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Regressive Prosecutors: Law and Order Politics and Practices in Trump’s DOJ

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Introduction

In October 2019, President Donald J. Trump signed an executive order authorizing the establishment of a Commission on Law Enforcement and the Administration of Justice, to be formed and directed by Attorney General William Barr.¹ The Trump executive order included 13 examples of the kind of issues the Commission was to address. Number Four was “refusals by State and local prosecutors to enforce laws or prosecute categories of crimes.”²

This provision echoes sentiments expressed just two months earlier by Attorney General Barr. In an August 2019 speech delivered at a national conference of the Fraternal Order of Police, Barr blasted “district attorneys that style themselves as ‘social justice’ reformers, who spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law.”³ Indeed, after an initial several-month period during which he was relatively quiet about how he would use the broad authority of his office to approach criminal justice issues, Attorney General Barr has since become quite vocal about his nostalgia for old-school law-and-order, his disdain for social

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1. Exec. Order No. 13896, 3 C.F.R. § 58595 (2019).

2. *Id.*

3. William P. Barr, Attorney Gen., U.S. Dep’t of Justice, Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference (Aug. 12, 2019).

justice movements, and—apropos of this symposium—his particular disdain for progressive prosecutors.⁴

Barr has since formed the above-referenced Commission on Law Enforcement and the Administration of Justice, introducing its 18 members in January 2020. All 18 members are law enforcement officials, including both state and federal prosecutors. This is a far cry from the composition of the original Commission of the same name, its members appointed 65 years ago by President Johnson.⁵ While the new Commission has not yet publicly announced its specific agenda, it is reasonable to expect that combatting “progressive prosecutors” will be included.

In this essay, I build on Professor Hadar Aviram’s initial observations and prognostications, published in this journal, about how the “Trump/Sessions/Barr”⁶ regime has approached criminal justice policy in an era of progressive reform. To that end, I analyze the indicators from Barr’s Department of Justice (“DOJ”) that it has moved from merely being an exemplar of a counter-trend to the justice reform movement of which progressive prosecutors are a part, to becoming an aggressively interventionist force that aims to actively impede progressive reform efforts in the criminal system.

I first detail the contours of the Trump-era DOJ criminal justice policies and practices to illustrate its countertrend status, then I delineate the DOJ policy statements and actual efforts to impose on

4. *Id.* See also *Third Annual Attorney General’s Award for Distinguished Service in Policing*, U.S. DEP’T OF JUSTICE at 16:54 (Dec. 3, 2019), <https://www.justice.gov/opa/video/third-annual-attorney-general-s-award-distinguished-service-policing> (suggesting the communities that do not show respect for police will find themselves without police protection). This was perceived by some as a threat against activists who protest police brutality. Tim Elfrink, *William Barr Says ‘Communities’ that Protest Cops Could Lose ‘the Police Protection They Need’*, WASH. POST (Dec. 4, 2019), <https://www.washingtonpost.com/nation/2019/12/04/william-barr-police-protests-communities-race/>. More recently, in Barr’s February 10, 2020 speech, he blasts “sanctuary cities” and the progressive politicians who oppose federal immigration enforcement, as well as prosecutors who tailor plea bargains in a manner to mitigate immigration consequences. William P. Barr, Attorney Gen., Dep’t of Justice, Remarks at the National Sheriffs’ Association Winter Legislative and Technology Conference (Feb. 10, 2020).

5. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 309–11 (1967) (report includes the biographies of the 1965 Commission members).

6. Hadar Aviram, *Are We Still Cheap on Crime? Austerity, Punitivism, and Common Sense in the Trump/Sessions/Barr Era*, 1 HASTINGS J. CRIME & PUNISHMENT 3 (2020).

state and local criminal justice operations through various initiatives. Within that, I examine how federal law enforcement itself is being mobilized to reinvigorate a “law and order” approach to street crime, including direct targeting of jurisdictions that have adopted more progressive policies and practices. To that end, I argue that a dangerous turn has happened in the Barr DOJ that extends and multiplies the threats posed by the Sessions regime, with significant negative consequences for individual defendants and, potentially, the larger criminal justice reform movement that is exemplified by the progressive prosecutor movement.

In Part I, I briefly summarize the evolution of the Sessions/Barr policy approach to criminal justice, and detail the most recent developments in that approach, including its harkening back to the “law and order” period that prevailed in the late 20th century, both in its national criminal justice policy and in its internal law enforcement practices. In Part II, I describe the signs that this turn back is morphing into a more proactive intervention that takes aim at “progressive” state and local actors and systems. As I detail, this is evidenced in both the DOJ’s national policy implementation and more directly in the prosecutorial practices mobilized by U.S. Attorneys’ offices. In Part III, I conclude by considering the limits of this federal countermovement.

I. Nostalgic Punitiveness in the Trump DOJ

As Professor Aviram makes clear in her essay,⁷ the federal government has been slower and much more tempered in its retreat from late 20th century mass incarceration compared to the state systems. While the collective retrenchment from mass incarceration in the states is still quite modest relative to the massive punitive build-up over the 1980s and 1990s,⁸ there have been some important changes at all stages of the criminal process. Critical scrutiny of, and intervention in, police behavior, especially in regard to aggressive

7. *Id.*

8. Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 ANN. REV. OF CRIMINOLOGY 235 (2018). See also HADAR AVIRAM, CHEAP ON CRIME (2015) (pointing out the contradictory policy responses to the fiscally driven reform movement).

stop-and-frisk tactics and racialized use of force, is no longer contained to activist movements;⁹ pretrial detention policies and cash bail systems are being reformed across the nation;¹⁰ penal codes are being revised to lower punishment ceilings and downgrade the severity of some offenses in many jurisdictions;¹¹ and prosecutors' offices in some urban jurisdictions are being remade to foreground a more progressive vision of justice, including more liberal policies on declination and diversion.¹² One measurable impact of these reforms has been a small but steady decline in the overall state prison population since 2009.¹³

The federal government came later to the reform movement, with the passage of the bipartisan Fair Sentencing Act of 2010 marking the first major legislative reform success.¹⁴ This Act reduced the so-called 100-1 "crack-powder" disparity, incorporated into federal law by the Anti-Drug Abuse Act of 1986, to an 18-1 ratio.¹⁵ Under the 1986 Act, a defendant convicted of distributing 5 grams of crack was subject to the same 5-year mandatory minimum as a defendant convicted of selling 500 grams of powder cocaine; with the 2010 reform, it now

9. A very telling example of this change is Mike Bloomberg's current policy stance on policing as a 2020 presidential candidate, as well as his apology for his previous defense of the "stop and frisk" policy that he actively encouraged as NYC mayor. See Abby Phillip, *Bloomberg Proposes Broad Changes to Criminal Justice System Amid Scrutiny of His Past Comments on Race and Policing*, CNN (Feb. 18, 2020), <https://www.cnn.com/2020/02/18/politics/michael-bloomberg-criminal-justice-plan/index.html>.

