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### A Second Step Act for the States (and Counties and Cities)

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# A SECOND STEP ACT FOR THE STATES (AND COUNTIES, AND CITIES)

*John F. Pfaff*

## TABLE OF CONTENTS

INTRODUCTION .....	151
I. PROLOGUE: REFORM’S BLINDSPOTS .....	157
II. REGULATING PROSECUTORS.....	162
A. <i>Prosecutors and Public Health</i> .....	163
B. <i>Public Defenders: Quis Custodiet Ipsos Progressive Prosecutors?</i> .....	165
C. <i>Prosecutorial Moral Hazard: The Problem of Free Prisons</i> .....	171
III. THE PRISON-PUBLIC SECTOR WAGES COMPLEX .....	175
IV. VIOLENCE: THE SLIGHTLY LESS THAN THIRD RAIL OF REFORM.....	181
V. DIRECT FEDERAL ACTION: THE PLRA AND THE CENSUS.....	186
CONCLUSION.....	187

## INTRODUCTION

On December 21, 2018, President Donald J. Trump signed the First Step Act (FSA),<sup>1</sup> one of the few significant pieces of legislation passed during his administration, and perhaps the only one with broad bipartisan support. Among other things, the FSA reduced some mandatory minimums for federal drug offenses, gave federal judges

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<sup>1</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

more options to avoid mandatory minimums altogether in certain drug cases, retroactively expanded the “good time” credits people in federal prison can earn, provided more incentives to people in prison to take classes and other rehabilitative programs, encouraged the Bureau of Prisons to incarcerate people closer to their homes, and banned the shackling of pregnant women during labor.<sup>2</sup> The bill received extensive coverage during the debates leading up to its passage in the House and Senate, and its enactment was met with significant fanfare: the New York Times, for example, called it the “most significant change[] to the criminal justice system in a generation.”<sup>3</sup>

The FSA is a laudable bill, but it is anything but a “significant change.” If nothing else, its provisions apply only to the federal system; while it is true that the federal system is the single largest prison system in the nation, it confines only about ten percent of all people incarcerated in the United States (it held 190,000 people in 2016, just slightly ahead of Texas, at 164,000, and California, at 130,000).<sup>4</sup> If the FSA completely emptied federal prisons—and it most certainly will not—the United States would *still* have the highest incarceration rate in the world. Moreover, none of the FSA’s proposals are particularly innovative, and none focus on any of the challenging issues that are central to any substantial reimagining of American criminal justice, like changing the power of prosecutors, the way we confront violence, or the complicated politics of punitiveness.

Given this, the extensive attention the media paid to the FSA is somewhat surprising. The FSA is not the first major criminal justice reform bill adopted in recent years, and it is by no stretch the most transformative or comprehensive. California’s AB 109, known as “Public Safety Realignment,” or just “Realignment” for short, led to such substantial prison reductions that the decline in California alone is responsible for nearly half of the total *national* decline since 2010.<sup>5</sup> And

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<sup>2</sup> See, e.g., Brandon Sample, *First Step Act: A Comprehensive Analysis*, SENTENCING.NET (Dec. 19, 2018), <https://sentencing.net/legislation/first-step-act> [<https://perma.cc/2D8D-L2Y6>].

<sup>3</sup> Nicholas Fandos & Maggie Haberman, *Trump Embraces a Path to Revise U.S. Sentencing and Prison Laws*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/politics/prison-sentencing-trump.html> [<https://perma.cc/VTW8-QBN5>].

<sup>4</sup> See *Corrections Statistical Analysis Tool (CSAT) – Prisoners*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=nps> [<https://perma.cc/M24F-GMRG>] [hereinafter *Corrections Statistical Analysis Tool*].

<sup>5</sup> JOHN F. PFAFF, LOCKED IN (2017); see *Corrections Statistical Analysis Tool*, *supra* note 4.

unlike the FSA, Realignment tackled some of the complex structural causes of mass incarceration that all too often get otherwise overlooked.<sup>6</sup> Yet, the FSA received far more print and television coverage nationwide than Realignment, even though its impact will prove to be far less, and even though (as we will see) the lessons from Realignment are far more useful to other states than those from the FSA.

Now, to be fair, that the FSA was not a sweeping reform bill is not necessarily a criticism of the *First Step Act* which, by its very name, was intended by its drafters to be the launching point for further reforms. Some first-and-a-half step acts are already underway, with legislators in several conservative-leaning states, like Alabama, Florida, Georgia, and Ohio, pointing to the FSA, and Trump's endorsement of it, as impetus to push for similar reforms in their own states.<sup>7</sup> Since states hold ninety percent of the nation's prisoners, shaping how the states act is a far more important outcome.

In fact, the actions in places like Florida and Ohio, along with the intense media coverage of what was, for all intents and purposes, a fairly modest reform law, crystallize what a Second Step Act should look like. A Second Step Act needs to do two things:

1. Focus its attention on the states, which hold about ninety percent of all prisoners, and even greater percentages of those in jail,

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<sup>6</sup> In particular, Realignment took aim at a moral hazard problem that runs through the criminal justice system, namely that the state government funds the prisons but imposes few if any checks on the number of people county-elected, and thus county-funded prosecutors, can send to prison. Prison, in effect, is free for county-funded prosecutors, a problem that Realignment addressed head-on. We will discuss Realignment in more depth in Section II.C below.

<sup>7</sup> Van Jones & Jessica Jackson, *Why We're Celebrating a Three-Month-Old Law*, CNN (Apr. 21, 2019), <https://www.cnn.com/2019/04/02/opinions/first-step-act-so-far-opinion-jones-jackson/index.html> [<https://perma.cc/Y8M8-SHE6>]; Jacob Paolillo & Jonathan Zalewski, *Florida Set to Follow Congress' Lead on Criminal Justice Reform*, HERITAGE FOUND. (Mar. 11, 2019), <https://www.heritage.org/crime-and-justice/commentary/florida-set-follow-congress-lead-criminal-justice-reform> [<https://perma.cc/8KJ3-PNUD>]; Dane Stallone, *First Step Act Will Spur Nationwide Bipartisan Justice Reform, Panel Says*, CRIME REP. (Feb. 22, 2019), <https://thecrimereport.org/2019/02/22/first-step-act-will-spur-nationwide-bipartisan-justice-reform-panel-says> [<https://perma.cc/J75B-46RH>]. It's less likely the case that the FSA provided the initial push for new reform legislation, but more that its success—and the conservative Trump's willingness to sign it—either provided political cover or genuine encouragement to enough uncertain conservative legislators to build a sufficiently large coalition with those already advocating for change to give reform bills a real shot at passage and enactment.

those working their way through felony and misdemeanor courts, and those arrested.

