling necessity’ for a non-disclosure order [because of] Uber’s policy . . . to ‘notify riders and driver-partners of any requests for their information from law enforcement prior to disclosure’ [which] directly conflicts with the primary purpose of grand jury secrecy”) (citing Gov’t Mot. at 3 ¶ 5).

Writs Act,¹⁰⁸ specifically due to the court's holding in *McKeever*, which was decided in between the two cases.¹⁰⁹

Presented with the question of whether to issue the requested order of non-disclosure for one year, accompanying a witness' receipt of a grand jury subpoena, the court in *In re United States 2019* first required the Government to "file a supplemental brief addressing whether, following the D.C. Circuit's opinion in *McKeever v. Barr*, [citation omitted] Federal Rule of Criminal Procedure 6(e)(2) must be read 'as an exhaustive list of people bound by grand jury secrecy,' making . . . the requested order improper."¹¹⁰ The court subsequently held the order improper, reading the Rule 6(e)(2)(A) obligations of secrecy as exhaustive. Despite the fact that *McKeever* only concerned disclosure exceptions in Rule 6(e)(3), the court found "that the rule-based exceptions are an exhaustive list seems equally applicable to Rule 6(e)(2)(B)'s list of who may be bound by an 'obligation of secrecy' in the first instance."¹¹¹

Here, the court essentially read the terms *secrecy* and *non-disclosure* as synonymous, failing to predict that doing so cuts both ways regarding the preservation of grand jury secrecy. While the two terms appear synonymous in a nonlegal sense, the practical procedural effect of this interpretation effectively thwarts grand jury secrecy by allowing a witness in receipt of a grand jury subpoena to freely disclose such matters (at least, in instances where a specific statutory authorization of witness non-disclosure does not apply).

Since *McKeever* and *In re United States 2019*, the Eleventh Circuit has joined the District of Columbia and Circuit in embracing the limiting, exhaustive reading of Rule 6 as it applies to witness non-disclosure orders.¹¹²

C. Examining Discretionary Interpretation of Rule 6

Alternatively, the First and Eighth Circuits have embraced a more discretionary reading of Rule 6, indicating that the rule permits "exceptions

¹⁰⁸ See *In re United States 2019*, 2019 U.S. Dist. LEXIS 163505, at *5 (D.D.C. Aug. 6, 2019).

¹⁰⁹ *McKeever*, 920 F.3d at 850; *But see id.* at 853 (Srinivasan J. Dissenting) (referencing *Haldeman v. Sirica*, 501 F.2d 714 (1974) (holding that the release of grand jury materials to the House Judiciary Committee as they bore on the Committee's inquiry "into possible grounds of impeachment of the President of the United States" was proper).

[G]rand jury materials falling outside Rule 6(e)'s exceptions cannot be released even if there is a strong public interest favoring disclosure and no enduring interest in secrecy . . . In my respectful view, however, our court's en banc decision in *Haldeman v. Sirica* [citation omitted], allows for district court disclosures beyond Rule 6(e)'s exceptions. *Id.*

¹¹⁰ *In re United States 2019*, 2019 U.S. Dist. LEXIS 163505, at *1 (citing Minute Order (July 29, 2019)).

¹¹¹ *Id.* at *3.

¹¹² See *Pitch v. United States*, 953 F.3d 1226, 1234 (11th Cir. 2020) (overruling *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1268–69 (11th Cir. 1984)) (citing *McKeever*, 920 F.3d at 850); See also *United States v. McDougal*, 559 F.3d 837, 840–41 (8th Cir. 2009)).