10. Aviram, *supra* note 6, at 22; Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 *RODHAM URB. L.J.* 845 (2019).

11. See, e.g., Katherine Beckett, Lindsey Beach, Emily Knaphus & Anna Reosti, *U.S. Criminal Justice Policy and Practice in the Twenty-First Century: Toward the End of Mass Incarceration*, 40 *L. & POL'Y* 321 (2018) (reviewing and analyzing impact of state-level legislative sentencing reforms from 2007-2014); Michael Campbell, Heather Schoenfeld & Paige Vaughn, *Same Old Song and Dance? An Analysis of Legislative Activity in a Period of Penal Reform*, *PUNISHMENT & SOC'Y* (forthcoming 2020) (on New Jersey's reforms).

12. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 *UCLA CRIM. JUST. L. REV.* 1 (2019).

13. Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, *SENT'G PROJECT* (Sept. 17, 2019), <https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/>.

14. Aviram, *supra* note 6, at 3. See Mona Lynch & Marisa Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality*, 52 *L. & SOC'Y REV.* 773, 776-77 (2018) (providing a brief history of the 15-year effort to address the crack-powder disparity in the federal law).

15. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 3, 124 Stat. 2372 (2010).

takes 28 grams of crack to trigger the 5-year mandatory minimum.¹⁶ While important, the Fair Sentencing Act was limited in scope to just a subset of one category of federal crime, so had no impact on the majority of federal defendants.

Several executive branch policy changes during the Obama administration had the potential to be a bit more far-reaching. First, in 2010, Attorney General Eric Holder issued a memorandum that reversed a Bush-era prosecutorial policy, promulgated in the 2003 “Ashcroft memo,” that required federal prosecutors to pursue “the most serious, provable offense,”¹⁷ and that held prosecutors to very stringent requirements in plea negotiations and in regard to maximizing sentences under plea agreements.¹⁸ Holder’s memorandum returned some decision-making discretion to line prosecutors to ensure that individualized circumstances in cases were also considered.¹⁹ Then, in 2013, Holder issued a memorandum explicitly aimed to reduce punishment exposure for drug defendants by directing prosecutors not to charge drug weight when it would trigger a mandatory minimum prison sentence for low-level drug defendants who met four criteria.²⁰ The memo also discouraged the use of a highly punitive drug recidivist enhancement unless the defendant was deemed appropriate for those severe sanctions.²¹ Two

16. Lynch & Omori, *supra* note 14.

17. Memorandum from John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, to All Federal Prosecutors Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm.

18. *Id.*

19. Memorandum from Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice, to All Federal Prosecutors on Department Policy on Charging and Sentencing (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>. Whereas the Ashcroft memo used the word “requires” in regard to charging the most serious and provable offense, the Holder memo uses “should ordinarily charge the most serious offense,” and qualifies this directive to stress individualized assessment of the case and defendant.

20. Memorandum from Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice, to All Federal Prosecutors on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

21. *Id.* at 3. This was followed by a memo in September 2014 that specifically prohibited using this recidivist enhancement as a threat to obtain guilty pleas or as punishment for asserting trial rights. See Memorandum from Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t

weeks later, the DOJ issued policy that barred federal prosecutors from pursuing marijuana prosecutions against those producing, possessing, or distributing marijuana in compliance with state law.²² The DOJ also instituted a more systematic clemency program that aimed to provide relief to long-term drug-sentenced federal prisoners.²³ Coupled with these DOJ policies, in 2014, the U.S. Sentencing Commission drafted a sentencing guideline amendment (with no objection by Congress) that reduced the sentencing guideline ranges for all drug offenses by two offense levels.²⁴

Taken together, these policy developments had a small, but measurable, effect on federal incarceration because, unlike in state systems, federally convicted drug defendants constitute the largest share of those in federal prison on any given day.²⁵ More than half of the annual federal prisoner count from the late 1980s through 2012 was made up of those convicted for drug offenses.²⁶ Therefore, the reductions to drug sentence lengths that occurred through these myriad reforms has contributed to an overall drop in the federal prison

of Justice, to All Federal Prosecutors on Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014), https://www.justice.gov/oip/foia-library/ag_guidance_on_section_851_enhancements_in_plea_negotiations/download.

22. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to All United States Attorneys on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. It should be noted that the Department of Justice during Obama's administration also increased efforts in intervening in problematic local police practices through its civil rights division, and made some effort on various prison conditions issues, such as the use of solitary confinement.

23. This program has been critiqued by many, often for not being generous enough with the relief. See, e.g., Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387 (2017); Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 FED. SENT'G REP. 271 (2017).

24. *Materials on 2014 Drug Guidelines Amendment*, U.S. SENTENCING COMM'N, <https://www.usc.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment> (last visited Apr. 14, 2020) (the Commission provided information about this amendment change and its retroactive applicability).

25. This is a consequence of the relative share of the federal caseload that is made up of drug cases, the high probability of a prison sentence in federal drug cases, and the extremely lengthy drug sentences meted out in federal court following the tough on crime reforms in the mid-1980s. See MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* 34 (2016).

26. *Id.* at 7, fig. I.1.

population,²⁷ as well as a slight decline in the drug defendant share of that population.²⁸ All in all, as the Obama administration headed into its final year, the general expectation was that the federal system would continue its slow, steady retreat from the law and order policies of the 1980s and 1990s.²⁹

When Donald Trump was elected President in 2016, that expectation was shattered. Candidate Trump campaigned on a particularly racialized and retrograde law and order platform³⁰ that, among other things, heralded police use of force,³¹ the death penalty,³² and racially exclusionary immigration policies justified by false claims about immigrant criminality.³³ When Trump named Jeff Sessions, then the senior Senator from Alabama, as his first Attorney General, there seemed to be no doubt that the law and order campaign

27. The annual federal prison population rose steadily from 1980-2013, then dropped for the first time in 2014, from 219,298 to 214,149. The annual decline has continued into the Trump administration as well. See *Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (last visited Apr. 2, 2020).

28. By 2014, drug defendants dipped below 50% of the federal prison population. See Mark Motivans, *Federal Justice Statistics, 2013-2014*, U.S. DEP'T OF JUST. 32 (2017), <https://www.bjs.gov/content/pub/pdf/fjs1314.pdf>. By 2016, drug defendants constituted 48% of the federal prison population. See Mark Motivans, *Federal Justice Statistics, 2015-2016*, U.S. DEP'T OF JUSTICE 11 (2019), <https://www.bjs.gov/content/pub/pdf/fjs1516.pdf>. As of February 20, 2020, 45.4% of those federally imprisoned were convicted of drug offense. See *Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Apr. 2, 2020).

29. LYNCH, *supra* note 25. The conventional wisdom had Hillary Clinton winning the presidency, and her stated criminal justice policies built directly on the Obama administration's efforts around police practices, racial disparities in sentencing, among other reform efforts. See *Criminal Justice Reform*, THE OFFICE OF HILLARY RODHAM CLINTON, <https://www.hillaryclinton.com/issues/criminal-justice-reform/> (last visited Apr. 2, 2020).

30. See, e.g., Michelle Mark, *Where Donald Trump stands on criminal justice*, BUS. INSIDER (Oct. 8, 2016), <https://www.businessinsider.com/where-donald-trump-stands-on-criminal-justice-2016-10>.

31. See Jelani Cobb, *Donald Trump Is Serious When He "Jokes" About Police Brutality*, NEW YORKER (Aug. 1, 2017), <https://www.newyorker.com/news/news-desk/donald-trump-is-serious-when-he-jokes-about-police-brutality> (recounting Trump's campaign comments).