2. Aim big. Unlike the FSA, which applied what the states had learned to the federal system, the Second Step Act should try to use the massive media attention that federal legislation receives to encourage the states to undertake reforms that they so far either are not considering or are balking at trying.

A Second Step Act like this might not accomplish that much directly. And the more daring the bill, the less likely it is to pass in the U.S. Senate, which may have approved the FSA but which also still contains several powerful opponents of reform. That, however, might not be as big a problem as it may appear. The media attention it would receive, especially for any of its more controversial provisions, would push our national debate about criminal justice reform in important, if difficult, directions, and it could encourage state and local politicians to start thinking differently about what, exactly, transformative reform has to look like.

In this Article, I discuss six provisions that a Second Step Act could include. Since Congress can rarely, if ever, directly regulate state and local criminal justice systems, almost all of these proposals focus on incentive grant schemes. Given that federal criminal justice grants make up a very small share of the \$200 billion state and local governments spend on criminal justice, often on the order of one or two percent,<sup>8</sup> it is critical to think about how to target the money at places where state and local governments systematically *underspend*, at least whenever possible. Thus, the main issues here are:

1. Grants to assist local communities with public health responses to root causes of crime. Some progressive prosecutors increasingly acknowledge that a lot of criminal behavior stems from issues related to poverty, homelessness, mental health, and drug use disorders, and that the criminal justice system is poorly equipped to address these problems. These grants would help them work and coordinate with public health officials to better address these causes outside of jails and prosecution.

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<sup>8</sup> See, e.g., John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567 (2015) [hereinafter *Federal Sentencing in the States*].

2. Grants to assist states with establishing state-level public defender offices and building out public defender data-gathering infrastructure. The underfunding of indigent defense has been receiving increased national attention recently: Senator Kamala Harris recently introduced a bill to establish pay parity between prosecutors and public defenders, and the criminal justice proposals put forth by the presidential campaigns for Senator Bernie Sanders and Senator Elizabeth Warren both talk about sizable Congressional outlays to improve indigent representation. These proposals have mostly focused on the problems of overwhelming caseloads. My focus here, however, is on how Congress can assist in the increasingly important *systemic* role that public defenders can—and perhaps must—play in advancing reform.

3. Grants to help states confront a major moral hazard problem that runs through the criminal justice system: county-elected and county-funded prosecutors have nearly unlimited access to state-funded prisons, making blunt, tough-on-crime responses effectively free for them. California's Realignment had such a big effect, in no small part, because it directly targeted this moral hazard issue. Federal assistance with the process could help other states implement similar policies while avoiding some of the problems that California has encountered along the way.

4. Grants and tax assistance to communities with large state prisons. Of the \$50 billion we spend annually on prisons, about \$35 billion goes to the wages and benefits of public-sector employees working in public prisons.<sup>9</sup> Those employees consistently resist any sort of reform that jeopardize their jobs. A trial project in New York State suggests that providing financial assistance to those communities can

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<sup>9</sup> *Prison Spending in 2015*, VERA, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-price-of-prisons-2015-state-spending-trends-prison-spending> [<https://perma.cc/2H24-H6EE>]. Note, too, that states often account for other personnel spending on prisons, like pension benefits, in other parts of the state budget. Thus, states are likely spending well above \$30 billion on correctional staffing. CHRISTLAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 6 (2012), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy\\_downloads/price-of-prisons-updated-version-021914.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/price-of-prisons-updated-version-021914.pdf) [<https://perma.cc/JH8P-W5V5>].

weaken resistance to reforms that may close prisons, and perhaps even help those communities in more fundamental ways.<sup>10</sup>

5. Grants to hire more police—or invest in other, non-police centered, street-level interventions—that are given to states which meaningfully cut sentences or expand parole options for those convicted of serious violent crimes, including armed robbery, rape, and murder. Over fifty-five percent of those in prison have been incarcerated for violence, and over ninety percent of those serving long sentences are in for violence, often serious violence (with a majority of the long-serving often in for homicide)<sup>11</sup>. We will remain the world’s largest jailor as long as we refuse to change how we punish violence. Fortunately, the data is clear: direct, street-level interventions work far better than long, harsh sentences at preventing violence. These grants could encourage states to take steps that may be politically risky but are sound policy.

6. Repeal the Prison Litigation Reform Act (PLRA) and change how the Census counts people in prison. These are two acts that the federal government can take entirely on its own. The PLRA makes it very difficult for state prisoners to complain about their conditions of confinement in federal court—which not only enables states to treat them poorly, but likely helps fuel the mass-ness of mass incarceration by allowing states to cram more and more people into the same number of cells. Making states more accountable for the conditions in which they lock people up would surely discourage states from locking up as many people, and it would hopefully lead states to create far less traumatizing environments. As for the Census, it currently counts prisoners as “residing” in their prisons, not their last-known addresses, for purposes of drawing legislative maps, even though prisoners cannot vote in forty-eight states.<sup>12</sup> This creates a powerful incentive for legislators with prisons in their districts to fight reforms, and it also encourages state-

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<sup>10</sup> John Pfaff, *Cory Booker Has a Plan to “Reverse” Mass Incarceration. It Won’t Work.*, VOX (Sept. 26, 2017, 8:40 AM), <https://www.vox.com/the-big-idea/2017/9/26/16363230/mass-incarceration-cory-booker-reverse-bill> [<https://perma.cc/PP94-73EX>].

<sup>11</sup> JENNIFER BRONSON & E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2017 (2019); URBAN INST., A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA’S PRISONS (2017), <https://apps.urban.org/features/long-prison-terms/trends.html> [<https://perma.cc/6AEF-66NV>].

<sup>12</sup> See, e.g., *Prison Gerrymandering Project*, PRISON POL’Y INITIATIVE, <https://www.prisonersofthecensus.org> [<https://perma.cc/F5Z4-6WV9>].

level Republican parties to resist deep reforms (since “prison gerrymandering” has a clear partisan bias to it).

To understand why I think the Second Step Act should target these specific issues, I think it is helpful to first take a quick step back to look at the current state of prison reform in the United States—a rare instance of bipartisan agreement, but one that is underperforming for clear reasons.

