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Are We Still Cheap on Crime? Austerity, Punitivism, and Common Sense in the Trump/Sessions/Barr Era

HADAR AVIRAM*

Abstract

Literature on “late mass incarceration” observed a contraction of the carceral state, with varying opinions as to its causes and varying degrees of optimism about its potential. But even optimistic commentators were taken aback by the Trump-Sessions administration’s criminal justice rhetoric. This paper maps out the extent to which federal, state, and local actions in the age of Trump have reversed the promising trends to shrink the criminal justice apparatus, focusing on federal legislation, continued state and local reform, and the role of criminal justice in 2020 presidential campaigns. The paper concludes that the overall salutary trends from 2008 onward have slowed down in some respects, but continued on in others, and that advocacy concerns should focus on particular areas of the criminal justice apparatus, especially immigration and the federal war on drugs.

Introduction

On August 3, 2010, Congress passed the Fair Sentencing Act.¹ The original version, known as the Fairness in Cocaine Sentencing Act,² initially sought to completely eliminate the 100:1 sentencing disparity between powder and crack cocaine, long criticized for generating unwarranted

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1. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

2. Fairness in Cocaine Sentencing Act of 2008, H.R. 5035, 110th Cong. (2008).

sentencing disparities between white and black offenders.³ The modified version of the bill, a compromise aimed at obtaining bipartisan and unanimous support,⁴ merely reduced the 100:1 disparity to 18:1.⁵ Authored by Democrat Senator Dick Durbin and cosponsored by Democrat Senator Patrick Leahy and Republican Senator Jeff Sessions,⁶ the bill passed and was signed into law by President Obama.⁷

On December 21, 2018, Congress passed the First Step Act.⁸ This bill, described by Senator Kamala Harris as “a compromise of a compromise,”⁹ retroactively applied the Fair Sentencing Act,¹⁰ restricted the use of restraints on pregnant women,¹¹ expanded compassionate release for terminally ill inmates,¹² allowed re-placement of prisoners closer to their families,¹³ authorized new markets for Federal Prison Industries,¹⁴ mandated de-escalation training for correctional staff,¹⁵ and increased the number of “good conduct time” credits from 47 to 54 days per year.¹⁶ The bill was supported by Vice President Mike Pence, White House senior advisor Jared Kushner, and Republican Senator Mike Lee. On the other side of the aisle, Senators Cory Booker and Dick Durbin, as well as Representative John Lewis,

3. See Jesselyn McCurdy, *ACLU Legis. Counsel, Testimony at a U.S. Sent’g Comm’n Hearing on Cocaine & Sent’g Policy*, ACLU (Nov. 14, 2006), <https://www.aclu.org/other/testimony-jesselyn-mccurdy-aclu-legislative-counsel-united-states-sentencing-commission>.

4. See *Fair Sentencing Act of 2020: It’s About Time*, L.A. TIMES (July 31, 2010), <https://www.latimes.com/archives/la-xpm-2010-jul-31-la-ed-sentencing-20100731-story.html>.

5. Fair Sentencing Act § 2 (reducing the cocaine sentencing disparity to 18:1).

6. *S.1798 - Fair Sentencing Act of 2010*, CONGRESS.GOV (Aug. 8, 2010), <https://www.congress.gov/bill/111th-congress/senate-bill/1789/cosponsors>.

7. Scott Wilson, *Obama Signs Fair Sentencing Act*, WASH. POST (Aug. 3, 2010), <http://voices.washingtonpost.com/44/2010/08/obama-signs-fair-sentencing-ac.html>.

8. Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (First Step Act) of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

9. Press Release, Senator Kamala D. Harris, Senator Harris Statement on First Step Act (Dec. 17, 2018), <https://www.harris.senate.gov/news/press-releases/senator-harris-statement-on-first-step-act>.

10. First Step Act § 404 (authorizing the retroactive application of the Fair Sentencing Act of 2010).

11. First Step Act § 301 (prohibiting the use of restraints on pregnant women).

12. First Step Act § 603(b) (increasing the use and transparency of compassionate release.)

13. First Step Act § 601 (placing inmates close to families).

14. First Step Act § 605 (authorizing new markets for Federal Prison Industries).

15. First Step Act § 606 (requiring the Bureau of Prisons to provide de-escalation trainings).

16. First Step Act § 102(b)(1)(A) (increasing good-conduct credits to 54 days a year).

supported the legislation.¹⁷ Republican Senator Chuck Grassley urged his fellow Republicans to support the bill, tweeting: “GOP colleagues: NOW is time to pass crim justice reform unless your argument is that you prefer to work w Speaker Nancy Pelosi to pass a bill?”¹⁸ Urged by Kim Kardashian, Kanye West, and Van Jones,¹⁹ President Trump signed the bill into law.²⁰

To an observer unaware of the changes in the American civil rights landscape following the 2016 election, these two bills would appear to reflect a continuum. They are both characterized by an overall animus to alleviate the criminal justice impact on sympathetic groups of inmates (nonviolent drug offenders, pregnant women, the sick and elderly), a spirit of bipartisan compromise, a decline in the blanket perception of offenders as public safety risks, and an intent to fold the financial market into the business of prison reform. These characteristics are emblematic of a trend observed by several punishment and society scholars and defined by Christopher Seeds as “late mass incarceration.”

The last decade has seen a bifurcation in punishment and society scholarship. Many works remain focused on the emergence of mass incarceration, examining the rise of the prison population, particularly through a lens of racial domination, oppression, and paternalism.²¹ But other works have focused on more recent, encouraging developments in the criminal justice field, examining whether these constitute a true reversal of the trend that characterized the previous four decades. In this vein, my book

17. Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html>.

18. Chuck Grassley (@ChuckGrassley), TWITTER (Nov. 16, 2018, 1:18 PM), <https://twitter.com/chuckgrassley/status/1063541907538747392>.

19. See Jacob Sullum, *Kanye’s Real Success: Trump Now Backs Criminal Justice Reform*, N.Y. POST (Oct. 17, 2018), <https://nypost.com/2018/10/17/kanyes-real-success-trump-now-backs-criminal-justice-reform/>.

20. John Wagner, *Trump Signs Bipartisan Criminal Justice Bill Amid Partisan Rancor over Stopgap Spending Measure*, WASH. POST (Dec. 21, 2018), https://www.washingtonpost.com/politics/trump-to-sign-bipartisan-criminal-justice-bill-amid-partisan-rancor-over-stopgap-spending-measure/2018/12/21/234f9ffc-0510-11e9-b5df-5d3874f1ac36_story.html.

21. See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); see also HEATHER SCHOENFELD, *BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION* (2018); see also Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 93 J. OF AM. HIST. 703 (2010); see also ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); see also NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

*Cheap on Crime*²² attributed the reduction in the American prison population, as well as some encouraging trends toward death penalty abolition, marijuana legalization, prison closures, and incarceration improvements, to the financial crisis of 2008. Arguing that states and localities bore the brunt of the crisis, I pointed to examples of states importing and exporting prisoners, reforming their early release programs and sentencing structures, and localities creating community alternatives to state confinement. Marie Gottschalk examines the financial impetus for reform in *Caught*,²³ though she is less sanguine about its potential for change.

David Dagan and Steven Teles focus their account on the convergence of bipartisan interests and on the conservative case for reform. In *Prison Break*,²⁴ they highlight opportunities for collaboration across the cheap on crime spectrum, demonstrate how reform serves conservative interests, and illustrate how bipartisan collaboration is engendered. Todd Clear and Natasha Frost make similar arguments in *The Punishment Imperative*.²⁵

Perhaps the most ideological of these accounts is Jonathan Simon's *Mass Incarceration on Trial*.²⁶ Focusing on *Brown v. Plata*,²⁷ the California prison healthcare conditions case, Simon argues that California's regime of "total incarceration"—filling prisons with inmates regardless of the severity of their crimes, to the point of untenable conditions—received a rebuke from the Supreme Court for humanitarian reasons, signaling the reemergence of dignity as an important principle in criminal justice.²⁸ Simon expresses hope that we have hit rock bottom in dehumanizing prisoners, and the reaction will be a top-down "dignity cascade."

Overall, these works identify several themes that characterize the recession-era retreat from punitive policy. First, late mass incarceration reforms are often justified through a discourse of savings, financial prudence, and "justice reinvestment." This cost-centered discourse has been at the heart of the marijuana legalization project and came to define the new

22. HADAR AVIRAM, *CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2015) [hereinafter AVIRAM].

23. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (rev. ed. 2016).