premised on inherent judicial power.”¹¹³ In *In re Grand Jury 1986*, the Eighth Circuit concluded that on “proper showing in an appropriate case, the district court may direct a grand jury witness to keep secret from targets of the investigation the existence of a subpoena, the nature of documents subpoenaed, or testimony before the grand jury, for an appropriate period of time.”¹¹⁴ The case concerned a non-disclosure order issued to a financial institution, preventing it from disclosing the existence or contents of the subpoena or investigation to its client, the target of the investigation, for ninety days (after the institution had communicated its intent to inform its client).¹¹⁵ The institution sought review, asserting first, that the court lacked the authority under Rule 6(e)(2) to impose secrecy on it as a witness, and, second, that even if the court possessed the requisite authority, the Government had not made “an adequate showing to warrant . . . the order.”¹¹⁶ The district court went on to deny the Government’s motion under the All-Writs Act, 28 U.S.C. § 1651, the Right to Financial Privacy Act, 12 U.S.C. §§ 3401–23, and under its own discretion to issue protective orders.¹¹⁷

Despite the district court’s reliance on the text of Rule 6(e) and its advisory notes, the Eighth Circuit nonetheless reversed and imposed non-disclosure on the institution, given the fact that the order prevented the institution from disclosing to the specific targets of the investigation while still permitting it to disclose to counsel.¹¹⁸ In balancing the Advisory Committee’s note on preserving a witness’ access to counsel,¹¹⁹ the court asserted that “to construe the provisions of Rule 6(e) to give a grand jury witness unrestricted freedom to communicate the existence of the subpoena . . . the investigation[,] or the content of testimony to targets could completely undercut the entire purpose of grand jury secrecy,” noting that it further did not believe that this was Congress’ intent behind enumerating exceptions to secrecy in Rule 6(e)(3).¹²⁰

The First Circuit also followed a similar approach in *In re Grand Jury Proceedings* when it reviewed an NDO imposed on a lawyer who had ad-

¹¹³ *In re Grand Jury Proc.* 417 F.3d at 26; *See also In re Grand Jury 1986*, 797 F.2d 676, 680 (8th Cir. 1986).

¹¹⁴ *In re Grand Jury 1986*, 797 F.2d at 680.

¹¹⁵ *Id.* at 677. Note, this case pre-dated the non-disclosure provision in the Right to Financial Privacy Act, 12 U.S.C. §§ 3413(i) and 3409, which now explicitly provide for non-disclosure on financial entities when subpoenaed for customer bank records. The Eighth Circuit’s conclusion in this case is still relevant regarding the balancing test employed, as it has been mimicked among courts in other circuits. *See, e.g., In re Grand Jury Proceedings*, 17 F. Supp. 3d 1033, 1035–36 (S.D. Cal. 2013) (relying on the Eighth Circuit’s “standard for an order imposing secrecy” . . . “compelling necessity” demonstrated with particularity,” in issuing an order of non-disclosure on Corporation A, from a subpoena for documents sought during a grand jury investigation of Corporation B, as there was no controlling Ninth Circuit precedent on the issue).

¹¹⁶ *In re Grand Jury 1986*, 797 F.2d at 677.

¹¹⁷ *Id.* at 677–78.

¹¹⁸ *Id.* at 680–81.

¹¹⁹ *See* FED. R. CRIM. P. 6. advisory committee’s note to 1944 adoption (note to subdivision (e) 2).

¹²⁰ *In re Grand Jury 1986*, 797 F.2d at 680.

vised his client to commit perjury before a grand jury and represented another client who was connected to the perjury of the first client.¹²¹ To protect against the risk of influence on a subsequent witness, the district court ordered the lawyer “not to reveal to anyone . . . the ‘substance of the Government’s motion to compel’” over the client’s objection that Rule 6(e)(2)(A) prevented the court from barring the lawyer, a witness to the grand jury, from disclosing to others.¹²²

In addition to the First Amendment and Rule 6(e)(2) challenges, the court’s inquiry was complicated by questions regarding the scope of lawyer-client privilege and the crime-fraud exception. Nevertheless, the court reasoned that Rule 6(e) “accommodate[s] rare exceptions premised on inherent judicial power[,]” to impose non-disclosure on witnesses without an explicit statutory grant.¹²³ The court likened this power to its ability to limit discovery in civil proceedings: “regularly expressed in orders limiting access to discovery materials [or] closing sensitive proceedings . . . these powers are . . . reconfirmed by rules . . . but orders of this kind predated such rules which . . . refine the underlying authority without displacing it.”¹²⁴