32. See Jenna Johnson, *Donald Trump wants the death penalty for those who kill police officers*, WASH. POST (Dec. 10, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/10/donald-trump-wants-the-death-penalty-for-those-who-kill-police-officers/> (supporting death penalty for those who kill police); Thomas Kaplan, *Death Penalty Takes on New Dimension in 2016 Campaign*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/us/politics/death-penalty-takes-on-new-dimension-in-2016-campaign.html> (defending death penalty as deterrent; support for death in Central Park 5 case).

33. Aviram, *supra* note 6.

talk would be translated into policy. Sessions was a vocal proponent of both law and order and anti-immigrant politics, with a record of making good on that rhetoric.³⁴

Prior to going into politics, Sessions served from 1981-1993 as the U.S. Attorney of the Southern District of Alabama, where he was notably aggressive in prosecuting drug crime.³⁵ As a Senator, he maintained his law and order commitments, and also espoused extremely restrictionist views on immigration.³⁶ He actively killed multiple bipartisan bills on immigration, including the DREAM Act which would have provided a path to citizenship for immigrants who came to the U.S. as children.³⁷ Just prior to Trump's election, Sessions was also one of three Senators who actively thwarted a multiyear effort to pass a bipartisan federal sentencing reform bill.³⁸

Notwithstanding the passage of the First Step Act in 2018, a compromise sentencing reform bill supported by the executive branch,³⁹ this administration's DOJ has delivered on the "tough on crime" agenda. As Attorney General, Sessions translated his political commitments, shared in large part by the president, into policy by mobilizing a variety of tools at his disposal as head of the Department of Justice. For instance, three weeks after being sworn in, Sessions

34. See AMES C. GRAWERT, BRENNAN CTR. FOR JUSTICE, ANALYSIS: SEN. JEFF SESSIONS'S RECORD OF CRIMINAL JUSTICE (2017).

35. *Id.* at 3 ("During the 12 years that Sen. Sessions served as U.S. Attorney for the Southern District of Alabama, federal data suggest that he shifted resources toward drug offenses, but away from prosecuting violent crimes. Drug cases made up more than 40 percent of his office's convictions, and just 20 percent of convictions for other U.S. Attorneys in Alabama. Sen. Sessions's office also obtained harsher sentences in drug cases.").

36. See, e.g., Seung Min Kim & Josh Gerstein, *What Jeff Sessions thinks about immigration, police and terrorism*, POLITICO (Jan. 10, 2017), <https://www.politico.com/story/2017/01/jeff-sessions-views-attorney-general-233383>; Michael D. Shear & Katie Benner, *How Anti-Immigration Passion Was Inflamed from the Fringe*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/immigration-children-sessions-miller.html>.

37. See AL.com & Press-Register staff, *Jeff Sessions outlines attacks on immigration reform plan with DREAM Act 'White Paper'*, AL.COM (Nov. 23, 2010), https://www.al.com/live/2010/11/jeff_sessions_s3827_dream_act.html.

38. This effort morphed into the 2018 First Step Act, which is a much-watered down version of the original bipartisan bill, first introduced in 2013 as the Smarter Sentencing Act. For more information about the passage of the First Step Act, see Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law – and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

39. *Id.* See also Aviram, *supra* note 6.

announced the formation of a “crime reduction” task force that directly linked undocumented immigration with violent crime.⁴⁰ A week later, he directed the 94 U.S. Attorneys to prioritize prosecutions of “illegal immigration and violent crime, such as drug trafficking, gang violence and gun crimes” in their offices.⁴¹

Two months after, in May 2017, Sessions issued a memorandum that laid out an agenda to return to punitive adjudication practices.⁴² Not only did he return to the dictates of the Bush-era Ashcroft memo in this iteration, but he also specifically rescinded key Holder policies that had aimed to reduce the punishment for lower-level drug defendants. Thus, his memorandum directs federal prosecutors to charge and seek convictions on “the most serious, readily provable offense”;⁴³ this includes maximizing the potential punishment exposure in every case that U.S. Attorneys bring, and requiring supervisory approval to deviate from this directive. The memo also requires that mandatory minimums be sought in all eligible cases, with exceptions requiring supervisory approval.⁴⁴ In addition, the memo rescinds the 2014 Holder policy that barred prosecutors from using threats of mandatory sentencing enhancements to compel guilty pleas from defendants.⁴⁵

40. Memorandum from Jefferson B. Sessions, Attorney Gen., Office of the Attorney Gen., to All Federal Prosecutors Regarding Update on the Task Force on Crime Reduction and Public Safety (Apr. 5, 2017), <https://www.justice.gov/opa/press-release/file/955476/download>.

41. Press Release, U.S. Dep’t of Justice, Attorney General Sessions Directs Federal Prosecutors to Target Most Significant Violent Offenders (Mar. 8, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-directs-federal-prosecutors-target-most-significant-violent> (at the same time that Jeff Sessions ramped up federal law enforcement in this way, he also worked to unleash local law enforcement in this way, largely by discarding much of the work done in the Civil Rights division to reform agencies with troubling patterns and practices in policing).

42. See Memorandum from Jefferson B. Sessions, Attorney Gen., Office of the Attorney Gen., to All Federal Prosecutors Regarding Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

43. *Id.* This language is identical to that used in the Ashcroft memo. See Ashcroft, *supra* note 17.

44. Sessions, *supra* note 42, at 1.

45. Sessions, *supra* note 42, at 2 (referencing the 2014 policy regarding enhancements in plea negotiations and the 2013 mandatory minimum policy as examples of policies inconsistent with the directives laid out in the memorandum).

In April 2018, Sessions directly tackled immigration on the criminal side when he devised a zero-tolerance policy on illegal entry, requiring prosecutors in border districts to file criminal charges against all those suspected of attempted or completed undocumented entry into the U.S.⁴⁶ This was a dramatic shift from the previous practice of prioritizing criminal prosecutions against undocumented immigrants with criminal records.⁴⁷ He also actively used his power to intervene in the noncriminal immigration regulation and enforcement activities of the administration to bar and expel immigrants from the country.⁴⁸

While Sessions was forced to resign just six months after his announcement of the zero tolerance policy, most of Sessions' regressive reforms live on under current Attorney General William Barr, contrary to some expectations.⁴⁹ Indeed, Professor Aviram took Barr at his word that, despite his 1990s record as a law-and-order Attorney General in the Bush administration, he was at least minimally aligned with the conservative "right on crime" criminal justice reform movement.⁵⁰ Thus, Aviram marked Sessions, but not Barr, as an outlier in the current moment:

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

46. Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

47. See *Immigration: Strengthening Enforcement*, THE WHITE HOUSE PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/issues/immigration/strengthening-enforcement> (last visited Apr. 9, 2020).

48. Aviram, *supra* note 6. For instance, Sessions instituted quotas for the number of cases that immigration judges had to hear, he changed asylum eligibility rules to make it much more difficult for crime victims to be granted asylum, he wrote the directive to end DACA protections, and he devised the family separation policy with the eager assistance of his protégé, Stephen Miller. See Jonathan Blitzer, *Jeff Sessions Is Out, but His Dark Vision for Immigration Policy Lives on*, NEW YORKER (Nov. 8, 2018), <https://www.newyorker.com/news/news-desk/jeff-sessions-is-out-but-his-dark-vision-for-immigration-policy-lives-on>.