24. DAVID DAGAN & STEVEN M. TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* (2016).

25. TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* (rev. ed. 2015).

26. JONATHAN SIMON, *MASS INCARCERATION ON TRIAL* (rev. ed. 2016).

27. *Brown v. Plata*, 563 U.S. 493 (2011).

28. Jonathan Simon, *The Second Coming of Dignity*, in *THE NEW CRIMINAL JUSTICE THINKING*, 275-307 (2017).

stage in death penalty abolition initiatives.²⁹ Second, and relatedly, the more neutral character of the discourse facilitates bipartisan coalitions that were not possible during the decades of impasse between public safety and human rights advocates.³⁰ Third, late mass incarceration sentencing reforms, like California's criminal justice realignment, tended to focus on low-hanging fruit, such as low-level, nonviolent drug offenders, while either retrenching or even toughening attitudes toward violent offenders (this trend is often exemplified through rhetoric that advocates shifting funds devoted to the punishment of nonviolent offender toward the "deserving," "real" population of offenders).³¹ Fourth, the emergence of cost/risk as an organizing principle in criminal justice reform has led to the rediscovery of low-risk, high-cost categories of inmates, such as the elderly, infirm, or pregnant.³² Fifth, one classic technique of the recent era has been restructuring categories: felonies become misdemeanors,³³ state prisoners become county prisoners,³⁴ juvenile institutions shift from criminal justice to public health supervision,³⁵ and so forth. And sixth, in terms of the market, late mass incarceration does not so much see the end of privatization—instead, it results in a continuing burden shift of the costs unto the "customers": inmates,³⁶ probationers,³⁷ and parolees become responsible for the costs of their own supervision.

The literature that identified these trends, by and large, preceded

29. See AVIRAM, *supra* note 22; José A. Brandariz & Ignacio González-Sánchez, *Economic Crises, Common Crime, and Penalty*, OXFORD RES. ENCYCLOPEDIA OF CRIME & CRIM. JUST. (2019), <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-351>.

30. See CLEAR & FROST, *supra* note 25.

31. See Chris Seeds, *Bifurcation Nation: American Penal Policy in Late Mass Incarceration*, 19 PUNISHMENT & SOC'Y 590 (2016).

32. See AVIRAM, *supra* note 22; see also Jody Sundt, Francis T. Cullen, Angela J. Thielo & Cheryl Lero Jonson, *Public Willingness to Downsize Prisons: Implications from Oregon*, 10 VICTIMS & OFFENDERS 365 (2015).

33. See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOW POLICING (2018); see also ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).

34. Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013).

35. See NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON (reprt. 2016).

36. See Bob Weisberg, *Pay-to-Stay in California Jails and the Value of Systemic Self-Embarrassment*, 106 MICH. L. REV. FIRST IMPRESSIONS 55 (2007).

37. See Michelle Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53 (2017).

Trump's ascent to the presidency and the appointment of Jeff Sessions as Attorney General. Trump and his administration hailed a reversal of progress made on various fronts: The U.S. retreat from the Paris Accord³⁸ and changes in environmental standards³⁹ were a substantial setback from the path of environmental protection and the fight against climate change.⁴⁰ Trump's personal record in degrading behavior toward women,⁴¹ as well as the hotly contested nomination of Brett Kavanaugh to the Supreme Court under the shadow of a sexual assault accusation,⁴² raised grave concerns about a reversal of reproductive rights and bodily autonomy.⁴³ The hard-earned right to marry a partner of the same sex has been undermined by rulings hostile to LGBT families,⁴⁴ and transgender individuals have been banned from serving in the military⁴⁵ and face dehumanizing restrictions on their everyday lives.⁴⁶ Trump has offered tacit, and at times express,

38. Chris Mooney, *Trump Withdrew from the Paris Climate Deal a Year Ago. Here's What Has Changed*, WASH. POST (June 1, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2018/06/01/trump-withdrew-from-the-paris-climate-plan-a-year-ago-heres-what-has-changed/>.

39. Michael Kreshko & Laura Parker, et al., *A Running List of How President Trump Is Changing Environmental Policy*, NAT'L GEOG.: ENV'T EXPLAINER (May 3, 2019), <https://www.nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment/>.

40. Juliet Eilperin & Seung Min Kim, *Trump Defends Environmental Record that Critics Call Disastrous*, N.Y. TIMES (July 8, 2019), https://www.washingtonpost.com/climate-environment/trump-defends-environmental-record-that-critics-call-disastrous/2019/07/08/e46d390e-a193-11e9-bd56-eac6bb02d01d_story.html.

41. Tim Alberta, *'Mother Is Not Going to Like This': The 48 Hours that Almost Brought Down Trump*, POLITICO (July 10, 2019), <https://www.politico.com/magazine/story/2019/07/10/american-carnage-excerpt-access-hollywood-tape-227269>.

42. Alana Abramson, *Brett Kavanaugh Confirmed to Supreme Court After Fight that Divided America*, TIME (Oct. 7, 2018), <https://time.com/5417538/bett-kavanaugh-confirm-ed-senate-supreme-court/>.

43. See Debbie Elliot, *Alabama Lawmakers Move to Outlaw Abortion in Challenge to Roe v. Wade*, NPR (May 1, 2019), <https://www.npr.org/2019/05/01/719096129/alabama-lawmakers-move-to-outlaw-abortion-in-challenge-to-roe-v-wade>; see also Alexis Okeowo, *The Threat to Birth-Control Access in the Trump Era*, NEW YORKER (Aug. 1, 2017), <https://www.newyorker.com/news/daily-comment/birth-control-in-the-trump-era>.

44. Susan Miller, *3 Years After Same Sex Marriage Ruling, Protections for LGBT Families Undermined*, USA TODAY (June 4, 2018), <https://www.usatoday.com/story/news/nation/2018/06/04/same-sex-marriage-ruling-undermined-gay-parents/650112002/>.

45. Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, N.Y. TIMES (Jan. 22, 2019) <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html>.

46. Stephanie Armour & Michelle Hackman, *Trump's Health Department Takes Aim at Transgender-Rights Rules*, WALL ST. J. (Oct. 21, 2018), <https://www.wsj.com/articles/trumps-health-department-takes-aim-at-transgender-rights-rules-1540162957>.

approval to groups advancing dangerous agendas of white supremacy and sometimes actual Nazism.⁴⁷ Perhaps the most unsavory development to civil rights advocates has been the Trump administration's hostility towards immigrants: throughout his campaign and presidency, Trump has propagated a false nexus between immigration and crime,⁴⁸ and his administration's policies, including family separations at the border leading to horrific personal tragedies,⁴⁹ pursuit of family detentions,⁵⁰ and deportation threats to DACA recipients,⁵¹ evince gratuitous cruelty.⁵²

Do these developments accurately reflect a reversal of gains made in the criminal justice arena, as well? As I argue in this article, the answer to this question is complex. It requires sifting hateful rhetoric from actual policies and governance techniques, and also viewing developments during the Obama administration's late mass incarceration era with a critical eye. Some of the Trump administration's criminal justice initiatives can be fairly characterized as "more of the same" of late mass incarceration techniques, either because they are not as insalubrious as policies in other areas or because their Obama-era counterparts were not as salubrious as they appeared, some are genuinely alarming and have had a disastrous impact on people's lives through the criminal justice apparatus, and some, while not immediately manifesting in punitive policies, constitute a rhetorical climate that could facilitate further disturbing developments.

The article proceeds in four parts. Part I examines the landscape of offenders affected by Trump administration policies, paying particular attention to the late mass incarceration trend of distinguishing between nonviolent and violent offenders as targets of reform. Part II examines the role the market plays in the Trump/Sessions/Barr criminal justice universe, specifically addressing the reliance on private prisons and civil asset forfeiture.

47. See Jack Shafer, *How Trump Changed After Charlottesville*, POLITICO (July 18, 2019), <https://www.politico.com/magazine/story/2019/07/18/donald-trump-racist-rally-227408>.

48. Salvador Rizzo, *Trump's Claim that Immigrants Bring 'Tremendous Crime' Is Still Wrong*, WASH. POST (Jan. 18, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/01/18/trumps-claim-that-immigrants-bring-tremendous-crime-is-still-wrong/>.

49. STAFF OF COMM. ON OVERSIGHT & REFORM, H.R., REP. ON CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION (2019).

50. Maya Rhodan, *The Family Separation Policy Ended. Now the Trump Administration Is Pursuing a Family Detention Policy*, TIME (Sept. 6, 2018), <https://time.com/5388643/family-separation-policy-court-agreement/>.