After delineating a comprehensive outline of the court’s power and balancing the considerations it set forth, the First Circuit nonetheless held that the non-disclosure order in this case was still overly broad as written.¹²⁵ Instead, the court reaffirmed its principles by restricting the order “to cover only ‘matters occurring before the grand jury’” and not the witness’ “independent recollections about external prior events.”¹²⁶ The First Circuit’s holding remains consistent with that of *In re Grand Jury 1986* by reaffirming the principle of a court’s inherent power to issue protective orders in

¹²¹ *In re Grand Jury Proc.* 417 F.3d 18, 19–20 (1st Cir. 2005).

¹²² *Id.* at 20.

¹²³ *Id.* at 23–26.

¹²⁴ *Id.* at 26; *See also* FED. R. CIV. P. 26(c).

The court may, for good cause, issue an order to protect a party or person . . . including . . .

- (A) forbidding the disclosure or discovery;
- (B) specifying terms . . . for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected . . .
- (D) forbidding inquiry . . . or limiting the scope of disclosure or discovery . . .
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that . . . confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Fed. R. Civ. P. 26(c)(1)(A)–(H).

¹²⁵ *See In re Grand Jury Proc.*, 417 F.3d at 28.

¹²⁶ *Id.* at 27.

cases of compelling necessity, while displaying judicial restraint by opting not to expand that power beyond its limit.¹²⁷

Across these cases, each court has balanced similar considerations when deciding it holds the discretion to issue orders of non-disclosure on grand jury witnesses. Most importantly, courts noted the temporal limit of non-disclosure orders, as opposed to blanket impositions of secrecy.¹²⁸ Further, in *In re United States 2017*, *In re Grand Jury 1986*, and *In re Grand Jury Proceedings*, each court carefully weighed opposing parties' express stances or policy considerations in favor of disclosing grand jury matters to subjects of the investigation.¹²⁹

Moreover, the common test employed by each court is a heavily fact-based inquiry that mirrors the strict scrutiny test, the highest judicial standard employed on speech restrictions.¹³⁰ Just as the Supreme Court has routinely upheld traditional and content-based restrictions on speech while utilizing the strict scrutiny standard,¹³¹ it does not logically follow that this standard suddenly becomes improper in light of the longstanding compelling necessity of grand jury secrecy, as the D.C. Circuit has effectively asserted in *McKeever*.

III. COMMENT

Considering the Advisory Committee's notes, this article asserts that the congressional dicta supporting the Rule evidences a clear intention to extend non-disclosure to witnesses, when justice so requires, in an effort to preserve the essential pillar of secrecy in criminal investigations. Recall from the 1944 adoption of Rule 6 that the Committee intended to continue

¹²⁷ See generally *In re Grand Jury 1986*, 797 F.2d 676, 680–82 (8th Cir. 1986); See also *In re Grand Jury Proc.*, 417 F.3d at 23–26.

¹²⁸ *In re the United States for an Order Pursuant to 28 U.S.C. § 1651a*, No. 17-mc-01604 (*In re United States 2017*), 2017 U.S. Dist. LEXIS 123841, at*1 (D.D.C. July 7, 2017) (noting that the duration of the order of non-disclosure sought on Uber Technologies was for 180 days).

¹²⁹ See *id.* at *3 (noting that it was Uber Technology's "policy to notify riders and driver-partners of any requests for their information from law enforcement prior to disclosure."); See also *In re Grand Jury 1986*, 797 F.2d at 677 (considering the financial institution's express intent and preference to inform its client of the existence and contents of the subpoena issued to it by the grand jury); See also *In re Grand Jury Proc.*, 417 F.3d at 28 (noting that the Government's motion for non-disclosure was decisively predicated on the witness' direct influence on other witnesses in the investigation, by directing them to commit perjury).