49. Barr is not going after marijuana when its production, use, or sales is legal under state law, whereas Sessions had announced that he would, rescinding the 2013 Cole memorandum.

50. Aviram, *supra* note 6, at 28–29.

milieu shaped by recession-era concessions, to the point that former top federal prosecutors called on him to recant his mandatory minimum policy ... While Barr is not a younger politician—his criminal justice record is a classic example of the older generation of Republicans—he has been able to adjust his perspective to the changing tides in conservative criminal justice approaches.⁵¹

Aviram concluded that, even with the racism and nativism that Trump promotes, she could foresee at least some continued movement by Barr’s DOJ on the criminal justice reform agenda, at times even with Trump’s blessing.⁵² It turns out, however, that Barr’s commitments on the job also mark him as a criminal justice “dinosaur,” notwithstanding his “soft on crime” approach to Trump’s cronies like Roger Stone.⁵³ Not only did Barr not rescind the Sessions charging and sentencing policies when he took the helm, but by the summer of 2019, about six months after his appointment, he has become quite vocal about his support of a traditional law-and-order approach to criminal justice, as noted in the introduction.⁵⁴

His commitments in this regard also appear to have translated into federal prosecutions in the crime categories targeted by the Sessions-introduced DOJ policies. The number of federal drug trafficking, firearms, and nonpetty immigration convictions appears to have risen in 2019, as illustrated in Table 1. Because these three offense categories represent Sessions-introduced initiatives, the data indicate that the policies are indeed being implemented by U.S. Attorneys in district courts, even beyond Sessions’ departure.

51. Aviram, *supra* note 6, at 29–30.

52. Aviram, *supra* note 6, at 30.

53. Lauren Brooke-Eisen, *William Barr’s Hypocrisy on Roger Stone’s Sentencing*, BRENNAN CTR. FOR JUST. (Feb. 13, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/william-barrs-hypocrisy-roger-stones-sentencing>.

54. See Exec. Order No. 13896, 3 C.F.R. § 58595 (2019); Barr, *supra* note 3. See also Nancy LeTourneau, *Barr’s Tough on Crime Approach Only Applies to Those People*, WASH. MONTHLY (Feb. 12, 2020), <https://washingtonmonthly.com/2020/02/12/barrs-tough-on-crime-approach-only-applies-to-those-people/> (discussing Barr’s “hypocrisy” in his criminal justice views).

Table 1: Federally Sentenced Cases, FY2014-FY2019⁵⁵

	Obama			Trump		
	2014	2015	2016	2017	2018	2019
Drugs	21,312	20,038	19,232	19,043	18,747	19,830
Immigration⁵⁶	22,238	20,771	20,051	20,496	23,883	29,354
Firearms	7,925	7,069	7,305	6,759	7,512	8,481

The heightened use of criminal prosecutions in immigration cases is particularly dramatic, including under Barr's leadership. An October 2019 DOJ press release touted its "record breaking" number of immigration-related criminal filings in FY2019,⁵⁷ surpassing any previous year for which data is available. Their data included filings of the petty misdemeanor of "improper entry,"⁵⁸ which hit an all-time record of 80,886 filings (up from 68,470 in FY2018).⁵⁹

The use of federal prosecutions for firearms status offenses represents a revitalization of a popular federal war-on-crime strategy from the 1990s and early 2000s, wherein prosecutors partnered with

55. This data, reflecting sentenced defendants in the last three years of the Obama administration and the first three years of the Trump administration, were compiled by the author from the year-end Sourcebook reports of the U.S. Sentencing Commission. See *Sourcebook Archives*, U.S. SENTENCING COMM'N, <https://www.ussc.gov/research/sourcebook/archive> (last visited Apr. 10, 2020). The U.S. Attorney data reflecting filings, rather than sentenced defendants, would be a more useful data source; however, they have not yet released the full FY2019 data report.

56. There are multitudes more petty convictions for immigration offenses annually, but they are not captured in official data sources such as the U.S. Sentencing Commission data. As detailed below in text and *infra* note 57, the DOJ issued a press release that provides data on one category of petty immigration prosecutions.

57. Press Release, U.S. Dep't of Justice, Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), <https://www.justice.gov/opa/pr/departement-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>.

58. 8 U.S.C. § 1325(a) (1996).

59. Press Release, U.S. Dep't of Justice, Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), <https://www.justice.gov/opa/pr/departement-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>. ("The Justice Department today announced that in fiscal year 2019, its U.S. Attorneys' offices prosecuted the highest number of immigration-related offenses since record-keeping began more than 25 years ago.")

local law enforcement to not only threaten federal gun charges to induce plea bargains,⁶⁰ but also to charge defendants in federal court where sentences were typically harsher than in state court, in the name of violence reduction. These programs disproportionately targeted African Americans.⁶¹ TRAC has documented federal gun prosecutions over the past two decades, finding FY2019 on track to exceed the number of prosecutions over the entire period.⁶² Under the Sessions gun initiative, African Americans have again been disproportionately charged in federal court, especially for the lowest-level illegal possession charges.⁶³

Finally, while drug prosecutions first dipped in number in the Trump era—despite Sessions’ policy interests and directives—those numbers crept back up in FY2019, as indicated in Table 1.⁶⁴ Moreover, my own recent collaborative research indicates that the imposition of drug mandatory minimums has increased, and that this is highly correlated with the confirmation of Trump-nominated U.S. attorneys.⁶⁵ Most recently, Barr has lobbied Congress to allow drug

60. Lisa L. Miller & James Einstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 L. & SOC. INQUIRY 239, 255-57 (2005). Lynch also found that these kinds of multi-jurisdictional partnerships mattered in some places, but not others. See LYNCH, *supra* note 25, at 42–43, 70.

61. Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305 (2007).

62. *Federal Weapons Prosecutions Continue to Climb in 2019*, TRAC REPORTS (June 5, 2019), <https://trac.syr.edu/tracreports/crim/560/>. See also Press Release, U.S. Dep’t of Justice, *Federal Gun Prosecutions up 23 Percent after Sessions Memo* (July 28, 2017), <https://www.justice.gov/opa/pr/federal-gun-prosecutions-23-percent-after-sessions-memo>.

63. George Joseph, *Jeff Sessions’ gun prosecution machine goes after many black nonviolent offenders*, SLATE (Nov. 21, 2018), <https://slate.com/news-and-politics/2018/11/jeff-sessions-gun-prosecutions.html> (presenting data of increased prosecutions of low-level illegal gun possession defendants, 53% of whom are African American).

64. In some of the border districts, where the highest number of drug cases have been prosecuted, the war on immigration has actually suppressed drug case numbers as so many resources are diverted to immigration prosecutions. Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 N.Y.U. REV. OF L. & SOC. CHANGE 59, 107 (2019).