51. *NAACP v. Trump*, 315 F. Supp. 3d 457 (D.D.C. 2018), *cert. granted*, No. 18-588, 2019 U.S. LEXIS 4421 (S. Ct. June 28, 2019).

52. Greg Sargent, *For Trump, Cruelty Is the Point, but It's Actually Worse than that*, WASH. POST (Apr. 9, 2019), <https://www.washingtonpost.com/opinions/2019/04/09/trump-cruelty-is-point-its-actually-worse-than-that/>.

Part III examines the limitations of federal power and some state and local developments. Part IV tackles the immigration-crime nexus and examines the differences between the Obama and Trump administrations in this regard. I conclude by offering some guidelines as to which aspects of criminal justice rhetoric and policy under the Trump administration merit attention.

I. Targets of Trumpian Criminal Justice Energy

Jeff Sessions and Drug Offenders as “Bad People” Committing “Serious Crimes”

The Obama-era political arena saw Republicans supporting a variety of criminal justice reforms, particularly in the area of the war on drugs. Right-wing think tank Right on Crime listed “substance abuse” as one of its “priority areas,” making a classic small-government argument against criminalization of drug possession and use: “[Incarcerated drug offenders] were not immediate threats to public safety, but it was in society’s best interest to ensure that they stopped abusing drugs. Taxpayers are entitled to ask whether incarceration is accomplishing that goal.”⁵³ Even the unapologetically conservative Koch brothers and their foundation partnered with liberal groups in opposing the war on drugs⁵⁴ and publicly decried Trump’s signaling of renewing it.⁵⁵ The Fair Sentencing Act’s focus on correcting racial disparities in drug sentencing might have appealed particularly to Democrats, but was supported by conservatives as well.⁵⁶ Post-Obama, Trump’s choice of Jeff Sessions as attorney general was an important signal as to the qualities to be expected of Trumpian criminal justice—a break with bipartisan reform initiatives and a return to old-fashioned punitivism.

Indeed, Jeff Sessions’ appointment appears to be a flashback to the Reagan drug policy; Sessions is one of few Republicans who still believe that “good people don’t smoke marijuana.”⁵⁷ Upon appointment, Sessions

53. *Substance Abuse*, RIGHT ON CRIME, <http://rightoncrime.com/category/priority-issues/substance-abuse/> (last visited Nov. 12, 2019).

54. Bill Keller, *Is Charles Koch a Closet Liberal?*, THE MARSHALL PROJECT (Jan. 20, 2016), <https://www.themarshallproject.org/2016/01/20/is-charles-koch-a-closet-liberal>.

55. John Frank, *Koch Network to Trump Administration: “You Are Never Going to Win the War on Drugs. Drugs Won”*, THE DENVER POST (June 25, 2017), <https://www.denverpost.com/2017/06/25/koch-network-trump-administration-war-on-drugs/>.

56. Kara Gotsch, “*After the War on Drugs: The Fair Sentencing Act and the Unfinished Drug Policy Reform Agenda*,” AM. CONST. SOC’Y (Dec. 2011), https://www.acs.law.org/wp-content/uploads/2012/10/Gotsch_-_After_the_War_on_Drugs_0.pdf.

57. Jacob Sullum, *Senator Says ‘Good People Don’t Smoke Marijuana’*, REASON (Apr. 6, 2016), https://reason.com/2016/04/06/senator-says-good-people-dont-smoke-mari?utm_s

effectively reversed the Obama-era policy of restraint in drug prosecutions, under which, per James Cole's 2013 memorandum,⁵⁸ the federal authorities refrained from drug enforcement in states that had legalized marijuana where there was compliance with state law. Sessions' memoranda to federal prosecutors have rescinded any federal commitment to restraint in prosecution.

In a May 10, 2017 memorandum, Sessions reiterated the "core principle" that "prosecutors should charge and pursue the most serious, readily provable offense," a policy that "affirms our responsibility to enforce the law, is moral and just, and produces consistency. This policy fully utilizes the tools Congress has given us. By definition, the most serious offenses are those that carry the most substantial sentencing guidelines, including mandatory minimum sentences."⁵⁹

A subsequent memorandum from January 4, 2018, specifically addressed marijuana prosecutions, rescinding the Cole memo protections, and reiterating "Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime."⁶⁰ These positions were reflected not only by Sessions himself, but by his newly-hired underlings; in a Brennan center examination of criminal justice in Trump's first 100 days in office, Ames Grawert and Natasha Camhi identified a number of Sessions hires who were in accord with reverting to Reagan-era enforcement priorities.⁶¹

The extent to which Sessions' appetite for drug enforcement and mandatory minimums changed prosecutorial policies is debatable. It is worthwhile to remember that Obama-era federal district courts were, overall, punitive toward drug offenders and inhospitable toward rehabilitation

ource=feedburner&utm_medium=feed&utm_campaign=Feed%3A+reason%2FHitandRun+%28Reason+Online++Hit+%26+Run+Blog%29.

58. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, on Guidance Regarding Marijuana Enf't (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

59. Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, on Dep't Charging & Sentencing Policy (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

60. Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, on Marijuana Enf't (Jan. 4, 2018), https://upload.wikimedia.org/wikipedia/commons/7/7d/DOJ_Sessions_memo_20180104.pdf.

61. AMES C. GRAWERT & NATASHA CAMHI, CRIMINAL JUSTICE IN PRESIDENT TRUMP'S FIRST 100 DAYS (2017).

arguments. Mona Lynch's *Hard Bargains*⁶² is based on a rich ethnography of drug sentencing proceedings and practices in three federal district courts, conducted during the Obama era. Lynch's account highlights the devastating impact of a sentencing structure rife with enhancements and multipliers. These potentially draconian sentences—decades in prison for possession of miniscule amounts of crack cocaine—are extremely effective trump cards in the hands of the prosecution, and thus a powerful incentive to plead guilty in federal courts. Despite the race consciousness that characterized Obama era rhetoric about drug sentencing, Lynch's findings reveal a reality of sentencing savagery that precedes Sessions' instructions to prosecutors.

At the same time, Lynch observed considerable regional differences in the styles of federal drug prosecutions. In the Northwest, she introduces readers to a prosecutor who believes he is on a mission to "save" neighborhoods through harsh sentencing of defendants that have already been convicted and sentenced at the state level. In the South, we meet punitive judges who do not even purport to have an educational purpose in meting out harsh sentences. And in the Southwest, we see drug sentencing used as an arm of the deportation machine with defendants who recently crossed the border with marijuana in their backpacks being instructed to plead guilty in batches. These differences are beyond stylistic: as early as 2002, Paula Kautt found considerable variation among federal districts and circuits in drug sentencing outcomes.⁶³ These findings precede the Supreme Court ruling in *Booker*,⁶⁴ which stripped the Federal Sentencing Guidelines of their mandatory power and thus increased sentencing variations between judges.⁶⁵ Amy Farrell and Geoff Ward in particular ascribe the interdistrict variation in sentencing to "district characteristics." Specifically, they found that the odds of incarceration for white and black defendants were most equal in districts where black prosecutorial representation was more proportional to black population in the district.⁶⁶

62. MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* (2016).

63. Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 JUST. Q. 633 (2002).

64. *U.S. v. Booker*, 543 U.S. 220 (2005).

65. James M. Anderson, Jeffery R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. OF L. & ECON. 271 (1999); see also Frank O. Bowman III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279 (2006); see also Amy Farrell & Geoff Ward, *Examining District Variation in Sentencing in the Post-Booker Period*, 23 FED. SENT'G REP. 318 (2011).

66. Farrell & Ward, *supra* note 65, at 321.

In an interview about Sessions' mandates, Lynch reiterated the importance of variation and speculated:

What I think is going to happen under this policy—and this is just speculation—is that there will be [federal district prosecutorial offices] that have operated under this less punitive criminal justice ethos. And some of those places are just not going to bring as many drug cases, because if they do, they'll have to then charge the most readily provable offense, seek all the enhancements, and just put the pedal to the metal. So they're just not going to bring as many cases. That doesn't mean the crimes will go unpunished—the cases will likely end up in state court and they'll be managed locally.

So, in places in the Northeast, you'll probably see mainly very serious drug cases being brought, because to bring the little ones will amount to throwing the book at people who the local folks might feel don't deserve it. Whereas in some places in the South, in particular, they may be “unleashed.” They might devote resources to bringing up all these drug cases to federal court, and say, “We're gonna go out there and set up all these busts and drag people into federal court and hammer them.”⁶⁷

There is still a paucity of research about the extent to which federal prosecutors have complied with Sessions' marching orders, though there are, of course, horrific anecdotes about individuals receiving draconian sentences for federal drug crimes. Because such anecdotes were commonplace during the Obama era as well, it is hard to rely on them to draw definitive conclusions.