¹³⁰ See *In re Grand Jury 1986*, 797 F.2d at 681 (finding that an order of non-disclosure on a grand jury witness must be predicated by "compelling necessity . . . shown with particularity"); See also *United States v. Marcavage*, 609 F.3d 264, 287 (3d Cir. 2010) (explaining that strict scrutiny applies to content-based restrictions, requiring them to "(1) serve a compelling . . . interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest."); See also *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 395 (1992) (noting that "[c]ontent-based regulations are presumptively invalid").

¹³¹ *In re Subpoena 2018R00776*, 947 F.3d 148, 159 (3d Cir. 2020) (holding that the witness non-disclosure order was the "least restrictive means to maintain grand jury secrecy[.]" after applying strict scrutiny).

the “traditional practice of secrecy.”¹³² The notes further provide that the rule imposes no automatic *obligation* of secrecy on witnesses, then acknowledges that the “existing practice [of imposing secrecy on witnesses] varies among the districts . . . the seal of secrecy seems an unnecessary hardship if a witness is not permitted to make disclosure to counsel or to an associate.”¹³³

This article deduces three conclusions from the Committee’s notes, along with text of Rule 6(e) as enacted: First, the intent to continue the traditional practice of secrecy decisively places secrecy within the investigative process above all else. Second, the Committee’s discussion on the mixed status of imposing secrecy on witnesses prior to enacting Rule 6(e), coupled with its deliberate decision to exclude witnesses from the rule entirely, acknowledges the legitimate need for secrecy to be imposed on witnesses in certain occasions by (deliberately) leaving a vacuum in the statute for courts to interpret accordingly (hence, the discretionary reading of Rule 6(e)).

These first two points are key in developing the third. The obligation of grand jury “*secrecy*” is not synonymous with an order of “non-disclosure,” as opposed to the D.C. Circuit’s commutable reading of the terms in *McKeever v. Barr*.¹³⁴ Therefore, the term “*disclosure*” as it is written in 6(e)(3) extends to non-disclosure orders. The Rule 6(e) secrecy requirement automatically establishes secrecy per se on those listed under the rule, which is permanent unless a Rule 6(e)(3)(A) exception applies.¹³⁵ An order of non-disclosure, however, is never permanent nor automatic; one must be applied for, stated with sufficient particularity, granted only by the “detached scrutiny of a neutral magistrate,”¹³⁶ and ceases after a set duration. Albeit Rule 6(e)(2)(B) does constitute the bounds of grand jury secrecy that are *automatically* imposed for an infinite duration, the rule simply does not prevent courts from issuing orders of non-disclosure to witnesses as a means to preserve the function and secrecy of investigative efforts.

Placing the order of non-disclosure in the rule merely serves to codify a longstanding practice that preceded the Rules themselves, now under a uniform standard that adequately weighs the valid competing interests at stake. On the contrary, limiting non-disclosure solely to instances of direct statutory authorization risks the exposure of sensitive investigation information, at the discretion of any individual witness, to an audience of their choosing, thus entirely undermining grand jury secrecy and the integrity of the grand jury process. Surely, Congress could not have intended for the decision to

¹³² FED. R. CRIM. P. 6. advisory committee’s note to 1944 adoption (note to subdivision (e) 1).

¹³³ *Id.* at note to subdivision (e) 2.

¹³⁴ See *McKeever v. Barr*, 920 F.3d 842, 845 (D.C. Cir. 2019) (“[P]ersons bound by grand jury secrecy must not make any disclosures about grand jury matters.”).

¹³⁵ See FED. R. CRIM. P. 6(e)(3)(A)(i)–(iii).

¹³⁶ *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

thwart an underpinning of a historical institution to be left to a grand jury witness, rather than to the discretion of a court of law.¹³⁷ The forthcoming subsections propose methods for resolving this circuit split both judicially and legislatively, based on the derived conclusions stated above.