65. The appointment is associated with a 22% increase in use of drug mandatory minimums in a given district. Matt Barno & Mona Lynch, Paper Presented at the American Society of Criminology Meeting (Nov. 13-16, 2019) (on file with author).

scheduling of fentanyl analogs so that those charged with trafficking this whole class of substances will be subject to severe punishment.⁶⁶

II. From Countertrend to Proactive Intervention

The Trump-era DOJ has not been content to just exist in a parallel criminal justice world, animated by the old tropes of the war-on-crime. It has increasingly wielded its tools to intervene in state matters, including to explicitly impede or push back on progressive criminal justice politics, policies, and practices. There are two ways this is happening, and both are reminiscent of the tactics deployed in the Reagan-era federal war on crime.⁶⁷ The first way is through the promulgation of policy that directly governs and/or dictates to state and local jurisdictions on matters related to law enforcement. The second is more insidious. It is through the use of federal prosecutorial power to bring cases that would normally be handled by local jurisdictions. This power can be, and has been in a few instances, politicized to send a message to local authorities. I will take each of these in turn.

The single most aggressive policy intervention that the Sessions/Barr DOJ has launched has been in the immigration arena. As Professor Aviram details,⁶⁸ the current administration has promulgated a false narrative about immigrant criminality to justify sweeping changes to the civil side of immigration enforcement, including weakened due process in immigration courts; dramatically tightened rules for legal immigration including for those seeking asylum; the attempted rescission of DACA protections; and most infamously, the family separation policy predicated upon a particularly cruel theory of deterrence.⁶⁹

66. MICHAEL COLLINS & SHEILA P. VAKHARIA, CRIMINAL JUSTICE REFORM IN THE FENTANYL ERA: ONE STEP FORWARD, TWO STEPS BACK 23 (2020). *See also* William P. Barr, *William Barr: Fentanyl Could Flood the Country Unless Congress Passes This Bill*, WASH. POST (Jan. 10, 2020), https://www.washingtonpost.com/opinions/william-barr-congress-pass-this-bill-so-we-can-attack-the-onslaught-of-illegal-fentanyl/2020/01/10/cbb8ccdc-33cb-11ea-a053-dc6d944ba776_story.html.

67. *See* LYNCH, *supra* note 25, at 23–39.

68. Aviram, *supra* note 6, at 25–28.

69. This policy was devised by Stephen Miller in the White House, then adopted by DOJ and DHS. Miller revived an old DHS idea of family separation as deterrence and made it into

On the criminal side, the Sessions/Barr DOJ has coupled aggressively using criminal charges against undocumented immigrants (as discussed in the previous section) with directed efforts to target jurisdictions that by law or practice have not been willing partners in the Trump/Sessions/Barr war on immigrants. First, it tweaked the criteria as to when the DOJ was authorized to deny criminal justice funding to local jurisdictions that withheld information about undocumented immigrants being held in their jails, and that do not comply with immigration detainer requests.⁷⁰ While the Obama administration had a similar policy that called upon localities not to impede federal immigration efforts, the DOJ under Sessions and Barr has demanded active cooperation with Immigration and Customs Enforcement (“ICE”) requests, at the risk of losing federal grants.⁷¹ This strategy was recently ruled legal by the 2nd U.S. Circuit Court of Appeals,⁷² resulting in a Circuit split on this issue.⁷³ The practice of withholding federal criminal justice funding to gain state and local compliance is directly drawn from the 1990s tough-on-crime federal playbook.⁷⁴

More troubling than the funding policy has been the targeted hunt for undocumented immigrants by immigration forces in sanctuary cities. In what plays out like a federalism face-off, the current DOJ

policy. See Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER (Mar. 2, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession>.

70. See Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017); Press Release, U.S. Dep’t of Justice, Department of Justice Announces New Immigration Compliance Requirements for FY 2018 Grants (June 28, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-new-immigration-compliance-requirements-fy-2018-grants>.

71. See Associated Press, *Court sides with Trump in ‘sanctuary cities’ grant fight*, L.A. TIMES (Feb. 26, 2020), <https://www.latimes.com/politics/story/2020-02-26/trump-sanctuary-cities-appeals-court-funding>.

72. *Id.*

73. Andrew R. Arthur, *Second Circuit Soundly Repudiates Arguments Made by Sanctuary Cities*, CTR. FOR IMMIGR. STUD. (Mar. 1, 2020), <https://cis.org/Arthur/Second-Circuit-Soundly-Repudiates-Arguments-Made-Sanctuary-Cities>.

74. For instance, it was aggressively utilized by the federal government beginning in the 1990s to get states and localities to adopt a range of punitive “sex offender” policies. Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51 (2008) (discussing the legislation passed between 1993-2006 that used the withholding of Byrne grants as “stick” to gain state compliance with federal mandates).

has very publicly flexed its immigration enforcement muscle by sending agents into sanctuary jurisdictions to arrest, criminally charge, and/or deport undocumented immigrants.⁷⁵ It has particularly targeted localities in California after the state passed a new set of sanctuary laws in 2017 that strengthen existing law by further limiting local and state law enforcement's participation role in immigration enforcement.⁷⁶ ICE has conducted major immigration enforcement "sweeps"⁷⁷ in the state and in other cities that have declared sanctuary status; many of these operations have targeted local public agencies and institutions to make immigration arrests. ICE agents have shown up in courts, hospitals, outside schools, and at workplaces to take undocumented immigrants into custody.⁷⁸ Most recently, in an operation announced in February 2020, one hundred "elite tactical" border agents are being deployed to work with interior-enforcement ICE agents in at least 10 large cities that have sanctuary policies to find and arrest immigration law violators.⁷⁹

The impact of this targeted immigration enforcement regime extends beyond the immigrant community. For instance, a state court judge and a court officer in a suburban Boston court were federally indicted on multiple obstruction of justice charges for helping an undocumented immigrant leave court through a back entrance, avoiding federal immigration agents who had shown up in court to take the defendant into federal custody.⁸⁰ The U.S. Attorney for the

75. City News Service, *Ice Immigration Raids Expected to Begin in 10 Cities on Sunday*, KPBS (June 21, 2019), <https://www.kpbs.org/news/2019/jun/21/ice-immigration-raids-expected-begin-10-cities-sun/>.

76. S.B. 54, Reg. Sess. (Cal. 2017).

77. Tatiana Sanchez, *Northern California ICE sweep over; 232 arrested*, MERCURY NEWS (Mar. 1, 2018), <https://www.mercurynews.com/2018/03/01/calls-reporting-ice-flood-rapid-response-hotline/>.

78. Nicole Phillips, *Mayor Hancock tells ICE: back off arrests in courthouses and near schools*, DENVER POST (Apr. 6, 2017), <https://www.denverpost.com/2017/04/06/denver-ice-agents-courthouse-school-raids/>; Editorial, *Arresting immigrants at schools, hospitals and courthouses isn't just cold-hearted, it's counterproductive*, L.A. TIMES (Mar. 16, 2017), <https://www.latimes.com/opinion/editorials/la-ed-trump-ice-courts-20170316-story.html>.

79. Catlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html>.

80. Ellen Barry, *When the Judge Became the Defendant*, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html>.

District of Massachusetts, who has been vocal in the press and on social media in support of various regressive DOJ policies, including those related to sanctuary cities,⁸¹ is moving forward with the prosecution of the judge and the court officer. And in Tucson, federal prosecutors have charged members of No More Deaths, a humanitarian group that supplies water and first aid to those crossing the border in a particularly deadly and treacherous part of the desert, with smuggling and harboring charges.⁸²

The DOJ has launched other, non-immigration-related initiatives that have been less well publicized, but that are nonetheless aggressively imposed on selected jurisdictions that are labeled as “soft,” or ineffective, in fighting crime. Many of these localities are Democratic cities that have also been politically targeted by the Trump administration, such as Baltimore and Chicago.⁸³ The more salient feature is the demography of targeted cities. The heavy artillery of federal crime prosecution is being launched once again in localities with minority populations, resulting in disproportionate harm to African Americans and Latinx defendants.