Another important issue is the similarity highlighted in the introduction between the political energy animating the Obama-era Fair Sentencing Act and the Trump-era First Step Act. In both cases, we see a legislative product born of deep compromise, which relies heavily on the bifurcation between violent and nonviolent drug offenders. Arguably, the First Step Act's most significant contribution to criminal justice reform was its declaration that the Fair Sentencing Act, which applied to nonviolent offenders, would apply retroactively. In this respect, both laws targeted the same population. While other provisions of the First Step Act, such as the increase in good time credits, were not explicitly limited to nonviolent offenders, the calculation of these credits relies on an algorithm that disadvantages offenders deemed “higher risk.”

67. Leon Neyfakh, *The DOJ's Drug Warrior*, SLATE (May 15, 2017), <https://slate.com/news-and-politics/2017/05/jeff-sessions-hard-line-drug-policies-explained.html>.

To summarize, Sessions' archaically punitive rhetoric notwithstanding, it is still difficult to establish whether nonviolent federal offenders have, overall, been disadvantaged in the Trump era. Resistance from Congress members of diverse political persuasions, as well as from district prosecutors, would ameliorate the practical effect of Sessions' efforts to invigorate the war on drugs—and, importantly, this rhetoric comes in the heels of an already grossly punitive federal sentencing scheme. But what about violent offenders?

Trump and Sessions on Violent Offenders: Shift or Continuity?

On March 8, 2017, Sessions sent a memorandum to federal prosecutors regarding prosecutions for violent crime. The memorandum opens with a factual falsehood—a claim that “crime rates [are] rising.”⁶⁸ Sessions proceeds to mention his newly established Task Force on Crime Reduction and Public Safety (established under an executive order from Trump)⁶⁹ and urges federal prosecutors to collaborate with state and tribal jurisdictions on violent crime prosecutions. In a typical “Sessionism,” he also draws a link between violent crimes and drug crimes: “[M]any violent crimes are driven by drug trafficking and drug trafficking organizations. For this reason, disrupting and dismantling those drug organizations through prosecutions under the Controlled Substances Act can drive violent crime down.”⁷⁰

Warnings about rising rates of violent crime are by no means a Trump/Sessions invention. As Katherine Beckett explains in *Making Crime Pay*,⁷¹ Richard Nixon's presidential campaign heavily relied on stoking public fear of violent crime with racial undertones. Nixon is so frequently regarded as the primeval villain of the mass incarceration project that newer works, which have taken pains to show similar trends in the Kennedy and Johnson administrations, are regarded as fresh and novel.⁷²

Nor is the link drawn between drugs and crime particularly inventive. Sessions' rhetoric closely tracks Reagan-era rhetoric which, as Michelle

68. Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, on Commitment to Targeting Violent Crime (Mar. 8, 2017), <https://apps.washingtonpost.com/g/documents/world/read-the-memo-sent-by-sessions-on-violent-offenders/2367/> [hereinafter Sessions, Targeting Violent Crime].

69. Exec. Order No. 13776, 3 C.F.R. § 13778 (2017).

70. Sessions, Targeting Violent Crime, *supra* note 68.

71. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997).

72. HINTON, *supra* note 21; MURAKAWA, *supra* note 21.

Alexander⁷³ and Elizabeth Hinton⁷⁴ argue, tended to target crack, heroin, and other street drugs associated in the public imagination with African American users and sellers, along with street violence. Indeed, Sessions' task force, ostensibly formed to combat violent crime, seems to have yielded more insights in the area of drug policy than violent crime. Despite the fact that the task force's findings have not been released to the public,⁷⁵ it seems to have triggered Sessions' plan to bolster and streamline the practice of civil asset forfeiture, which has particular relevance to drug crimes,⁷⁶ as well as a toughened stance toward marijuana, because "[e]xperts are telling me there's more violence around marijuana than one would think and there's big money involved."⁷⁷

If the Trump/Sessions rhetoric around violent crime can be distinguished from that of their predecessors, it is in the brazen falsity of their factual claims. During his campaign, Trump repeatedly claimed that "murders are up" nationwide as well as in New York City specifically. These claims have turned out to be false: a slight increase in homicide cases could only be observed briefly, during a cherry-picked period, and as both John Pfaff⁷⁸ and Louis Jacobson⁷⁹ observed, even these temporary anomalies failed to make a significant difference in an era of historically low crime rates.

Nonetheless, the Trump/Sessions period does not evince an appreciable punitive change toward violent offenders. The First Step Act, as explained above, primarily targeted nonviolent offenders, but its retrenchment of the punitive approach toward violent offenders should be seen more as a continuation than a shift.

73. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012).

74. HINTON, *supra* note 21.

75. Press Release, Brennan Ctr. for Justice, Crime & Safety Task Force Recommendations Should Be Made Public (July 26, 2017), <https://www.brennancenter.org/press-release/crime-and-safety-task-force-recommendations-should-be-made-public>.

76. Press Release, U.S. Dep't of Justice, Attorney Gen. Sessions Issues Policy & Guidelines on Fed. Adoptions of Assets Seized by State or Local Law Enf't (July 19, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state>.

77. Josh Gerstein, *Sessions Pushes Tougher Line on Marijuana*, POLITICO (Feb. 27, 2017), <https://www.politico.com/blogs/under-the-radar/2017/02/jeff-sessions-marijuana-235461>.

78. John Pfaff, *Donald Trump's Wild Portrayal of Crime Is Simply Not True*, NATION (Sept. 27, 2016), <https://www.thenation.com/article/donald-trumps-wild-portrayal-of-crime-is-simply-not-true/>.

79. Louis Jacobson, *Donald Trump Off-Base in Saying Murders Are Up in New York City*, POLITIFACT (Sept. 27, 2016), <https://www.politifact.com/truth-o-meter/statements/2016/sep/27/donald-trump/donald-trump-base-saying-murders-are-new-york-city/>.

Creating the false perception that violent crime is on the rise is best seen, therefore, as a tool for promoting punitive change. However, this change is not directed toward the bulk of violent offenders, who are, for the most part, native-born U.S. residents, but rather toward those whose violent crimes have been disproportionately highlighted and decried in Trumpian rhetoric: undocumented immigrants, who constitute a minority of violent offenders in the United States. We will come to this point again in Section IV of this essay. Before doing so, however, we turn to the extent to which Trumpian logic relies on the market for its crime-fighting policies.

II. The Role of the Market in the Trumpian Criminal Justice Arena

The Fall and Rise of Private Prison Providers?

After years of declining value, the morning after the 2016 election saw a sharp rise in private prison stock.⁸⁰ By late February 2017, CoreCivic (formerly known as Corrections Corporation of America) shares were up by 140% and Geo Group shares had risen by 98%.⁸¹

Investors expecting a windfall after Trump's victory might have been somewhat disappointed when private prison stock turned out to be a solid but not prolific investment.⁸² According to Reuters, the rise in shares could be attributable to "expectations that detention centers they run for ICE would fill up thanks to an anticipated surge in arrests along the Mexican border." However, "arrests declined for months after Trump's inauguration because fewer people attempted to cross the border and shares in CoreCivic and Geo reversed course after peaking in February and April respectively."

The Reuters report correctly focused on the investors' hopes in the context of immigration, rather than domestic federal incarceration. By the time Trump won the 2016 election, private prison providers had already internalized the lessons of the 2008 recession and diversified their investment portfolio. As I demonstrate in *Cheap on Crime*,⁸³ private prison

80. Jeff Sommer, *Trump's Win Gives Stocks in Private Prison Companies a Reprieve*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/your-money/trumps-win-gives-stocks-in-private-prison-companies-a-reprieve.html>.

81. Heather Long, *Private Prison Stocks Up 100% Since Trump's Win*, CNN (Feb. 24, 2017), <https://money.cnn.com/2017/02/24/investing/private-prison-stocks-soar-trump/index.html>.

82. Sinead Carew, *No Trump Windfall for Private Prisons Yet, but Some Bet on Gains*, REUTERS (Dec. 26, 2017), <https://www.reuters.com/article/us-usa-stocks-prisons/no-trump-windfall-for-private-prisons-yet-but-some-bet-on-gains-idUSKBN1EL0A7>.