### I. PROLOGUE: REFORM’S BLINDSPOTS

It is hard to understate the scale of punishment in the United States right now. While the United States’ incarceration rate was relatively stable and average by global standards from the mid-1920s (when we first start having consistent data) through to the 1970s, from the early 1970s to 2010 it grew steadily but relentlessly. The total prison population rose during that time from 300,000 to over 1.5 million, with our incarceration rate soaring above that of any other country in the world.<sup>13</sup> By 2010, the United States was home to about five percent of the world’s population, but over twenty percent of its prisoners. We achieved a level of punitiveness unseen worldwide or in our own, often harsh, history.

Since 2010, there have been some flashes of change. The total United States prison population declined by just over 100,000, or slightly under seven percent, between 2010 and 2016, although over a third of that decline happened in just the state of California, and twenty-

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<sup>13</sup> PATRICK A. LANGAN ET AL., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86 (1988); *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/highest-to-lowest/prison-population-total> [<https://perma.cc/47MW-3H4F>]; *Corrections Statistical Analysis Tool*, *supra* note 4. It is worth noting that the World Prison data do not include Iran and North Korea, and there are clearly limitations with its data on China, which likely does not include such things as its mass detentions of Uighurs in Xinjiang. See, e.g., Dave Lawler, *The World Shrugs as China Locks Up 1 Million Muslims*, AXIOS (May 6, 2019), <https://www.axios.com/uighur-muslim-detention-camps-xinjiang-china-7d682095-4dcc-4b7b-8368-09e73ae7178a.html> [<https://perma.cc/3V77-ABTY>]. Yet, if the United States is in reality fourth behind China, Iran, and North Korea, the core idea that the United States has an outsized prison population remains unchanged; if anything, the fact that this is the locus of any debate shows just how punitive the United States is.

four states still saw their incarceration rates rise over that period.<sup>14</sup> On the one hand, after decades of unrelenting growth, any sort of decline is something to celebrate. On the other hand, scaling back prison populations is one of the few issues of true bipartisan consensus these days,<sup>15</sup> and a seven percent decline seems less impressive given all the millions of dollars and legislative and executive effort expended on pushing for these reforms.

One core issue, as I have stressed repeatedly, is that reform efforts often target issues that are not central to prison growth,<sup>16</sup> and do so in ways that often make it *harder* for us to address and reform the things that matter more.<sup>17</sup> Three central defects stand out—all three of which a carefully designed Second Step Act could confront.

The first is that we have historically overlooked the critical role of the prosecutor. Prison growth has been driven far more by increases in the number of people we admit than in the amount of time that those people spend in prison. And that admissions growth has been driven

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<sup>14</sup> *Corrections Statistical Analysis Tool*, *supra* note 4. Between 2010 and 2015, nearly *half* the national decline was just California. In 2016, California's central role lessened slightly.

<sup>15</sup> People often talk about bipartisan drive for criminal justice reform, but it strikes me that it is far more a bipartisan consensus for *prison* reform, not criminal justice reform more broadly. As we move away from prisons, the amount of bipartisan agreement—at least among politicians, as opposed to think tanks and foundations—starts to shrink. When it comes to issues like policing, for example, there is far more partisan disagreement.

<sup>16</sup> Many of the factors that are central to prison growth may not be as critical to other areas of the criminal justice system. Thus, my emphasis on how we treat violence, for example, may be less of an issue for those looking at trends in jails, probation, or arrests. The criminal justice system is a complex sprawl of institutions, and there is no one-size-fits-all diagnosis or solution to its multitude of failings.

<sup>17</sup> See generally PFAFF, *supra* note 5. See John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 FED. SENT. REP. 265 (2014); *Federal Sentencing in the States*, *supra* note 8; John F. Pfaff, *Prosecutors Matter: A Response to Bellin's Review of Locked In*, 116 MICH. L. REV. ONLINE 165 (2018); John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173 (2015) [hereinafter *The War on Drugs and Prison Growths*]; John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951 (2016); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239 (2012); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, 13 AM. L. & ECON. REV. 491 (2011); John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (July 12, 2011) (unpublished manuscript), <https://ssrn.com/abstract=1884674> [<https://perma.cc/F354-UQ7U>].

primarily by prosecutors. Over the 1990s and 2000s, as crime fell, total arrests fell as well—and fell sharply for serious violent and property crimes—yet prosecutors increased the *total number* of felony cases filed in state courts. Importantly, the amount of time served once someone has been admitted has not really changed, with only a few exceptions.<sup>18</sup>

Initially, however, reforms focused primarily on targeting sentence length far more than prosecutorial power. Fortunately, of the three defects considered here, this is the one where there has been the most progress: the past four or five years have witnessed a growing effort to elect progressive-minded prosecutors, mostly in urban or more-populous counties. Given that the largest ten percent of all prosecutorial districts process about sixty-five percent of all felony cases, targeting these counties—which are also the ones that often seem the most politically open to the idea of less punitive prosecution—has a lot going for it.<sup>19</sup>

Yet, there are several reasons to be wary of relying too much on elections, besides the fact that any gains can be immediately reversed at the next election. In this Article, I will focus on just one, namely that we have reached the point now where it is easy for candidates to *sound* like they are progressive reformers without necessarily *being* one. There is a readily accessible lexicon now to draw upon: “bail reform” (which could mean anything), “low-level offenses” (which could mean anything too, and often has significant fine-print carve-outs), “smart on crime, not tough on crime” (ditto), etc. Given the opacity of prosecutorial offices, and the electorate’s general ignorance of what prosecutors do, it is often hard to monitor whether a newly elected “progressive” prosecutor really is adopting genuinely reform-oriented policies. Fortunately, as we will see below, there are steps a Second Step Act could take to help along these lines.

A second major failing of reform efforts is their refusal to grapple with the mangled politics of punishment. Reformers talk a lot about

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<sup>18</sup> The biggest exception is homicide, where sentence lengths have grown sharply over the past twenty to thirty years. NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSE AND CONSEQUENCES 54 (Jeremy Travis et al. eds., 2014). Yet, homicide remains the one offense where we generally seem unwilling to consider any shortening of sentence length.