For instance, in October 2017, Attorney General Sessions announced a reinvigoration of Project Safe Neighborhoods, as well as new initiatives aimed at drugs, guns, and violence.⁸⁴ This set of

81. See, e.g., Andrew Lelling, *U.S. Attorney Andrew Lelling: Sanctuary cities are a 'genuine and persistent threat'*, BOS. HERALD (Feb. 10, 2020), <https://www.bostonherald.com/2020/02/10/u-s-attorney-andrew-elling-sanctuary-cities-are-a-genuine-and-persistent-threat/>.

82. Judith Greene, *Confronting Immigration Enforcement Under Trump: A Reign of Terror for Immigrant Communities*, 45 SOC. JUST. 83, 91 (2018). Despite an acquittal in the most recently tried case of this sort, Michael Bailey, the U.S. Attorney for the district of Arizona, indicates his plan to continue these kinds of prosecutions: “We won’t distinguish between whether somebody is trafficking or harboring for money, or whether they’re doing it out of, you know, what I would say a misguided sense of social justice or belief in open borders or whatever.” Teo Armus, *After helping migrants in the Arizona desert, an activist was charged with a felony. Now, he’s been acquitted*, WASH. POST (Nov. 21, 2019), <https://www.washingtonpost.com/nation/2019/11/21/arizona-activist-scott-warren-acquitted-charges-helping-migrants-cross-border/>.

83. Mark Berman, *These prosecutors won office vowing to fight the system. Now, the system is fighting back*, WASH. POST (Nov. 9, 2019), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html.

84. Press Release, U.S. Dep’t of Justice, Attorney General Sessions Announces Reinvigoration of Project Safe Neighborhoods and Other Actions to Reduce Rising Tide of

programs brought back racialized tools used in the 1990s federal war on crime that relied on harsh punishment through federal prosecution as the primary tool.⁸⁵ While these kinds of programs typically involve partnerships with state and local law enforcement agencies, they nonetheless can create tensions in localities where prosecutors' offices or the judiciary may be more progressive. In that regard, the DOJ has set up permanent Organized Crime and Drug Enforcement "strike forces" in a number of cities with progressive prosecutors, including Baltimore, Boston, Chicago, Denver, Kansas City, and Houston.⁸⁶ These programs do an end-run around a core tenet of the progressive prosecutor movement,⁸⁷ which is to reduce the disproportionate impact of mass incarceration on communities of color.⁸⁸

Rather than retreat from this Sessions-initiated revitalization, Attorney General Barr has deepened the DOJ's racialized approach to the war on crime. In November 2019, the Barr DOJ introduced Project Guardian, which is explicitly characterized in a press release as drawing on "the Department's earlier achievements, such as the Triggerlock program."⁸⁹ Project Triggerlock was administered during

Violent Crime (Oct. 5, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-reinvigoration-project-safe-neighborhoods-and-other>.

85. See LYNCH, *supra* note 25, at 25-63; Steven Raphael & Jens Ludwig, *The Case of Project Exile*, in *EVALUATING GUN POLICY* 251 (2003); Mark Obbie, *Why Jeff Sessions' Recycled Crime-Fighting Strategy Is Doomed to Fail*, POLITICO (Sept. 7, 2017), <https://www.politico.com/magazine/story/2017/09/07/jeff-sessions-gun-crime-st-louis-215578>.

86. See *OCDEF Strike Forces*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ocdef/ocdef-strike-forces> (last visited Apr. 15, 2020) (featuring a map of the location of these permanent strike forces. In some of these locales, the local police are also resistant to progressive prosecutors so may be especially willing to join in these kinds of joint task forces); see Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back*, WASH. POST (Nov. 9, 2019), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html (explaining the sources of pushback to progressive prosecutors).

87. Davis, *supra* note 12.

88. *E.g.*, Joseph, *supra* note 63. Generally, the federal government has over-targeted racial minorities in guns and drug prosecutions since the 1990s, and this has not changed under the current administrations. See Gardner, *supra* note 61; LYNCH, *supra* note 25; Lynch & Omori, *supra* note 14.

89. Press Release, U.S. Dep't of Justice, Attorney General William P. Barr Announces Launch of Project Guardian – A Nationwide Strategic Plan to Reduce Gun Violence (Nov. 13, 2019), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-project-guardian-nationwide-strategic-plan>.

Barr's Bush-era stint as Attorney General and was used disproportionately against African Americans.⁹⁰

These kinds of policies are also being translated into what is a more far-reaching tactic by federal prosecutors: using federal criminal laws to prosecute defendants in cases that otherwise would be handled by local courts. This practice, too, has its origins in the federal war on crime that was initiated by the Reagan-era DOJ. The question of jurisdiction grew increasingly complex as federal criminal law greatly expanded in the last half of the 20th century in ways that overlapped with state and local law.⁹¹ In 1980, the DOJ formalized a general principle that U.S. Attorneys should assess the other jurisdiction's "ability and willingness to prosecute effectively" when deciding to bring federal charges.⁹² Indeed, up until the mid-1980s, U.S. Attorneys were discouraged as a matter of policy from bringing "local" drug cases.⁹³

This policy shifted with the Reagan administration's drug enforcement policy.⁹⁴ In the 1980s and 1990s, federal prosecutors began to take more and more cases that would previously have been left to state and local courts, especially drugs and firearms cases, in part through the initiatives described in the previous section, and with or without the cooperation of local law enforcement.⁹⁵ In the current iteration of U.S. Attorney policy on charging when other jurisdictions are also available to prosecute, federal prosecutors can consider "any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the other authorities conducting a thorough and effective prosecution."⁹⁶ This language can therefore

90. Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 144–75 (2018).

91. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996).

92. See U.S. Dep't of Justice, *Principles of Federal Prosecution*, 6 FED. SENT'G REP. 317 (1980); John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 521 (1983). It was then incorporated into the U.S. Attorney's Manual, now called the Justice Manual, where it now is delineated in Section 9-27.240. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL 9-27.240 (2018) [hereinafter JUSTICE MANUAL].

93. LYNCH, *supra* note 25, at 16.

94. LYNCH, *supra* note 25, at 32–33.

95. See, e.g., LYNCH, *supra* note 25, at 42–43, 70–71.

96. JUSTICE MANUAL, *supra* note 92, 9-27.240.

justify aggressive federal prosecution in jurisdictions where the local prosecutors' approaches are deemed out of sync with federal policy and interests.