83. AVIRAM, *supra* note 22, at 103-04.

companies communicated openly about the decline in domestic incarceration rates and the need to find alternative markets. CCA's transformation into CoreCivic was part of the company's diversification foray into the market of incarceration alternatives, and private offerings of noncarceral supervision, reentry programming and surveillance, and foreign markets, increased as investment in traditional domestic incarceration declined.

For this reason, Obama's declaration in August 2016 that the federal government would cease to rely on private prisons⁸⁴ was largely symbolic. At that point, less than 35,000 prisoners—approximately 18.5% of the U.S. federal prison population of 189,000—were incarcerated in private facilities.⁸⁵ The overall population of domestic prisoners in private facilities at all government levels was 128,000,⁸⁶ less than 6% of the total prison population of 2.2 million. These percentages represent the end point of a rise in the relative share of private prisons, at least seven years of which saw this rise as the overall prison population in the United States was declining. Importantly, at the same time of its divestment from private domestic incarceration, the Obama administration never ended its reliance on private providers for federal detention facilities, which housed nearly three-quarters of the average daily immigration detainee population.⁸⁷ During the 2016 fiscal year, the overall number of immigrants passing through detention facilities was approximately 353,000.⁸⁸ At the moment of Obama's declaration, losing a few dozen federal prisoners presented a negligible share of the overall scope of the private providers' activities, and certainly a fraction of its contract with the very same federal government for housing undocumented immigrants.

Jeff Sessions' reversal of Obama's statement, therefore, rather than being a viable revenue channel for the private prison providers, can be better understood as an example of the gratuitous cruelty characteristic of the Trump/Sessions rhetoric, and perhaps also as a market signal to private prison providers that their relationship with their federal client was solid. Indeed, despite the failure to provide investors with the expected windfall,

84. Eileen Sullivan, *Obama Administration to End Use of Private Prisons*, ASSOCIATED PRESS (Aug. 18, 2016), <https://www.pbs.org/newshour/nation/obama-administration-end-use-private-prisons>.

85. *Private Prisons in the United States*, THE SENT'G PROJECT (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/>.

86. *Id.*

87. Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, IMMIGRATION POLICY INSTITUTE (May 2, 2018), <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention>.

88. *Id.*

private prison providers experienced a year of business growth in the United States. In *Inside Private Prisons*,⁸⁹ Lauren Eisen notes that executives openly and explicitly referred to the expected changes in immigration policy as a potentially beneficial revenue stream. She quotes CoreCivic CEO Damon Hininger, who in August 2017 told investors, “ICE expects the average length of stay for detainees to increase as a result of increased interior enforcement. While immigrants arrested at the border typically are detained for 27 days, those arrested in the interior of the country are detained for roughly 52 days.”⁹⁰

I emphasize the interplay between domestic and immigration confinement because mainstream progressive conversations tend to disproportionately focus on the role of private prison providers in domestic incarceration. For example, Eric Schlosser has pointed out that “[p]rivate prisons are the most obvious, controversial, and fastest-growing segment of the [Prison Industrial Complex]”;⁹¹ similarly, Angela Davis refers to prison privatization as “the most obvious instance of capital’s current movement toward the prison industry.”⁹² As I argued elsewhere,⁹³ this discourse was a distortion of the financial picture even during the Obama era. First, focusing on privately owned prisons ignores the realities of the incarceration market, where even government-owned facilities encompass many privatized features, such as healthcare, food, and transportation; second, from a public choice economics perspective, the motivations of public and private actors are not so dissimilar, and a one-to-one comparison of the litany of cruelties and scandals in U.S. prisons does not yield a clear indictment specifically against private facilities. In short, Sessions’ announcement was another example of gratuitous cruelty in rhetoric designed to rally their base and alarm their opponents, but had little effect on domestic incarceration and a moderate effect in the immigration arena, which I discuss later in this paper.

89. LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* (2017).

90. Lauren-Brooke Eisen, *Trump’s First Year Has Been the Private Prison Industry’s Best*, BRENNAN CTR. FOR JUST. (Jan. 15, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-first-year-has-been-private-prison-industrys-best>.

91. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1, 1998, at 63.

92. Angela J. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES, Sept. 10, 1998, at 1.

93. Hadar Aviram, *Are Private Prisons to Blame for Mass Incarceration and Its Evils? Prison Conditions, Neoliberalism, and Public Choice*, 42 FORDHAM URB. L.J. 411 (2014).

Sessions and Congress Battle Civil Asset Forfeiture

Another financial aspect of the Trump/Sessions punitive push was Sessions' renewed support for the practice of civil asset forfeiture by police departments of people suspected of drug involvement, whose popularity sharply declined in the last few years of the Obama administration. In July 2017, Sessions issued a policy and guidelines on the federal use of civil asset forfeiture, extolling the virtues of the practice:

[C]ivil asset forfeiture is a key tool that helps law enforcement defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed, and it weakens the criminals and the cartels. Even more importantly, it helps return property to the victims of crime. Civil asset forfeiture takes the material support of the criminals and instead makes it the material support of law enforcement, funding priorities like new vehicles, bulletproof vests, opioid overdose reversal kits, and better training. In departments across this country, funds that were once used to take lives are now being used to save lives.

It also removes the instrumentalities of crimes, such as illegal firearms, ammunition, explosives and property associated with child pornography from criminals—preventing them from being able to use these tools in further criminal acts.⁹⁴

Sessions' instructions specifically targeted the practice of "federal adoption," under which local law enforcement agencies can circumvent state restrictions on asset seizures by collaborating with federal authorities. As Sarah Stillman explains in a *New Yorker* article, this partnership enables police departments to "turn their seizures over to federal colleagues, who 'adopt' them for prosecution—ultimately returning up to eighty per cent of the assets to the originating cops or prosecutors to keep. One result, often unaddressed in critiques of forfeiture, is the tacit encouragement of racial profiling and targeting of property owners of color, who remain prime targets of the practice in much of the country."⁹⁵

This approach demonstrates Sessions' dated approach to criminal justice, which comes off as completely out of touch with the new political realities around civil asset forfeiture. In 2013, Stillman published a *New*

94. U.S. Dep't of Justice, *supra* note 76.

95. Sarah Stillman, *Jeff Sessions and the Resurgence of Civil-Asset Forfeiture*, NEW YORKER (Aug. 15, 2017), <https://www.newyorker.com/news/news-desk/jeff-sessions-and-the-resurgence-of-civil-asset-forfeiture>.

Yorker article about civil asset forfeiture—the culmination of three years’ worth of journalistic investigation—revealing the low burden of proof required to seize people’s property, the extent to which people with little or no criminal involvement are affected, and the Byzantine and expensive paths toward obtaining one’s property back.⁹⁶ *The Washington Post* followed suit in 2014 with a five-part story about civil asset forfeiture, whose first part, titled “Stop and Seize,”⁹⁷ exposed the extent to which police departments rely on private surveillance firms like Blackwater to obtain information on vehicles that might contain sizeable (and seizable) amount of cash. Comedian John Oliver added his own take in October 2014 with a comic segment that ridiculed not only the police’s aggressive stance toward innocent, nonviolent citizens, but also the preposterous uses to which the seized property was sometimes put (such as the purchase of margarita makers or Zamboni machines).⁹⁸ By that point, the practice had fallen out of favor with both progressives and small-government libertarians. By 2016, not only did both Republican and Democrat party platforms alike endorse civil asset forfeiture reform,⁹⁹ but the public consistently opposed the practice. According to a Cato Institute report, opposition to civil asset forfeiture cut across demographics and partisanship. Majorities of whites (84%), blacks (86%), Hispanics (80%), Democrats (86%), independents (87%), and Republicans (76%) all opposed the practice, except when the property owner was convicted of a crime; even those who were highly favorable toward the police staunchly opposed (78%) civil asset forfeiture.¹⁰⁰

Like the marijuana controversy, Sessions’ position on civil asset forfeiture put him at odds with many of his Republican colleagues, who had come of age, politically, in an era of low crime rates and a call for austerity. In September 2017, in a rare display of bipartisanship, the House of Representatives unanimously voted to block Sessions’ civil forfeiture program.¹⁰¹ Nonetheless, the Senate never voted on the bill, and despite

96. Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken>.

97. *Stop and Seize*, WASH. POST, https://www.washingtonpost.com/sf/investigative/collection/stop-and-seize-2/?noredirect=on&utm_term=.53f45900d772 (last visited Nov. 11, 2019).

98. Last Week Tonight, *Civil Forfeiture: Last Week Tonight with John Oliver*, YOUTUBE (Oct. 5, 2014), <https://www.youtube.com/watch?v=3kEpZWGgJks>.