<sup>19</sup> STEVEN W. PERRY & DUREN BANKS, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES (2011).

trying to abolish private prisons, but the impact of such institutions is relatively slight: only eight percent of prisoners are held in private facilities, and over half of those held in private prisons are held in just five states, none of which experienced above-average prison growth. More important, of the \$50 billion we spend on state prisons, about \$4 billion goes to private prisons (yielding a profit of about \$300 million), while approximately \$35 billion, or about two-thirds of *all* spending, is *public-sector* payroll.<sup>20</sup>

In other words, our emphasis on the relatively small private sector obscures the fact that public sector unions have very strong incentives to fight hard against reforms, and often do so quite successfully.<sup>21</sup> Moreover, state legislators with (public) prisons in their districts have strong reasons to fight reforms as well: prisons often provide the only well-paying jobs in many of the remote, rural areas where they are frequently built, and as noted above, the prisoners often count as non-voting “people” for the purposes of drawing legislative maps.<sup>22</sup> This “prison gerrymandering” has a strong political valence—prisons are generally in more rural—and thus more Republican—areas, while the people locked up in them tend to be Black and Hispanic men from more urban, and thus more Democratic, districts. This forces State Republican parties to think carefully about what serious reform means for the size of their legislative delegations or even whether they will hold onto all of their majorities.

Unfortunately, the power of these public sector actors has been largely overlooked, and few, if any, reforms have sought to address their influence. This, too, is the sort of critical but overlooked issue that a well-designed Second Step Act could help address, and one it could certainly help make the public more aware of.

The final major blind spot relates to violence. So much of our reform rhetoric emphasizes that we lock up too many “low-level non-

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<sup>20</sup> See, e.g., PFAFF, *supra* note 5.

<sup>21</sup> See, e.g., Ken Stier, *NYS Prison Budget Climbs, Despite Fewer Inmates*, CITY LIMITS (Nov. 10, 2015), <https://citylimits.org/2015/11/10/nys-prison-budget-climbs-despite-fewer-inmates> [<https://perma.cc/47DZ-N7M9>].

<sup>22</sup> In two states—Maine and Vermont—people in prison can vote. In six states—California, Delaware, Maryland, Nevada, New York, and Washington—prisoners cannot vote but are counted as living at their last known address. In the remaining forty-two states, prisoners “live” in the prison but cannot vote. See *Prison Gerrymandering Project*, PRISON POL’Y INITIATIVE, <https://www.prisonersofthecensus.org> [<https://perma.cc/F5Z4-6WV9>].

violent offenders,” especially those convicted of marijuana. And we *do* lock up too many people for low-level offenses (although almost no one is in prison for marijuana).<sup>23</sup> Yet our steady focus on these low-level cases, especially drug cases, has created a public that is unwilling to think about changing how we punish people convicted of violent crimes. A 2016 poll by Vox, for example, asked 3,000 people, “Should we reduce prison sentences for people who committed a violent crime and have a low risk of committing another crime?” The consensus was “no”: fifty-five percent of liberals said no, as did sixty-two percent of moderates and sixty-eight percent of conservatives.<sup>24</sup> This was due in no small part to the fact that over sixty percent of the respondents thought that about half of people in U.S. prisons were there for drugs—which, if true, would justify a policy focused primarily on drug and other non-violent cases.

But it is not fifty percent. It is fifteen percent: at most only fifteen percent of people in U.S. prisons are there primarily for a drug conviction. Over fifty-five percent, on the other hand, are confined for violence; fully twenty-five percent are in prison just for murder, manslaughter, rape, or sexual assault.<sup>25</sup> Over ninety-five percent of those serving the longest sentences are in for serious violence, and violent crimes now make up a plurality of prison admissions.<sup>26</sup> And that is a lower bound on the number in prison for violence. Our data classifies people by the most serious offense for which they were *convicted*. So if

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<sup>23</sup> Marijuana cases may play a bigger role when it comes to arrests and time spent in jail, which is where we confine people for pretrial detention or for convictions for low-level misdemeanors. But it appears that only about one percent of the prison population has been confined for marijuana. Marijuana may also play some role in parole violations, but despite the attention technical drug-test parole violations receive, they appear to make up a very small percentage of the parole-violation cases that result in a return to prison. See *The War on Drugs and Prison Growth*, *supra* note 17.

<sup>24</sup> German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You.*, VOX (Sept. 7, 2016, 11:30 AM), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll> [<https://perma.cc/W88B-F7FU>].

<sup>25</sup> JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2017 (2019).

<sup>26</sup> For time served, see URBAN INST., A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA'S PRISONS (2017), <https://apps.urban.org/features/long-prison-terms/trends.html> [<https://perma.cc/6AEF-66NV>], which defines the “longest serving” as those in the top ten percent of total time actually served. For admissions, see John Pfaff (@JohnFPfaff), TWITTER (Oct. 6, 2017, 10:04 AM), <https://twitter.com/JohnFPfaff/status/916303088809635840> [<https://perma.cc/6DH5-TUNJ>].

someone is arrested for domestic violence but ultimately pleads guilty to just a drug charge (if, say, he had heroin on him at the time of the arrest), then that person shows up in the prison data as a “non-violent drug offender,” even if the (ultimately uncharged) violence was the primary reason the prosecutor sought prison time in the first place.

There is no way our incarceration rate can drop below world-high levels without a serious rethinking on how we handle violence. And, to be clear, shifting away from prisons to address violence is sound public policy. Prisons are blunt, inefficient tools for confronting violent behavior that often beget more violence in the future (which is not to discount retributivists arguments, but those are beyond our scope here).<sup>27</sup>

Fortunately, there are ways that a Second Step Act could help us address the power of prosecutors more effectively, fix some of the political defects that permeate our criminal justice system, and perhaps even shift our policies when it comes to violence.

## II. REGULATING PROSECUTORS

There are numerous ways to try to regulate prosecutorial behavior. Here I want to consider three: (1) directly supporting the most innovative and progressive prosecutors who are trying to fundamentally shift criminal justice from a punitive footing to a more public health one; (2) helping ensure that progressive-*sounding* prosecutors live up to their promises by bolstering public defense in specific ways; and (3) targeting a giant fiscal moral hazard that gives prosecutors unfettered freedom to send as many people to prison regardless of cost. These are by no means the only options, but they cover a wide range of (quite important) scenarios and flesh out the sorts of approaches any sort of Second Step Act should try to use.

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<sup>27</sup> See, e.g., David Roodman, *Reasonable Doubt: A New Look at Whether Prison Growth Cuts Crime*, OPEN PHILANTHROPY PROJECT (Sept. 25, 2017), <https://www.openphilanthropy.org/blog/reasonable-doubt-new-look-whether-prison-growth-cuts-crime> [https://perma.cc/97VS-PXTA].