A. Rule 6(e) Amendment Proposal

In declining to issue a writ of certiorari, Justice Breyer issued a statement regarding the Supreme Court's decision not to review *McKeever v. Barr*.¹³⁸ In a short paragraph, Justice Breyer summarized how the holding in *McKeever* conflicts not only with that of "several other Circuits," but also with the "views of the Rules Committee," regarding the disclosure of grand jury materials.¹³⁹ In the spirit of urging the Rules Committee to revisit the disclosure provisions of Federal Rule of Criminal Procedure 6(e), the following proposals are asserted by the author:

First, a provision to Rule 6(e) must be added to explicitly grant U.S. District Courts the authority to issue orders of non-disclosure on grand jury witnesses as justice so requires, imposed with a specific durational limit.¹⁴⁰ An exception must accompany the provision, providing that any order of non-disclosure issued on a grand jury witness must preserve the witness' ability to "make a disclosure to counsel or to an associate," therefore codifying the Rules Committee's main concern against including witnesses in Rule 6(e)(2) grand jury secrecy.¹⁴¹ Third, the section must qualify the court's discretion to issue witness non-disclosure orders by requiring a sufficient likelihood that disclosure of the existence or the contents of the order will result in a detrimental outcome, sufficiently posed to impede the integrity of the criminal investigation.¹⁴² Below is a compilation of each of these ideals into one novel amendment to Rule 6(e), as proposed by the author:

[Proposed] Federal Rule of Criminal Procedure 6(e)(2)(C). Witness Non-Disclosure: Accompanying a proper subpoena or other judicial order, the court may issue an order of non-disclosure

¹³⁷ See generally *In re Grand Jury Proc.*, 417 F.3d 18, 26 (1st Cir. 2005) (finding that "[a]bsent restriction, courts have inherent power, subject to the Constitution and federal statutes, to impose secrecy orders incident to matters occurring before them . . . [t]hose who drafted and approved Rule 6(e) Seemingly intended to do no more than abolish a general practice existing in some districts of automatically silencing grand jury witnesses as to their testimony.").

¹³⁸ See *McKeever v. Barr*, 140 S.Ct. 597, 597–58 (2020) (Breyer, J., statement respecting denial of cert.).

¹³⁹ *Id.* at 598 (Breyer, J., statement respecting denial of cert.) ("Whether . . . courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question . . . one I think the Rules Committee both can and should revisit.").

¹⁴⁰ See generally *In re Grand Jury Subpoena*, No. 18-MJ-00085, 2018 U.S. Dist. LEXIS 12396, at *1 (D. Nev. Jan. 25, 2018) (Emphasizing that that "courts are especially disinclined to issue nondisclosure orders that a grand jury witness remain silent for a lengthy or indefinite period").

¹⁴¹ See FED. R. CRIM. P. 6. advisory committee's note to 1944 adoption (note to subdivision (e) 2).

¹⁴² See, e.g., 18 U.S.C. §§ 2705(b)(1)–(5); See also 12 U.S.C. §§ 3409(a)(3)(A)–(E).

on a recipient of a judicial order, upon a showing of compelling necessity, for an appropriate period not to exceed one-hundred and eighty (180) days, prohibiting the witness not to disclose, in any fashion, the existence of or the contents of the order. The order must be narrowly tailored to prevent any risk(s) listed in Rule 6(e)(2)(C)(ii)(1)–(5).

(i) Exception. The existence of or the contents of the judicial order sponsoring an order of non-disclosure under this section may be disclosed to the recipient’s counsel for the purpose of obtaining legal advice or otherwise facilitating professional legal services.

(ii) Merits. An order of non-disclosure imposed on a witness must accompany a substantial likelihood that disclosure of the existence or contents of the order will result in:

- “(1) endanger[ment] [of] the life or physical safety of an individual;
- (2) flight from prosecution;
- (3) destruction of or tampering with evidence;
- (4) intimidation of potential witnesses; or
- (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.”¹⁴³

(iii) Review. A recipient may move to quash or modify order of non-disclosure within twenty-one (21) business days of receipt, “if compliance would be unreasonable or oppressive.”¹⁴⁴

(iv) Extension. An order of non-disclosure issued to a witness under Rule 6(e)(2)(C) may be renewed, upon application, for additional periods not exceeding thirty (30) days, only in accordance with this subsection.¹⁴⁵