99. *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/> (last visited July 1, 2019).

100. Emily Ekins, *Civil Asset Forfeiture*, CATO INST. (Dec. 7, 2016), <https://www.cato.org/policing-in-america/chapter-4/civil-asset-forfeiture>.

101. 163 CONG. REC. H7272-77 (daily ed. Sept. 12, 2017).

pleas from numerous organizations across the political spectrum—the Institute for Justice, the ACLU, the NAACP, the American Conservative Union, and others—none of these amendments found their way into Trump’s Omnibus Spending Bill.¹⁰²

Congress’ failure to stop Sessions’ reforms puts federal policy strongly at odds with developments at the state level. According to the Justice Institute, since 2014, 33 states and the District of Columbia have reformed their civil forfeiture laws; 18 states require a criminal conviction to forfeit most or all types of property and offenses; 16 states and the District of Columbia place the burden of proof on the government in innocent-owner claims; 23 states and the District of Columbia require law enforcement agencies to report their seizure and forfeiture activity; and, in response to Sessions’ revival of the “federal adoption” practice, seven states and the District of Columbia have passed anti-circumvention legislation to close the equitable-sharing loophole.¹⁰³

This is not the only instance in which states and municipalities have introduced legislation, policies, and practices that either contradict or undermine the punitive developments on the federal level. We now turn to these.

III. Local and State Developments

To the extent that the prior two parts of this essay evince a punitive shift in the Trump/Sessions era from Obama-era policies and practices, this federal trend is in stark contrast to many recent developments on the state and local level. Above we discussed two important examples of these countertrends: the waves of marijuana legalization civil asset forfeiture reform. These, however, are merely part of the picture: state reforms have been instrumental in the post-recession era reforms of the criminal justice apparatus. The overall reduction in the U.S. prison population is credited to the states, not the federal government: the federal prison population began to decline only in 2014, three years after the beginning of the decline in the overall prison population.¹⁰⁴ Many state reforms, like federal reforms,

102. Nick Sibilla & Institute for Justice, *Congress Killed Efforts to Undo Sessions’s Civil Forfeiture Expansion, Despite Unanimous House Votes*, FORBES (Apr. 2, 2018, 12:10 PM), <https://www.forbes.com/sites/instituteforjustice/2018/04/02/congress-killed-efforts-to-undo-sessions-civil-forfeiture-expansion-despite-unanimous-house-votes/#1a60300f4549>.

103. INST. FOR JUST., *supra* note 96.

104. *Past Inmate Population Totals*, U.S. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (last visited July 27, 2019).

tended to target the low-hanging fruit of nonviolent drug offenders,¹⁰⁵ but because of the savagery of federal drug sentencing, these reforms were important in themselves in the federal system.¹⁰⁶ In large states, such as California, these reforms were sufficient to bring about a noticeable population decline. As Katherine Beckett, Lindsey Beach, Emily Knaphaus, and Anna Reosti found, the bulk of the reduction resulted from California's Criminal Justice Realignment of 2011.¹⁰⁷

Some state reforms have not only directly targeted the size of the prison population, but also some of the system's most odious features. One recent example is the cash bail industry. Inspired by Kalief Browder's tragic death while detained pretrial,¹⁰⁸ several states have reconsidered their reliance on the practice. California eliminated cash bail,¹⁰⁹ New Jersey overhauled its bail system,¹¹⁰ New Mexico minimized its reliance on the bail bonds industry,¹¹¹ and New York, home to the infamous Rikers Island facility that led Browder to take his own life, joined the trend.¹¹²

Perhaps the most notable deviation from federal practices is the change in prosecutorial personnel, and in particular, the growing appetite in counties for progressive prosecutors. In 2017, John Pfaff's *Locked In*¹¹³ offered a rebuttal of the "standard story" of mass incarceration, which relies on

105. GOTTSCHALK, *supra* note 23; Seeds, *supra* note 31.

106. LYNCH, *supra* note 62.

107. Katherine Beckett & Lindsey Beach, et al., *U.S. Criminal Justice Policy and Practice in the Twenty-First Century: Toward the End of Mass Incarceration*, 40 L. & POL'Y 321 (2018). Elsewhere I argue that California could have done even better: Hadar Aviram, *The Correctional Hunger Games: Understanding Realignment in the Context of the Great Recession*, 664 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 260 (2016).

108. David K. Li, *Family of Kalief Browder, Young Man Who Killed Himself After Jail, Gets \$3.3M from New York*, NBC NEWS (Jan. 24, 2019, 2:32 PM), <https://www.nbcnews.com/news/us-news/family-kalief-browder-young-man-who-killed-himself-after-jail-n962466>.

109. Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html?module=inline>.

110. Lisa W. Foderaro, *New Jersey Alters Its Bail System and Opens Legal Landscape*, N.Y. TIMES, (Feb. 6, 2017), at A1.

111. J. B. Wogan, *Can't Afford Bail? In One State, that Doesn't Matter Anymore*, GOVERNING THE STATES AND LOCALITIES (Nov. 9, 2016, 11:00 AM), <https://www.governing.com/topics/public-justice-safety/gov-new-mexico-bail-ballot-measure.html>.

112. Julie McMahon, *New York Ends Cash Bail for Most: What It Means for People Charged With a Crime*, SYRACUSE POST-STANDARD (Apr. 3, 2019), <https://www.syracuse.com/news/2019/04/new-york-ends-cash-bail-for-most-what-it-means-for-people-charged-with-a-crime.html>.

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

racialized drug enforcement and prison privatization. As Pfaff explained, the bulk of the rise in incarceration is attributable to harsher charging policies in violent offenses, and therefore the most influential actors in the system are county prosecutors. Pfaff argued that reforms should focus on states and counties, rather than on the federal system, in terms of obtaining maximum impact. Similarly, Katherine Beckett, who highlighted the political hurdles and compromises involved in legislative change, emphasized that progressive prosecutorial policies could make significant difference without deferring to legislation.¹¹⁴

These insights made their way into progressive mainstream discourse.¹¹⁵ An important development was the formation of Real Justice, a PAC which, under the leadership of Shaun King, sets out to “elect prosecutors who will fix our broken criminal justice system.”¹¹⁶ Real Justice endorses progressive candidates, many of them from criminal defense backgrounds, in local District Attorney elections. But even candidates who were not officially endorsed by Real Justice have won District Attorney positions on a progressive platform. Some notable examples include Larry Krasner, a civil rights attorney from Philadelphia, who delivered on his promise of “transformational change”¹¹⁷ with a personnel shakeup that included the firing of 31 prosecutors on his first week in office.¹¹⁸ Marilyn Mosby of Maryland captured the public sentiment with an unapologetic charging of police officers involved in the in the killing of Freddie Gray.¹¹⁹ Progressive prosecutors have espoused nontraditional views about public service, such as Cook County State Attorney Kim Foxx’s call for increased prosecutorial accountability,¹²⁰ Houston District Attorney Kim Ogg’s

114. Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 ANN. REV. OF CRIMINOLOGY 235 (2018).

115. Adam Gopnik, *How We Misunderstand Mass Incarceration*, NEW YORKER (Apr. 3, 2017), <https://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration>; and two years later, Adam Gopnik, *Who Belongs in Prison?*, NEW YORKER (Apr. 8, 2019), <https://www.newyorker.com/magazine/2019/04/15/who-belongs-in-prison>.

116. REAL JUST., <https://realjusticepac.org/> (last visited July 17, 2019).

117. Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, PHILA. INQUIRER (Nov. 7, 2017, 9:11 PM), <https://www.philly.com/philly/news/politics/city/larry-krasner-wins-race-for-philly-da-20171107.html>.

118. Chris Palmer, Julie Shaw & Mensah M. Dean, *Krasner Dismisses 31 from Philly DA’s Office in Dramatic First-Week Shakeup*, PHILA. INQUIRER, (Jan. 5, 2018, 12:29 PM), <https://www.philly.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html>.