### A. Prosecutors and Public Health

Not without controversy, some progressive-leaning prosecutors in recent years have started to refuse to prosecute certain low-level offenses, marijuana in particular, and they have also begun to raise concerns that the United States relies too often on the criminal justice system to address issues of poverty, homelessness, mental illness, and drug addiction that could be better handled elsewhere.<sup>28</sup> Perhaps the most ambitious example is Rachael Rollins, the newly-elected district attorney for Suffolk County in Massachusetts, i.e., Boston. Following up on a promise she made during her campaign, Rollins has listed approximately fifteen offenses that her office will presumptively not charge absent clear reasons, including certain types of trespass, shoplifting, breaking and entering, and drug possession charges (beyond just marijuana)—all offenses tied to poverty, homelessness, drug use, and mental health disorders.<sup>29</sup>

Implicit in Rollins' policy is a harsh critique of the public health and public services sectors. It argues, in effect, that public housing agencies, mental health providers, and other public health and social support services—or, perhaps more fairly, those who set their budgets—have allowed the Suffolk County Jail to effectively become a policy-failure backstop. Although she may not frame them this way herself, Rollins' actions can certainly be seen as insisting that we stop relying on the criminal justice system to be a major service provider and expand our investment in non-criminal public health solutions. It is a policy recommendation that rests on solid empirical ground, since there is plenty of evidence that non-penal interventions often, if not almost

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<sup>28</sup> Besides being criticized on public safety grounds, such categorical refusals are viewed by some critics as a violation of the separation of powers on the grounds that the executive branch, charged with *enforcing* the laws, is usurping the *law-defining* role of the legislature. I disagree, but it is not a point without merit. See John Pfaff, *Boston's New D.A. Pushes Back Against Prosecutors' 'Punishment-Centric' Point of View*, APPEAL (Nov. 14, 2018), <https://theappeal.org/bostons-new-da-pushes-back-against-the-punishment-centric-point-of-view-of-prosecutors> [https://perma.cc/8W57-YHSF].

<sup>29</sup> RACHAEL ROLLINS, THE RACHAEL ROLLINS POLICY MEMO (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [https://perma.cc/9VXU-PK48].

always, have a more significant impact on criminal offending and reoffending than detaining people in prisons and jails.<sup>30</sup>

Yet, an approach like Rollins' is politically risky. The elected prosecutor is far better known, and far more immediately electorally accountable, than the people who manage the public health side of things. It may be that few people can name their local prosecutor, but fewer still can say who is running, say, public housing or mental health treatment. When Rollins thus says, in effect, that the Suffolk County Jail can no longer be used as a fallback homeless shelter, what will compel the city, county, or state to invest more heavily in public housing? Perhaps other agencies will simply drag their feet for a few years and hope that the unaddressed social problem will cause Rollins or a prosecutor like her to lose the next election and be replaced by someone who will start charging those crimes again.

A Second Step Act here could play an important role, both directly and symbolically. Directly, the Second Step Act could authorize federal grants to any city or county whose district attorney agrees to decline to prosecute broad categories of lower-level offenses, at least absent some sort of clear, compelling reason. The grants could be earmarked for public health investments like expanded public housing, drug treatment programs, or mental health facilities, or they could be used to assist local inter-agency coordination. Given how much state and local governments already invest in public housing and other public welfare policies,<sup>31</sup> the latter grants may be more effective: rather than adding a few extra federal dollars to significant pre-existing state and local expenditures, they would target federal funds at something local governments do not do much of at all.

Whatever the design, such programs could provide prosecutors with some important political protection. Right now, prosecutors like Rollins are effectively playing chicken with the social services agencies and the legislature; that is a lonely position for an office that remains

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<sup>30</sup> Jennifer L. Doleac, *New Evidence that Access to Health Care Reduces Crime*, BROOKINGS (Jan. 3, 2018), <https://www.brookings.edu/blog/up-front/2018/01/03/new-evidence-that-access-to-health-care-reduces-crime> [<https://perma.cc/A4QP-CMAH>]; Roodman, *supra* note 27.

<sup>31</sup> We spend about \$150 billion on mental health. See PEW CHARITABLE TRS. & JOHN D. & CATHERINE T. MACARTHUR FOUND., *MENTAL HEALTH AND THE ROLE OF THE STATES* (2015), <https://www.pewtrusts.org/~media/assets/2015/06/mentalhealthandroleofstatesreport.pdf> [<https://perma.cc/2EMV-DLG9>].

vulnerable to one shocking, salient, media-captivating crime. A grant program that brings the prosecutor and public health officials together would not only increase the chance that policies such as Rollins' would succeed, but it would spread out some of the political risk, encouraging other prosecutors to adopt policies similar to Rollins'.

The communicative impact of such a proposal would also be quite significant. Right now, categorical declinations are either framed as scaling back the war on drugs (for marijuana cases), or as examples of generic progressivism (like with Rollins). A federal program designed to help local governments shift how they address antisocial behavior would give categorical bans a more solid political footing: rather than reflecting idiosyncratic efforts to "be progressive," they could be seen as an important effort to systematically and systemically shift our approach to certain social harms away from a punitive criminal justice system.

A grant program like this could also effectively exploit the outsized media attention that federal criminal justice reform efforts receive. Categorical bans such as Rollins' remain highly controversial, so this proposal would likely generate significant debate during the legislative process. The media's coverage of that debate could raise the issue for many state and local politicians and advocates who may not have thought much about it before, even if the program ultimately fails to make it out of Congress.

#### *B. Public Defenders: Quis Custodiet Ipsos Progressive Prosecutors?*

It is increasingly easy for district attorney candidates to *sound* progressive or reform-leaning, but there is a growing risk that commonly-invoked words—like the nebulous "bail reform"—could mean very different things to different people, and that ambiguity could allow candidates who lack a serious commitment to reform to avoid accountability if they win their elections but implement few real changes. This problem is confounded by the fact that prosecutor offices have historically been quite opaque: we lack any sort of centralized data on their behavior akin to the Uniform Crime Reports for crimes and arrests and the National Prisoner Statistics for prison populations, and individual offices rarely provide comprehensive data on their actions.

In a handful of jurisdictions, local citizens have established court watching organizations, which train volunteers to sit in court and

record what cases come up and how they are processed, and then compile statistics on who is prosecuted and in what way that are shared with the public.<sup>32</sup> Court watchers are an invaluable resource, but they are a limited response. Not only do they rely on volunteers and thus gather only a periodic sampling of what is happening, but they can only see what happens in open court—and given that well over ninety percent of all guilty verdicts result from plea bargains, most of the critical work driving mass punishment happens outside of the courtroom.