Note that Proposed Rule 6(e)(2)(C)(ii) reflects the merit standard for delayed notification of a judicial order under the Stored Communications Act.¹⁴⁶ This SCA provision outlines the very real and pertinent risks that disclosure of grand jury materials through a subpoena may present for the integrity and secrecy of a federal criminal investigation.¹⁴⁷ Proposed Rule 6(e)(2)(C)(iii) also provides for timely judicial review of the non-disclosure order for two reasons: First, to preserve the efficiency of grand jury proceedings, minimizing the risk of disruptive, untimely mini-hearings to arise

¹⁴³ 18 U.S.C. § 2705(b)(1)–(5); *See also* 18 U.S.C. § 2705(a)(2)(A)–(E).

¹⁴⁴ FED. R. CRIM. P. 17(c)(2).

¹⁴⁵ *See generally* 12 U.S.C. § 3409(b)(2).

¹⁴⁶ *See* 18 U.S.C. § 2705(b)(1)–(5); *See also* 18 U.S.C. § 2705(a)(2)(A)–(E).

¹⁴⁷ *See* 18 U.S.C. § 2705(b)(1)–(5).

during the latter, pivotal points of the investigation.¹⁴⁸ Second, to preserve a standard of judicial review specifically for the non-disclosure order, which mirrors Rule 17(c)(2) for subpoenas, in an effort to appreciate the witness' speech interests.¹⁴⁹

The amended rule also provides a mechanism for extension of an existing non-disclosure order, for a much shorter period of thirty days, in the event a court finds that the Government showed that an extension serves as a narrowly-tailored means of preserving a compelling interest(s) listed in Rule 6(e)(2)(C)(ii)(1)–(5), which mirrors the extension provision under the Right to Financial Privacy Act.¹⁵⁰ Finally, the rule also contains strict scrutiny elements.

Proposed Rule 6(e)(2)(C) presents a notably high standard against prior restraint concerns, implicating language of compelling necessity and narrow tailoring to enumerated risk factors, to be weighed uniformly across federal courts. Further, the amendment preserves methods of judicial review and access to counsel, in favor of the subject. The amendment is designed to limit judicial discretion to a set of applicable factors applied to each case, as opposed to the vague discretionary standard that exists today.¹⁵¹ Compare the broad statutory grant utilized for non-disclosure orders in the Consolidated Laws of New York, reproduced in relevant part below:

§ 2b: General powers of courts of record.

A court of record has power

1. to issue a subpoena requiring . . . a person . . . to testify in a cause pending in that court, subject, however, to the limitations prescribed by law . . .
2. to administer an oath . . . in the exercise of the powers and duties of the court . . .
3. to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.

While the statute noticeably lacks any reference to orders of non-disclosure, delayed or preclusion of notice, New York state courts have repeatedly relied on the sweeping § 2-b(3) language, coupled with the “inher-

¹⁴⁸ See generally *U.S. v. Calandra*, 414 U.S. 338, 350 (1974) (quoting *U.S. v. Dionisio*, 410 U.S. 1, 17 (1973) (Finding that “[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public’s interest in the fair and expeditious administration of the criminal laws”)).

¹⁴⁹ See *FED. R. CRIM. P.* 17(c)(2).

¹⁵⁰ See generally 12 U.S.C. § 3409(2).

¹⁵¹ See *supra* note 129.

ent powers” of courts, to “restrict disclosure of . . . investigative efforts to protect the integrity of the [i]nvestigation[.]”¹⁵²

Finally, Proposed Rule 6(e)(2)(C) provides a specific duration requirement (180 days), as opposed to duration limits set by judicial discretion, as found in Section 2705(b) of the SCA.¹⁵³ Presently, the U.S. Department of Justice Manual guides prosecutors utilizing the SCA to seek preclusion of notice orders to limit such “applications [to] seek to delay notice for one year or less.”¹⁵⁴ Conversely, Proposed Rule 6(e)(2)(C) considerably limits this period, when another statute does not otherwise control. Practically, this provision would mostly apply in cases where the recipient of the subpoena is an individual as opposed to an entity, in efforts to unify the standard across all recipients, as well as to preserve, and limit, prior restraint over the individual.