119. Note, *The Paradox of ‘Progressive Prosecution’*, 132 HARV. L. REV. 748 (2019).

120. Steve Schmadeke, *Kim Foxx Promises “New Path” of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016, 6:34 PM), <https://www.chicagotribune.com/news/>

position on marijuana decriminalization,¹²¹ and Suffolk County District Attorney Rachael Rollins' objection to mandatory minimums for drug offenses.¹²² One recent example of a progressive prosecution campaign is San Francisco Chesa Boudin's bid for District Attorney; Boudin, a long-time public defender and the son of incarcerated revolutionaries, ran an unapologetically progressive campaign and promised to end mass incarceration, give crime victims a voice in every case, eliminate cash bail, effectively prosecute police misconduct, investigate and prosecute political corruption, corporate crime, and landlords who break laws to exploit tenants, end racist disparities, treat every arrest as an opportunity for intervention, and focus resources on serious and violent felonies.¹²³ Notably, Boudin's platform relies on humanitarian tropes such as referring to incarceration of nonviolent offenders as a "waste of resources."¹²⁴

While this wave of public support for a different kind of prosecutor is intense and notable, it is not without precedent. In 2009, Kamala Harris, then running for California Attorney General after being the San Francisco District Attorney, wrote a book titled *Smart on Crime*,¹²⁵ in which she espoused her preference for collaboration, prevention, and diversion over incarceration, using the classic humanitarian tropes of saving the precious resources of the criminal justice system for the deserving.¹²⁶ It is a testament to the attractiveness of the "progressive prosecutor" moniker that Harris heavily relied on this trope in her bid for U.S. President,¹²⁷ even though critics questioned the accuracy of this self-description.¹²⁸ Against this backdrop, Sessions and his hires stand out as arcane, Reagan-era relics,

breaking/ct-kim-foxx-states-attorney-met-20161201-story.html.

121. Brian Rogers, Houston District Attorney Proud of First Year in Office, HOUS. CHRON. (Dec. 29, 2017, 6:05 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-district-attorney-proud-of-first-year-in-12462622.php>.

122. Andy Metzger, *Rachael Rollins Wins Nod for Suffolk County District Attorney*, WGBH (Sept. 4, 2018), <https://www.wgbh.org/news/politics/2018/09/04/rachel-rollins-wins-nod-for-suffolk-county-district-attorney>.

123. *Roadmap for Reform*, CHESA BOUDIN FOR DA, <https://www.chesaboudin.com/issues> (last visited July 17, 2019).

124. *Id.*

125. KAMALA HARRIS, *SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER* (2009).

126. For an analysis of Harris' book, see HADAR AVIRAM, *CHEAP ON CRIME*, *supra* note 22, at 84-86.

127. Kate Zernike, "*Progressive Prosecutor*": Can Kamala Harris Square the Circle?, N.Y. TIMES, Feb. 11, 2019 at A1.

128. Lara Bazelon, *Kamala Harris Was Not a "Progressive Prosecutor"*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html>.

whose arc of influence cannot extend to the majority of U.S. criminal defendants.

Does all this mean that developments on the federal level truly do not matter? It is important to keep in mind that, even if the core of the mass incarceration does not involve federal prosecutions of drug offenses, the individual miscarriages of justice in these cases do result from a bloated and savage sentencing structure and its exploitation in federal courts. But even more notably, there is one area in which the federal government retains its authority and can govern the fate of millions:¹²⁹ immigration enforcement, and in particular the nexus between immigration and crime.

IV. Immigration, Crime, and Gratuitous Cruelty

The previous sections illuminated areas of domestic crime in which the Trump/Sessions punitive energy was evident. However, this administration has disproportionately focused on the false nexus between immigration and crime. This focus dates back to Trump's campaign, in which he repeatedly linked immigrants, particularly from Central America, to drug and violent crimes. Trump's presidential announcement speech from June 2015 foreshadows the centrality of this false nexus to his campaign and later presidency:

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.¹³⁰

Trumpian anti-immigrant rhetoric relying on the immigration-crime nexus came to be the lynchpin of his campaign. Appealing to racist and nativist sentiments, Trump has linked immigrants to homicides,¹³¹ sex

129. Jose A. Del Real, *The Number of Undocumented Immigrants in the U.S. Has Dropped, a Study Says. Here Are 5 Takeaways*, N.Y. TIMES, Nov. 27, 2018 at A12.

130. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?noredirect&utm_term=.67b3c9c1e700.

131. Katie Rogers, *Trump Highlights Immigrant Crime to Defend His Border Policy. Statistics Don't Back Him Up*, N.Y. TIMES (June 22, 2018), at A12.

offenses,¹³² drug trafficking,¹³³ terrorism,¹³⁴ and property offenses,¹³⁵ on occasions too numerous to count—statements that fly in the face of robust empirical research showing that areas with more immigrants experience less crime in general¹³⁶ and violent crime in particular.¹³⁷ This virulent propaganda has fueled a partisan discourse about immigration that is untethered from reality, and fed into immigration policies

Have the consequences of the immigration-crime nexus made the situation worse under Trump? As many media outlets have explained in the last few years, the Obama administration presided over a record number of deportations, which are yet unmatched by the Trump administration.¹³⁸ Moreover, despite claims that deportation focused on immigrants with a criminal record, deportations of immigration violators with no criminal involvement remained above 40 percent throughout Obama's presidency, and exceeded 65 percent in his first two years in office.¹³⁹ But the sense that current immigration policies are particularly cruel, heartless, and deliberately misleading, is not completely mistaken.

As Attorney General, Sessions dismantled the Legal Orientation

132. Emma Court, *Trump Ties Undocumented Immigrants to Sex Crimes Against Children, but He's Not Telling the Full Story*, BUS. INSIDER (Jan. 13, 2019, 1:47 PM), <https://www.businessinsider.com/fact-check-trumps-claims-on-undocumented-immigrants-and-sex-crimes-tweet-2019-1>.

133. *Full Transcripts: Trump's Speech on Immigration and the Democratic Response*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/politics/trump-speech-transcript.html>.

134. Remarks by President Trump and Members of the Angel Families on Immigration, White House (June 22, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-members-angel-families-immigration/>.

135. Meg Kelly, *Fact-Checker: Trump Falsely Claims the Human Toll of Illegal Immigration*, WASH. POST (July 6, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/07/06/trump-falsely-claims-the-human-toll-of-illegal-immigration/?utm_term=.59f68896d69b.

136. Robert Adelman & Lesley Williams Reid, et al., *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. OF ETHNICITY IN CRIM. JUST. 52 (2016).

137. Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection Between Immigration and Violent Crime Rates in U.S. Cities, 1980-2000*, 56 SOC. PROBS. 447 (2009).

138. Louise Radnofsky, *U.S. Deportations Rise, but Remain Below Peak in Obama Era*, WALL ST. J. (Mar. 21, 2019), <https://www.wsj.com/articles/u-s-deportations-rise-but-remain-below-peak-in-obama-era-11553198656>.

139. Jason Lemon, *Deportations Under Trump Still Lag Far Behind Those Carried Out by the Obama Administration*, NEWSWEEK (Dec. 23, 2018, 2:48 PM), <https://www.newsweek.com/trump-still-deports-less-people-obama-1269962>.

Program, which offered support to immigration detainees,¹⁴⁰ as well as undermined and weakened due process in immigration courts.¹⁴¹ Sessions was criticized by the U.S. District Court about his decision to require victims of domestic violence seeking asylum to meet a nearly impossible threshold during the asylum screening process.¹⁴² Flying in the face of the false immigration-crime nexus, which supposedly justifies pursuing immigrants who pose a public safety risk, Sessions issued a letter rescinding legal protections formerly available to recipients of the DACA program, which protects undocumented immigrants who arrived to the United States as children—people who study and work in the United States, whose criminal records are clean.¹⁴³ And the Trump administration, including Sessions, engaged in a bitter battle with “sanctuary cities,” raising questions of federal intervention in local affairs and resulting in the cities’ victory at the Ninth Circuit¹⁴⁴—another habitual target of Trump’s ire.¹⁴⁵

Perhaps the most extreme manifestation of this nativist animus is the notorious family separation policy. Much has been written about the devastating consequences of these policies, which have claimed young lives,¹⁴⁶ terrified and emotionally scarred young children,¹⁴⁷ and exposed

140. Cecilia Wang, *In Its Zeal to Deport Immigrants, the Justice Department Scraps Due Process*, ACLU (Apr. 19, 2018, 11:45 AM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/its-zeal-deport-immigrants-justice-department>.

141. David Hausman, *How Jeff Sessions Is Attacking Immigration Judges and Due Process Itself*, ACLU (Oct. 1, 2018, 2:00 PM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges>.

142. *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). For previous background on the case, see *Backgrounder and Briefing on Matter of A-B-*, CTR. FOR GENDER & REFUGEE STUDIES, UC HASTINGS (Aug. 2018), <https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b>.