Yet, while court watchers cannot observe what takes place behind the scenes, public defenders can, and in comprehensive, systematic ways. Although data on the issue is shaky, it seems that about eighty percent of all defendants facing prison time qualify for some sort of state-provided indigent counsel.<sup>33</sup> These lawyers are involved in every step of the process and thus observe not just everything that happens in open court but all the behind the scenes choices as well. A Second Step Act could thus help improve prosecution by improving public defense.

Let me be clear about the focus here, which is *not* the conventional one towards public defense funding. Observers have known for years that indigent defense is systematically underfunded, and our public defense system mostly lurches from one underfunding crisis to another. Public defenders in many places manage near-impossible caseloads, to the point that some offices have been refusing to take on new cases

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<sup>32</sup> Bryce Covert, *The Court Watch Movement Wants to Expose the 'House of Cards,'* APPEAL (July 16, 2018), <https://theappeal.org/court-watch-accountability-movement> [<https://perma.cc/3A36-GV9E>]; COURT WATCH NYC, *BROKEN PROMISES: A CWNYP RESPONSE TO DRUG POLICING AND PROSECUTION IN NEW YORK CITY* (2018), <https://static1.squarespace.com/static/5a21b2c1b1ffb67b3f4b2d16/t/5bda55bb21c67c69e6b50409/1541035453806/CWNYP+Drug+Zine+FOR+WEB.pdf> [<https://perma.cc/V95P-Q75L>].

<sup>33</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963), held that defendants facing prison time had a constitutional right to counsel, and several subsequent cases extended that right to those charged with misdemeanors facing significant jail time, *Argersinger v. Harmlin*, 407 U.S. 25 (1972), or even the threat of jail time (like with a suspended sentence), *Alabama v. Shelton*, 535 U.S. 654 (2000), but not people facing misdemeanors without the risk of being sent to jail, *Scott v. Illinois*, 440 U.S. 367 (1979). The eighty percent number is generally invoked for cases falling specifically under *Gideon*: felonies at risk of prison sentences. Our data on misdemeanor cases is so faulty that it is likely impossible to calculate a similar number for those. See generally ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2019).

because they could not provide adequate representation if they did.<sup>34</sup> And not only do public defender offices face problems with the absolute number of cases they must take on, but they are also at a *relative* funding disadvantage. In 2008 (again, the last year with reliable data), total spending on indigent defense (for public defenders as well as other, court-appointed counsel) came to about \$4.5 billion, which was twenty-five percent less than the \$6 billion we spent on prosecutors.<sup>35</sup> And the gap grows even more when we take into account the fact that prosecutors receive all sorts of free services, like investigations courtesy of the police, that defenders have to pay for. One study in North Carolina, for example, found that while defender and prosecutor budgets were nominally the same, prosecutors' budgets were effectively *triple* that of the defenders once these free services were accounted for.<sup>36</sup>

This is a very real crisis, and it is one that Congress is actually starting to think about. Senator Kamala Harris recently introduced a bill authorizing \$250 million per year for at least five years to support indigent defense and to incentivize states to adopt pay-parity provisions to ensure defenders and prosecutors are paid equally, and criminal justice platforms by presidential candidates Senators Bernie Sanders and Senator Elizabeth Warren both discussed plans to increase public

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<sup>34</sup> See, e.g., Stacey Barchenger, *How Can Public Defenders Refuse Cases?*, TENNESSEAN (May 11, 2016, 7:49 PM), <https://www.tennessean.com/story/news/local/williamson/2016/05/11/how-can-public-defenders-refuse-cases/84190022> [<https://perma.cc/W6G8-KEHZ>]; Corin Hoggard, "Crisis" at Public Defender's Office Delays Justice, Costs Taxpayers, ABC30 (Feb. 17, 2018), <https://abc30.com/politics/crisis-at-public-defenders-office-delays-justice-costs-taxpayers/3080562> [<https://perma.cc/FZW5-UU3X>]; Debra Cassens Weiss, *Public Defender Is Found in Contempt for Refusing Cases; DA Asks State Supreme Court to Intervene*, A.B.A. J. (Dec. 1, 2016, 3:16 PM), [http://www.abajournal.com/news/article/public\\_defender\\_is\\_found\\_in\\_contempt\\_for\\_refusing\\_cases\\_da\\_asks\\_state\\_supre](http://www.abajournal.com/news/article/public_defender_is_found_in_contempt_for_refusing_cases_da_asks_state_supre) [<https://perma.cc/HK3W-MPBW>]; John Yang & Frank Carlson, *Missouri Public Defenders Are Overloaded with Hundreds of Cases While Defendants Wait in Jail*, PBS (May 2, 2018, 6:35 PM), <https://www.pbs.org/newshour/show/missouri-public-defenders-are-overloaded-with-hundreds-of-cases-while-defendants-wait-in-jail> [<https://perma.cc/2JCG-QRRT>]; see also John P. Gross, *Case Refusal: A Right for the Public Defender But Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253 (2017).

<sup>35</sup> HOLLY R. STEVENS ET AL., STATE, COUNTY, AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 (2010), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf) [<https://perma.cc/Z6A2-CM9W>]; PERRY & BANKS, *supra* note 19. Note that the data on prosecutors is from 2007, not 2008. But the comparison is still valid.

<sup>36</sup> N.C. OFFICE OF INDIGENT DEF. SERVS., NORTH CAROLINA'S CRIMINAL JUSTICE SYSTEM: A COMPARISON OF PROSECUTION AND INDIGENT DEFENSE RESOURCES (2011).

defense spending.<sup>37</sup> These are notable first steps towards repairing our indigent defense system, but my focus here is not simply on trying to improve funding for public defenders; while that is essential, I think the Second Step Act should focus on bigger, less intuitive, and more systemic issues.

My point of departure is a powerful insight that Paul Butler made a few years ago, that proved indigent defense *cannot* solve mass incarceration because mass incarceration is not really driven by inadequate lawyering.<sup>38</sup> Butler's core point is that improved lawyering can scale back incarceration only if it can change the outcome of cases, but the reality is that most people coming into the criminal justice system are in fact guilty. Legislatures have written incredibly broad criminal codes that are easy to violate. To be clear, this is *not* a defense of mass incarceration or mass punishment: it is just an acknowledgement that to reverse mass incarceration, we have to change the *policy choices* that we are making. A bar fight is clearly a crime—but it does not have to end in an arrest, or a charge, or a prosecution, or a conviction. To decarcerate, we have to *decide to use* criminal punishment less. Improved public defense can still help in this environment—with more time and resources, defense lawyers may be able to push for shorter sentences or more diversion—but not in a transformative sort of way.<sup>39</sup>

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<sup>37</sup> S. 1377, 116th Cong. (2019). Given the billions we already spend on indigent defense, \$250 million is not a significant boost—it is about 5.5% of what we were spending on indigent defense in 2008—but it is symbolically important, and it could have lasting effects if it pushes at least some states to adopt pay-parity laws. See also Elizabeth Warren, *Rethinking Public Safety to Reduce Mass Incarceration and Strengthen Communities*, MEDIUM (Aug. 20, 2019), <https://medium.com/@teamwarren/rethinking-public-safety-to-reduce-mass-incarceration-and-strengthen-communities-90e8591c6255> [<https://perma.cc/X8UQ-GXYQ>]; *Justice and Safety for All*, BERNIE SANDERS, <https://berniesanders.com/issues/criminal-justice-reform> [<https://perma.cc/X4LM-Q9XX>].