B. Heightened Judicial Standards

As discussed by the First Circuit in *In re Grand Jury Proceedings*, the Rule 6(e)(2)(A) “obligation of secrecy”¹⁵⁵ imposed on those listed in Rule 6(e)(2)(B) is just that, an obligation. Rule 6(e)(2)(A) “set[s] a default rule of permitting disclosure by witnesses absent a contrary order by the court in that proceeding, but also . . . leave[s] open the possibility of restrictions where they can be justified by particular and compelling circumstances.”¹⁵⁶

The obligation is automatically imposed on grand jurors, court reporters, attorneys for the Government, and others listed in Rule 6(e)(2)(B); moreover, it comprises the de minimis threshold of secrecy, not the upper limit.¹⁵⁷ A subpoena issued from a grand jury investigation inherently contains sensitive information that must be protected by a temporary non-disclosure order, in order to, *inter alia*, preserve the freedom and integrity of grand jury deliberations, protect the rights of the accused, and to encourage those with pertinent information to come forward in aid of the investigation.¹⁵⁸

¹⁵² See *In re New York Mayor’s Office of Special Enforcement*, 2020 N.Y. Misc. LEXIS 829, at *1–2 (Sup. Ct. Feb. 26, 2020); See also *In re New York City Mayor’s Office of Special Enforcement*, for a Non-Disclosure Order Directed to Airbnb, Inc., 2020 N.Y. Misc. LEXIS 729, at *1 (Sup. Ct. Feb. 20, 2020).

¹⁵³ Cf. 18 U.S.C. § 2705(b).

¹⁵⁴ See 18 U.S.C. §§ 2705 et seq., 12 U.S.C. §§ 3409 et seq. The one-year provision is the standard embraced by DOJ, barring any “exceptional circumstances,” which may be extended for periods of “equal or less duration” in the event of expiration. *Id.*

¹⁵⁵ FED. R. CRIM. P. 6(e)(2)(A). “No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).” *Id.*

¹⁵⁶ *In re Grand Jury Proc.*, 417 F.3d at 26 (citing *In re Grand Jury Proceedings*, 814 F.2d 61, 69 (1st Cir. 1987)).

¹⁵⁷ See generally *In re Grand Jury Proc.*, 417 F.3d at 26.

¹⁵⁸ See *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681–82 n.6, (1958) (citing *United States v. Rose*, 215 F.2d 617, 628–29 (3d Cir. 1954)).

These legitimate policy considerations underlying grand jury secrecy must be scrutinized under appropriate judicial weight to permit witness non-disclosure orders, one that is uniform across the U.S. Federal Courts. Recall the current generally accepted test, which requires a display of “compelling necessity . . . shown with particularity.”¹⁵⁹ As the D.C. Circuit relinquished its authority to issue non-disclosure orders under this standard in *McKeever*.¹⁶⁰

First, an obvious addition to the current standard is to tack on an explicit duration requirement to the imposition of the non-disclosure order, such as: “a display of compelling necessity, shown with particularity, given the totality of the circumstances, for a narrow, reasonable period of time.” Under this standard, the order is required to be tailored to a certain timeframe in an effort to preserve any concerns or considerations about prior restraint.

A second option is to forgo the existing standard altogether in lieu of a more traditional strict scrutiny standard, as applied in cases regarding restrictions on content-based speech.¹⁶¹ This standard would ask whether the non-disclosure order is “justified by a compelling government interest and is narrowly drawn to serve that interest.”¹⁶² To survive a strict scrutiny analysis, typically, there must be an “‘actual problem’ in need of solving . . . and the curtailment of free speech must be actually necessary to the solution.”¹⁶³ In light of the many policy considerations for the preservation of grand jury secrecy, the problem, in this context, rests in the risk of potential dissemination of sensitive grand jury matters by a witness. The temporary curtailment of the witness’ speech right to disclose the grand jury information they receive in a judicial order is decisively the only means available to preserve secrecy.¹⁶⁴