143. Letter from Jefferson B. Sessions, U.S. Attorney Gen., Office of the Attorney Gen., to Elaine Duke, Acting Sec’y, Dep’t of Homeland Sec. (Sept. 5, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

144. *City & Cty. of S.F. v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

145. Ben Feuer, *Thanks to Trump, the Liberal 9th Circuit Is No Longer Liberal*, WASH. POST (Feb. 28, 2019), https://www.washingtonpost.com/outlook/2019/02/28/thanks-trump-liberal-ninth-circuit-is-no-longer-liberal/?utm_term=.2bfe0304b9b6.

146. Nicole Goodkind, *Trump Officials Acknowledge Sixth Migrant Child Death in U.S. Custody in 6 Months After None the Previous Decade*, NEWSWEEK (May 23, 2019, 4:30 PM), <https://www.newsweek.com/border-family-separation-child-death-democrats-investigate-1434591>.

147. Eli Rosenberg, *‘Gut-Wrenching’ Recording Captures Sounds of Crying Children Separated from Parents at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/06/18/a-secret-recording-captures-the-sounds-of-crying-children-separated-from-parents-at-the-border/?utm_term=.cb6dbe7dabf8.

them to unimaginable sexual abuse.¹⁴⁸ For our purposes, it is important to highlight that Trump has relied on the false immigration-crime nexus to justify these cruelties.¹⁴⁹ The rhetorical devices used for this deception, including the propagandist reliance on victims' voices to create the false impression that immigration is a cause of crime, are reminiscent of the crime control rhetoric of the 1980s.

Conclusion

The controversy about William Barr's role in mischaracterizing the findings of the Mueller report has obscured an interesting moment that occurred in his confirmation hearing. Republican Senator Chuck Grassley pressed Barr on his tough-on-crime record, asking him, "Will you commit to fully implementing the FIRST STEP act?" Barr replied: "Yes, Senator."¹⁵⁰ The Brennan Center reported:

Barr said that when he was last attorney general in the early 1990s, the violent crime rate was high and prison sentences were short. The system had broken down, he said. Barr argued that the growth of the prison population helped bring crime down since then, something the Brennan Center strongly disputes. But he acknowledged that times have changed: "I have no problem with the approach of reforming the prison structure and I will faithfully implement the law."¹⁵¹

This excerpt is telling because it is a classic cheap-on-crime conversation between two conservatives. As the Brennan Center wrote,¹⁵² Barr is by no means a bleeding-heart prison reformer. Nonetheless, this exchange evinces his willingness to go beyond pledging general obedience to the law: he acknowledges the merits of criminal justice reform in changing

148. Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>.

149. Katie Rogers, *Trump Highlights Immigrant Crime to Defend His Border Policy. Statistics Don't Back Him Up.*, N.Y. TIMES (June 22, 2018), at A12.

150. Tim Lau, *Barr Pledges to Implement FIRST STEP Act*, BRENNAN CTR. FOR JUST. (Jan. 15, 2019), <https://www.brennancenter.org/blog/barr-pledges-implement-first-step-act>.

151. *Id.*

152. Tim Lau, *William Barr Is Out of Step on Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Dec. 7, 2018), <https://www.brennancenter.org/blog/william-barr-out-of-step-criminal-justice-reform>.

times. The exchange, which is characteristic of conservative humonetarian discourse, is notable because of Barr's lack of compunction about legality in other areas of his position. It also highlights the distinctiveness of Jeff Sessions' tenure as Attorney General: more than a decade after the Great Recession, Republicans who still consider the war on drugs a good idea and who have not modified their stance on mass incarceration are the exception, rather than the rule.

In 2013, UC Hastings hosted a conference about sentencing reform. One of the speakers on a panel titled *The Economics of Sentencing Reform* was Vikrant Reddy, a senior policy analyst for the right-wing thinktank *Right on Crime*¹⁵³ and later a senior fellow at the Charles Koch Institute.¹⁵⁴ Reddy astutely pointed out that bipartisan reform and Republican good will in the post-recession era stems from a generational gap within the conservative side of the political map. Former generations of Republican politicians served and campaigned against a backdrop of high crime rates between the 1960s and 1980s, which shaped their perceptions about violent crime, public safety, and the need for incarceration. The newer cadre of conservative politicians "came of age" as elected officials in an era of declining crime rates and were therefore more open to political compromise about reform, if only for the sake of financial prudence. Applying Reddy's observation to Sessions' tenure as Attorney General is instructive. Sessions, a war-on-drugs dinosaur fighting a losing battle against a wave of marijuana legalization and targeting nonviolent crime in an era of reform, was out of step with most of the pre-Trump Republican party. His approach is an outlier in the Republican milieu shaped by recession-era concessions, to the point that former top federal prosecutors called on him to recant his mandatory minimum policy.¹⁵⁵ His approach is not emblematic of conservative views on the state or federal level; if anything, it is emblematic of Trump's own antiquated tough-on-crime views, as manifested in his ongoing investment in the false assertion of the guilt of the Central Park Five.¹⁵⁶ While Barr is not a younger politician—his criminal justice record is a classic example of the older

153. RIGHT ON CRIME, <http://rightoncrime.com/> (last visited July 17, 2019).

154. *Charles Koch Institute Welcomes Criminal Justice Reform Expert Vikrant P. Reddy*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/blog/charles-koch-institute-welcomes-criminal-justice-reform-expert-vikrant-p-reddy/> (last visited June 22, 2018).

155. Laura Jarrett, *Former Top Federal Prosecutors Call on Sessions to End "Zero Tolerance" at Border*, CNN (June 19, 2018, 9:43 AM), <https://www.cnn.com/2018/06/19/politics/us-attorneys-letter-jeff-sessions/index.html>.

156. Olivia B. Waxman, *President Trump Played a Key Role in the Central Park Five Case. Here's the Real History Behind "When They See Us"*, TIME (May 31, 2019), <https://time.com/5597843/central-park-five-trump-history/>.

generation of Republicans—he has been able to adjust his perspective to the changing tides in conservative criminal justice approaches.

What might we expect from Barr, or from a possible successor of his in the Trump administration? As this paper demonstrates, not much is new in the criminal justice field beyond the increased virulent focus on racism and nativism. It is obvious that gains in criminal justice reform can, and should, continue to be made in states and municipalities; it is perhaps less obvious, but not impossible, that such gains can be made on particular issues on the federal level as well, sometimes even with Trump's blessing. The extent to which these gains will go beyond the symbolic depend on the meaning ascribed to "justice reinvestment." As I explain in *Cheap on Crime*, the dark side of austerity in prison reform manifests in the continuing decline in rehabilitation and reentry programming. A classic example of this disturbing trend is the recent announcement that the Trump administration plans to cancel English, legal aid, and recreational activities in shelters for unaccompanied minors.¹⁵⁷ Beyond the gratuitous cruelty, one wonders whether the ostensible effort to alleviate a budget strain will not result in alienation, cynicism, and transgressions on the part of people who cannot access any programming beyond their mere survival.

It is important to point out that, while Trumpian nativist rhetoric has already resulted in the loss of lives and the destruction of families, the rhetoric in and of itself needs to be a focus of activism and advocacy. Virulent rhetoric against immigrants and non-white American residents can, and has, become a Petri dish in which hate crime can fester, and can have the long-term effect of desensitizing the American public to the plight of people they perceive as "other." Of all federal policies related to criminal justice, it is this discourse and its ramifications that is most deserving of attention, activism and advocacy.

Finally, it is imperative to remove Trump from office, via impeachment, election, or both. It is not difficult to imagine a Republican administration that would embrace the criminal justice positions held by many Republicans, on the state and federal levels, before the 2016 election; some developments during the Trump administration suggest that not all is lost on the front of bipartisan reform. A misinformation campaign that can tenderize the American public to horrific violations of human and civil rights has already

157. Maria Sacchetti, *Trump Administration Cancels English Classes, Soccer, Legal Aid for Unaccompanied Child Migrants in U.S. Shelters*, WASH. POST (June 5, 2019), https://www.washingtonpost.com/immigration/trump-administration-cancels-english-classes-soccer-legal-aid-for-unaccompanied-child-migrants-in-us-shelters/2019/06/05/df2a0008-8712-11e9-a491-25df61c78dc4_story.html?fbclid=IwAR33KimeU9cCYahl3qPJdQpeVSY8p_ui4KJ2RhhEU_z40vdfYiOheckpmHI&utm_term=.fcdcc5bd8f55.

wreaked much damage, but it would take many years for it to succeed in passing much worse policies without objection. It is crucial that throwbacks to the Nixon and Reagan eras not have a chance to dominate the criminal justice conversation, and the only way to guarantee this is to ensure that these trends, which the Trump administration (and Trump himself) encourages and fosters, are repudiated and reversed by the American electorate in 2020.