The current DOJ has revived this tactic of weaponizing federal law to achieve more punitive outcomes for defendants with lower-level charges that would typically be handled in state court. As noted in the previous section, federal prosecutions of illegal gun possession cases are significantly higher under this administration, and they have disproportionately been brought against African Americans.⁹⁷ Moreover, there is at least one salient case of this power being politicized against a progressive prosecutor. The U.S. Attorney for the Eastern District of Pennsylvania, William McSwain, who has been openly critical of Philadelphia District Attorney (and progressive prosecutor) Larry Krasner for his handling of a number of cases,⁹⁸ filed federal charges in an aggravated assault case involving an AK-47 rifle used during an attempted robbery. The case was being prosecuted locally and the conviction was a result of a negotiated sentence of three-and-a-half to ten years in state prison.⁹⁹ The U.S. Attorney held a press conference to publicize the decision to federally charge, wherein he denigrated Krasner's approach and blamed Krasner for an increase in homicides in the city.¹⁰⁰ This kind of overreach, coupled with the open, self-publicized hostility toward the local prosecutor, is both highly unusual and a sign of the current administration's politicization of its prosecutorial power.

97. Joseph, *supra* note 63.

98. See Jeremy Roebuck, *U.S. Attorney McSwain assails DA Krasner's handling of defendant linked to shooting of 2 children*, INQUIRER (Nov. 4, 2019), <https://www.inquirer.com/news/philadelphia/mcswain-krasner-yazeem-jenkins-nikolette-rivera-francisco-ortiz-20191104.html>.

99. Julie Shaw, *Federal prosecutors charge AK-47 shooter who got a deal from DA Krasner's office*, INQUIRER (Feb. 28, 2019), <https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-us-attorney-william-mcswain-feds-charge-ak-gunman-20190228.html>.

100. *Id.*

III. Conclusion

The policies and practices of the Trump administration's Department of Justice have alarmed many, especially institutionalists, but not necessarily for its reinvigoration of a federal war on non-elite crime. The objections have been much more centered on the breaking down of barriers between the White House and the DOJ, thereby politicizing the most newsworthy investigations and prosecutions--those related to Trump's election and reelection campaigns.¹⁰¹ There have also been a number of well-founded objections to its handling of the civil side of immigration policy that have been xenophobic, cruel in intent, and demonstrably harmful for a large number of immigrants in or trying to come in this country.¹⁰² And there have been sporadic outrages regarding how the DOJ has handled a number of finance-related cases that straddle the criminal and civil sides to favor banks and other financial institutions,¹⁰³ and that benefit the business interests of Trump donors and friends (or punish perceived Trump foes).¹⁰⁴

The criminal side developments that I have highlighted here are equally alarming. First, it is alarming that the current administration has not taken advantage of hindsight to learn a lesson from its fraught, late 20th century war on crime. Rather, the Trump-era DOJ has thus far been consecutively led by two true believers in the 1990s tough-on-crime rhetoric. Neither man has been humbled, or educated, by his past punitive zeal as a federal prosecutor that so disproportionately harmed persons of color. That lack of insight and inability to heed

101. Kevin Wack, *American Justice Isn't Impartial Anymore*, ATLANTIC (Feb. 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/gradual-politicization-doj/606469/>; Dahlia Lithwick, *The Fall of the DOJ*, SLATE (Feb. 19, 2020), <https://slate.com/news-and-politics/2020/02/william-barr-fall-department-of-justice-donald-trump.html>; Nicholas Fandos, *House Democrats Inquire About Political Inference at the Justice Dept.*, N.Y. TIMES (Feb. 28, 2020), <https://www.nytimes.com/2020/02/28/us/politics/political-interference-doj.html>.

102. Aviram, *supra* note 6. See also Paul Waldman, *Don't be fooled: Trump's immigration policy is still incredibly cruel*, WASH. POST (June 21, 2018), <https://www.washingtonpost.com/blogs/plum-line/wp/2018/06/21/dont-be-fooled-trumps-immigration-policy-is-still-incredibly-cruel/>.

103. Roebuck, *supra* note 98.

104. Matthew Yglesias, *Trump is approving an anti-competitive merger that will cost you money*, VOX (July 29, 2019), <https://www.vox.com/2019/7/29/8932025/trump-sprint-tmobile-hotel>.

lessons from past mistakes by leadership means that the current DOJ will be guided by principles that are not congruent with current science and ethics around effective criminal justice practices.

More alarming is the petit politicization of the criminal side, as I highlighted in Part II. The weaponizing of federal criminal law to push back on state and local practices with which the current administration disagrees not only delegitimizes the federal agencies doing that work, but it also directly harms the community members who end up as fodder in that fight. In regard to the undocumented immigrants who reside in locales with sanctuary protections, their risk of being trapped in the Trump immigration prosecution, detention, and deportation regime is heightened by virtue of the politically selective enforcement tactics being utilized. Similarly, the federal prosecution practices targeting street crime, such as gun possession and drug sales, will result in more punitive punishments for a disproportionate amount of minority defendants from urban centers in those jurisdictions that have landed in the political crosshairs of the Trump administration.

Before Sessions resigned, he was remarkably effective at instituting his agenda so that the disparate U.S. Attorneys' offices could put it into action,¹⁰⁵ likely the product of his own knowledge and experience as a U.S. Attorney. Consequently, Barr has not had to do much to maintain the practices in federal court. Indeed, without a deliberate effort to change course, it is reasonable to expect that the new-old war on crime ushered in by Sessions and stoked by Barr will once again become status quo in the federal system. Certainly, a second Trump term will make that highly likely.

But there are some reasons to think that this war can and will be blunted. At the more macro, cultural level, the effect of marijuana legalization is notable and offers a case-in-point on the limits of radical regression. In a declaration of supremacy of federal law, Sessions had plans to go after state-legal marijuana businesses through federal prosecutions. Indeed, a year into his term, he rescinded the 2013 Cole memorandum and reminded U.S. Attorneys that marijuana remained

105. German Lopez, *Trump and Sessions's quiet success: reinvigorating the federal war on drugs*, VOX (Jan. 5, 2018), <https://www.vox.com/policy-and-politics/2018/1/5/16851120/trump-sessions-war-on-drugs>; Molly Ball, *Jeff Sessions Is Winning for Donald Trump. If Only He Can Keep His Job*, TIME (Mar. 29, 2018), <https://time.com/magazine/us/5220076/april-9th-2018-vol-191-no-13-u-s/>.

illegal under federal law.¹⁰⁶ Despite this rescission, and unlike the other rescissions of Obama-era DOJ policies, an offensive against legal marijuana was never launched.¹⁰⁷ Even more significantly, members of Congress from both parties worked to protect the marijuana industry, and a handful of additional states legalized in the year following Sessions's rescission memorandum.¹⁰⁸

Moreover, perhaps heeding the lesson from Congress's reaction to Sessions, Barr promised in his confirmation hearing not to go after the legal marijuana industry if confirmed as Attorney General—his one notable rebuke of Sessions' policies.¹⁰⁹ What this case suggests is that there can be a tipping point wherein the political and social cultural shift will preclude certain practices from taking hold, even if policy is formally changed.¹¹⁰ To that end, as Aviram points out in her essay, the cultural shift against mass incarceration, as well as against brutal and racist law enforcement practices, may soon reach that tipping point.