<sup>38</sup> Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

<sup>39</sup> This is true at least for felony court, which drives mass incarceration. In misdemeanor court, which drives mass punishment, the story is a little less clear. As Natapoff points out, misdemeanor statutes are much less clearly written, and misdemeanor cases often turn solely on the dueling testimonies of the arresting officer and the defendant, so the issue of actual innocence becomes stronger. Natapoff, *supra* note 33; see also ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018).

Until now. The rise of the progressive prosecutor has the potential to fundamentally change the role of the public defender. Unlike public defenders, prosecutors *can* change the flow of cases into the criminal justice system, by refusing to charge broad categories of offenses, or at least by using their unfettered discretion to decline or dismiss cases far more aggressively. As we just saw with Rollins, this is a central way that “progressive prosecutors” claim they will enact more-progressive policies. And public defenders are in the best position to ensure that they do so.

There are two ways that a Second Step Act could help ensure that public defenders are better able to monitor what prosecutors do. The first would be to establish grants for indigent defense that tie funding to states adopting or maintaining state- or county-level public defender (*not* just “indigent counsel”) offices. The Supreme Court cases that established the indigent right to counsel were not particularly precise: they tell states to ensure that the poor have lawyers (at least in some situations), but they provide no guidance about how to do so. Many states and counties have public defender offices, but many do not, relying instead on, say, court-appointed private lawyers.<sup>40</sup> A Second Step Act should attempt to push states and counties to specifically adopt public defender offices.

For my purposes here, the need for public defenders, as opposed to appointed counsel, is not about the quality of lawyering.<sup>41</sup> Rather, it is about the ability of public defenders to systematically observe what the prosecutor’s office is doing. A centralized public defenders’ office would be far better able to synthesize what is happening over time than scattered individual appointed counsels, especially since that office would handle nearly all the cases in that district. Moreover, public defenders, unlike appointed counsel, do not need to maintain a good

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<sup>40</sup> LYNN LANGSTON & DONALD FAROLE, JR., U.S. DEP’T OF JUSTICE, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010); LYNN LANGSTON & DONALD FAROLE, JR., U.S. DEP’T OF JUSTICE, STATE PUBLIC DEFENDER PROGRAMS, 2007 (2010).

<sup>41</sup> For more on that particular issue, see, e.g., James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012); Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 OHIO ST. J. CRIM. L. 223 (2005); Amanda Agan, Matthew Freedman & Emily Owens, *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense* (Nat’l Bureau of Econ. Research, Working Paper No. 24579, 2018).

relationship with the courts to ensure future employment. This political freedom would allow them to be more aggressive and adversarial in how they gather and report data.

In states and counties that already have public defender offices, the Second Step Act could provide funding to help those offices build out their capacity to meaningfully monitor the prosecutor. This could include assistance in acquiring any hardware needed to gather data, as well as to design the software needed to track what is taking place in and out of court. The funding could also help cash-strapped offices hire people to gather and maintain the data. In states and counties without public defender offices, obviously, the funds would be used to help establish those institutions.

Establishing public defender offices will not only make it easier for public defenders to play a critical monitoring role, but it will introduce some important political balance. Prosecutors often try to defend some of their harsh decisions by claiming that they are just enforcing the laws that the legislature has adopted, but this is a disingenuous position: state prosecutor associations frequently lobby the state legislature to adopt or protect the very laws they then claim they have no choice but to uphold.<sup>42</sup> There is rarely a comparable state-level public defender association to counter the political lobbying of the prosecutors, in no small part because many states and counties lack any such office, and it is hard-to-impossible for individual appointed counsel to organize in any sort of similar way.

Thus, by pushing states to adopt public defender offices, the Second Step Act would advance two distinct levels of monitoring. At the micro level, as we just saw, it would help make sure that public defenders could track what individual progressive-sounding prosecutors are doing (or better publicize the practices of those who are not progressive). And at a macro level it would establish a political counterweight to the often-unseen but quite influential power of prosecutor associations to shape the laws they are then in charge of enforcing.

Finally, funding indigent defense has two things going for it that some of the other proposals here may lack. First, it has growing

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<sup>42</sup> See, e.g., Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform> [<https://perma.cc/7FSE-8JR6>].

bipartisan support. A recent article in the Marshall Project, for example, pointed out that conservatives are increasingly concerned about indigent defense for Second Amendment reasons: minor convictions often carry life-long gun bans or restrictions.<sup>43</sup> And second, we spend so little on indigent defense right now that even the relatively small amounts that the federal government can deploy here could make a difference. When the federal government throws money at institutions that are already spending billions—like when they offer state departments of corrections millions of dollars to build out prisons—the grants tend to have little impact. This, for example, is why the prison-building grants in the 1994 Crime Control Act appear to have changed little, if anything at all.<sup>44</sup> Grants aimed at indigent defense, however, will not have this same sort of problem and thus are more likely to have *some* sort of impact.

### C. *Prosecutorial Moral Hazard: The Problem of Free Prisons*

A third way that a Second Step Act could attempt to rein in prosecutorial power is both the most technical but perhaps also the most promising. One of the less-appreciated drivers of mass incarceration is a long-standing moral hazard problem sitting at the heart of the criminal justice system. In fact, it is an issue that makes it clear that the term “criminal justice system” is a misnomer; we should speak instead of “criminal justice systems.” What we have is not one single, unified system but an often incoherent agglomeration of city, county, state, interstate, and federal institutions, all responding to different constituencies, and all facing widely different incentives. And, quite frequently, the incentive misalignments that arise can have significant implications.

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<sup>43</sup> Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, MARSHALL PROJECT (Sept. 22, 2017, 1:15 PM), <https://www.themarshallproject.org/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor> [<https://perma.cc/G47Q-QQ8V>].