Regardless of which heightened judicial standard is used, the practical outcome would likely still result in a similar circuit split, as the existing discretionary test very closely mirrors the traditional strict scrutiny standard.¹⁶⁵ The justification behind each of these propositions, however, remains unchanged: to preserve the secrecy of grand jury investigations, both

¹⁵⁹ *In re Grand Jury* 1986, 797 F.2d 676, 681 (8th Cir. 1986); *See also In re Grand Jury Proc.*, 417 F.3d at 26 (finding that witness non-disclosure orders may be “justified by particular and compelling circumstances”); *See also In re United States* 2017, 2017 U.S. Dist. LEXIS 123841, at *3 (D.D.C. July 7, 2017); *See generally United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004) (finding that “while district courts have inherent authority to act outside Rule 6(e)(3), any inherent disclosure authority is exceedingly narrow and exists only in exceptional circumstances”).

¹⁶⁰ *See In re United States* 2019, 2019 U.S. Dist. LEXIS 163505, at *2 (D.D.C. Aug. 6, 2019).

¹⁶¹ *See In re Subpoena* 2018R00776, 947 F.3d 148, 156 (3d Cir. 2020).

¹⁶² *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 799 (2011).

¹⁶³ *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)).

¹⁶⁴ *See generally In re Subpoena*, 947 F.3d 156.

¹⁶⁵ *See id.*; *See also United States v. New York Telephone Co.*, 434 U.S. 159, 165, n. 5 (1977); *Compare In re Grand Jury* 1986, 797 F.2d 676, 681 (8th Cir. 1986) (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958)) (emphasis added) (Finding that there must be “compelling necessity . . . shown with particularity” to impose secrecy on a grand jury witness).

as a means to uphold the integrity of the investigation and due process of any potential subjects,¹⁶⁶ as well as to ensure a uniform standard for NDOs as methods of content-based prior restraint. Accordingly, to elicit any real uniformity on this issue, the Rules Committee must amend Rule 6(e).¹⁶⁷

IV. CONCLUSION

Witness non-disclosure orders are a vital tool that have been routinely utilized in grand jury investigations to preserve the “cloak of secrecy,”¹⁶⁸ a longstanding pillar of criminal investigations that predates the United States.¹⁶⁹ While *McKeever v. Barr* serves as a sound legal rationale for abiding by the explicit, enumerated warrants of disclosure of grand jury materials beyond the scope of Rule 6(e)(2)(B), extending the decision to limit the court’s authority to issue non-disclosure orders does more to undercut the sanctity of grand jury secrecy than preserve it.¹⁷⁰ Equating a temporary restraint on speech, for the compelling interest of preserving grand jury secrecy, to the infinite cloak of grand jury secrecy not only does not follow in a practical sense but undermines the integrity of federal grand jury investigations.

¹⁶⁶ See U.S. CONST. amend. V; See also U.S. CONST. amend. VI.

¹⁶⁷ See *McKeever v. Barr*, 140 S.Ct. 597, 597–58 (2020) (Breyer, J., statement respecting denial of cert.); See also *In re Grand Jury* 89-4-72, 932 F.2d 481, 488 (6th Cir. 1991) (noting in its holding that, absent any “an unambiguous statement to the contrary from Congress,” the court had no choice but to abide by the exhaustive reading of Rule 6(e)(3) as it limits disclosures of grand jury materials).

¹⁶⁸ Edwards, *supra* note 2.

¹⁶⁹ See generally Costello, *supra* note 16.

¹⁷⁰ See *McKeever v. Barr*, 920 F.3d 842, 850 (D.C. Cir. 2019); See also *In re Grand Jury*, 932 F.2d at 488 (Holding that “Rule 6(e)(3)(C)(i) is not a rule of convenience; without an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule,” in concluding that disclosure of grand jury matters to third parties is not warranted beyond the scope of the Rules).