At the level of district court operations, there is, at least in some jurisdictions, a potent counterforce working against the most punitive tendencies of federal prosecutors: the other court actors, especially trial court judges and defense attorneys. Since some sentencing discretion was returned to federal judges in 2005,¹¹¹ defense attorneys have been able to do much more robust and effective sentencing advocacy with judges as their audience, resulting in a notable tempering of sentences especially in drug cases.¹¹² This has also

106. Memorandum from Jefferson B. Sessions, Attorney Gen., Dep't of Justice, on Marijuana Enforcement to All United States Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

107. Kyle Jaeger, *One Year After Jeff Sessions Rescinded A Federal Marijuana Memo, the Sky Hasn't Fallen*, MARIJUANA MOMENT (Jan. 4, 2019), <https://www.marijuanamoment.net/one-year-after-jeff-sessions-rescinded-a-federal-marijuana-memo-the-sky-hasnt-fallen/>.

108. *Id.*

109. Glenn Fleishman, *States Hold Breath as Trump's Attorney General Nominee Says He Won't Prosecute Pot in Marijuana-Legal States*, FORTUNE (Jan. 15, 2019), <https://fortune.com/2019/01/15/barr-marijuana-pot-cole-memo-legal-states/>. He was also more measured on the federal sentencing reform bill, saying he'd carry out its dictates, but this was more grudging.

110. David Garland, *Concepts of Culture in the Sociology of Punishment*, 10 THEORETICAL CRIMINOLOGY 419 (2006).

111. Lynch, *supra* note 64.

112. Lynch, *supra* note 64.

transformed how criminal cases are negotiated, as the defense can sometimes forego plea bargains and take their case for leniency straight to the judge.¹¹³ Although Trump is dramatically transforming the federal judiciary, thereby potentially limiting the impact of judicial resistance to highly punitive sentences, at the front lines of the criminal justice system, judges have reclaimed their power and authority as sentencing decision-makers, and are not going to just cede that power to the rote demands by prosecutors for long sentences dictated by the guidelines.¹¹⁴ The shift in power dynamics at sentencing, and the norm-changing that has come with it as sentences have collectively decreased, has put real, and enduring, limits on assistant U.S. Attorneys' ability to obtain those sentences.¹¹⁵

While the DOJ's immigration regime on the criminal side is likely tougher to disrupt, the aftermath of the No More Deaths prosecutions in Tucson suggest that the humanitarian argument against the inhumanity of this administration's policies can have powerful effects. In 2017, federal prosecutors charged nine No More Deaths workers regarding their humanitarian work in southern Arizona to save lives of undocumented immigrants crossing the Sonoran desert, where the death toll has reached close to 200 annually.¹¹⁶ Under Obama, the Border Patrol in this sector was in an uneasy agreement with these groups to not interfere with their humanitarian aid work.¹¹⁷ This pact quickly disappeared under Sessions. By April 2017, following a visit by Sessions to this Border Patrol sector, border agents began a surveillance and investigative operation focusing on No More Deaths and one of its key members, Scott Warren.¹¹⁸ By December 2017, nine members, including Warren, were charged with a variety of misdemeanors that stemmed from their work, including "abandonment of property" for leaving water for immigrants.¹¹⁹ The

113. Lynch, *supra* note 64.

114. Lynch, *supra* note 64.

115. Lynch, *supra* note 64.

116. Ryan Devereaux, *Bodies in the Borderlands*, INTERCEPT (May 4, 2019), <https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/>.

117. *Id.*

118. *Id.*

119. *See id.* In an especially cruel twist on this, border patrol agents routinely drained the water supplies left by the group, either slashing the jugs or dumping their contents.

next month, Border Patrol agents stepped up their campaign against Warren, arresting him for harboring unauthorized migrants, after surveilling the group's base camp where two migrants were provided aid and a place to sleep.¹²⁰

All of these cases proceeded in federal court. Charges were eventually dropped against four of the misdemeanor defendants; four others were found guilty at a bench trial in front of a Magistrate judge¹²¹ and were fined and sentenced to probation.¹²² Warren's case proceeded to a felony jury trial. In June 2019, his first jury deadlocked on the verdict, and the U.S. Attorney elected to retry the case.¹²³ In November 2019, the second jury took just two hours after a six-day trial to acquit Warren of the felony charges.¹²⁴ While the U.S. Attorney's office expressed a commitment to continue to prosecute these kinds of cases,¹²⁵ Warren's acquittal sent a clear message to that office that the citizens of the jurisdiction do not necessarily share the values of this administration.

Then, in February 2020, Arizona District Court Judge Rosemary Marquez issued a scathing reversal of the misdemeanor convictions in the No More Deaths cases,¹²⁶ graphically calling out the Trump regime's inhumanity and providing a glimpse of an alternative regime that values saving human lives over its own policy prerogatives:

The Government has ... asserted a compelling governmental interest in "enforcing the border and controlling immigration."

120. *Id.*

121. Kristine Phillips, *They left food and water for migrants in the Desert. Now they might go to prison*, WASH. POST (Jan. 20, 2020), <https://www.washingtonpost.com/nation/2019/01/20/they-left-food-water-migrants-desert-now-they-might-go-prison/>.

122. Curt Predergast, *Border aid volunteers sentenced to probation in Tucson*, TUCSON (Mar. 1, 2019), https://tucson.com/news/local/border-aid-volunteers-sentenced-to-probation-in-tucson/article_1160a3c2-3c74-11e9-bd57-873b4471925b.html.

123. Jasmine Aguilera, *Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border*, TIME (Nov. 20, 2019), <https://time.com/5732485/scott-warren-trial-not-guilty/>.

124. *Id.* The trial judge acquitted Warren of one of the misdemeanor charges and convicted on another.

125. Armus, *supra* note 82.

126. The basis for the reversal was on the religious exception. *See* Order, United States v. Hoffman, No. CR-19-00693-001-TUC-RM (D. Ariz. Jan. 31, 2020), <https://assets.documentcloud.org/documents/6763128/2020-02-03-Hoffman-DE22-Order-Reversing.pdf>.

Although Defendants were not charged with any immigration-related offense, the Government nonetheless claims that Defendants' actions "furthered and encouraged illegal smuggling activity in the CPNWR." The Government seems to rely on a deterrence theory, reasoning that preventing clean water and food from being placed on the Refuge would increase the risk of death or extreme illness for those seeking to cross unlawfully, which in turn would discourage or deter people from attempting to enter without authorization. In other words, the Government claims a compelling interest in preventing Defendants from interfering with a border enforcement strategy of deterrence by death. This gruesome logic is profoundly disturbing. It is also speculative and unsupported by evidence. As discussed above, 32 sets of human remains were recovered from the Refuge in 2017 alone, and the Government produced no evidence that these fatalities had any effect in deterring unlawful entry. Nor has the Government produced evidence that increasing the death toll would have such an effect.¹²⁷

The U.S. Attorney's office expressed "disappointment" in this decision.¹²⁸ Fortunately, there remain many of us who are elated by this kind of decision, if for no other reason than to help us envision a way back out of the Trump-era dystopia. Efforts of committed people working within the criminal system, including progressive prosecutors, those who have been touched by the system and have experienced its harms, and the rest of us who are committed to a humane system of governance will continue to collectively work to turn away from the "gruesome logic" that underpins so many of these policies and practices.

127. *Id.* at 19.

128. Matthew Casey, *Federal judge throws out No More Deaths convictions*, ARIZ. PUB. MEDIA (Feb. 5, 2020), <https://www.azpm.org/p/home-articles-news/2020/2/5/165450-federal-judge-throws-out-no-more-deaths-convictions/>.