<sup>44</sup> The grants in the 1994 Act, for example, amounted to about one percent to three percent of what states were already spending on prison. John Pfaff (@JohnFPfaff), TWITTER (May 29, 2019, 12:33 PM), <https://twitter.com/JohnFPfaff/status/1133773491478716416> [<https://perma.cc/CYL9-XJUN>]. It is not surprising, then, that most states said that the grants did not affect their decisions much. And, tellingly, states claimed only \$3 billion of the \$10 billion the Act authorized. States chose to leave money on the table because the incentives were just too weak. See generally *Federal Sentencing in the States*, *supra* note 17.

Here, I want to focus on what I have referred to as the “prosecutorial moral hazard” problem.<sup>45</sup> In all but four states, prosecutors are elected by the county (or sometimes a multi-county circuit) and paid mostly out of county funds.<sup>46</sup> Local jails as well as many probation offices are similarly locally funded. Prisons, in contrast, are funded by the *state* government, not by the county or the city. The resulting moral hazard issue should now be clear.

County-funded prosecutors do not have to pay to send someone to prison: incarceration comes out of someone else’s budget. In fact, compounding this problem, less-harsh approaches are actually *more* expensive, since most misdemeanor sanctions—jail or probation—are county expenses. Thus, being tougher on crime is both politically more expedient (even today) *and*, from the prosecutor’s perspective, cheaper than less harsh responses.

Now, to be clear, this moral hazard problem predates mass incarceration, so it is not a direct cause of our prison explosion. But whenever prosecutors face growing pressure or desire to be harsh, this defect means that they can do so at almost no fiscal cost, either to their own budget or to the tax base of those who elect them. It also means that they feel less of a fiscal push to adopt or support wide-ranging reforms. And except for one important exception, no state legislature has adopted a law that seriously limits prosecutors’ access to state prison capacity.

That one exception is California, which in 2011 adopted its sprawling “Public Safety Realignment” law, or AB 109, which is

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<sup>45</sup> PFAFF, *supra* note 5.

<sup>46</sup> In Alaska and New Jersey, the state Attorney General appoints the local district attorneys, and in Connecticut, it is the State Criminal Justice Commission that does the appointment. *Anchorage District Attorney’s Office*, ST. ALASKA, <http://www.law.alaska.gov/department/criminal/adao.html> [<https://perma.cc/4DZ7-WNQ4>]; *Michael Gailor Appointed Middlesex State’s Attorney*, CT ST.: DIVISION CRIM. JUST., <https://portal.ct.gov/DCJ/Criminal-Justice-Commission/Criminal-Justice-Commission-News-Releases/News-Releases/Michael-Gailor-Appointed-Middlesex-States-Attorney> [<https://perma.cc/5Q6H-4FV3>]. In Delaware, the elected State Attorney General is considered to be the state’s (sole) prosecutor, but he in turn appoints more-local deputies who tend to run the day-to-day criminal justice operations. Data on exactly how prosecutors are funded is unclear, in no small part because the particulars vary from state to state, but one of the most recent Bureau of Justice Statistics reports on the issue indicated that about eighty percent of prosecutor budgets come from county funds. STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005 (2006).

commonly referred to simply as “Realignment.”<sup>47</sup> Prior to Realignment, California’s prison system was often operating at 200% of its designated capacity, and the state admitted in court that its inability to provide adequate physical and mental health care was leading to approximately sixty preventable deaths per year.<sup>48</sup> The Ninth Circuit insisted that California cut its prison population to 137.5% of its capacity, and Realignment was the state’s response.

Realignment is a complex bill that addresses many issues at once, but the part I want to focus on here was how it confronted the moral hazard problem. Realignment states that if a county prosecutor convicts someone of a “triple-non” offense—non-violent, non-serious, and non-sexual—then that person has to serve his sentence in county jail, even if the conviction is for a felony that would have resulted in state prison time prior to Realignment.<sup>49</sup> Suddenly, counties found themselves responsible for the costs of incarceration, and the result was a significant decline in incarceration: prison populations fell by over 27,000 in a single year, and jail populations rose by only about 8,000; all told, California’s prison-and-jail incarceration rate fell from 619 per 100,000 residents to 566.<sup>50</sup> This drop was so big that nearly fifty percent of the total *national* decline in prisons between 2010 and 2015 came from California’s adoption of Realignment, a decline that came about in no small part by forcing county officials to think about the costs they were imposing on the state.

Yet, almost immediately there was a twist. When the state rolled out Realignment, it included funding to help counties build out jail capacity as well as non-jail programming to deal with the increase in people diverted from state prisons to county facilities. At the time, the state only provided for temporary funding, but in 2012 the voters approved a state constitutional amendment which made state grants

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<sup>47</sup> For a general overview, see MAGNUS LOFSTROM & BRANDON MARTIN, PUB. POLICY INST. OF CAL., PUBLIC SAFETY REALIGNMENT: IMPACTS SO FAR (2015), <https://www.ppic.org/publication/public-safety-realignment-impacts-so-far> [<https://perma.cc/H54Q-FB3R>].

<sup>48</sup> *Brown v. Plata*, 563 U.S. 493 (2011).

<sup>49</sup> For a list of offenses that fall within Realignment, see J. RICHARD COUZENS & TRICIA A. BIGELOW, FELONY SENTENCING AFTER REALIGNMENT 160 (2017), [http://www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf) [<https://perma.cc/XLR3-YM43>].

<sup>50</sup> LOFSTROM & MARTIN, *supra* note 47.

permanent.<sup>51</sup> Such permanent subsidies undermine the very cost-internalization that is central to Realignment.

Here is where a Second Step Act can capitalize on its “*federalness*” to advance better policy. The Second Step Act could offer to provide “Realignment” funds to states that adopt policies similar to California’s—money that could be used by counties to expand, or at least upgrade, facilities and non-carceral programming in anticipation of prisons accepting fewer people.<sup>52</sup> Unlike in California, however, it is less likely that Congress would feel political pressure to make such grants permanent. Sacramento is fairly beholden to all the counties in California, but Congress is not beholden to any one state (and it is unlikely that all the states would undertake such an approach all at once). Thus, the Second Step Act could authorize funds to help with the transition that everyone would know would be time-limited.

Moreover, this is the sort of issue where the congressional “bully pulpit” could also play a very important role. This is likely an issue that most voters—and, to be honest, even many people who think about and focus on the criminal justice system—have not thought about extensively, if they even realize it at all. Any debate about this issue, and the media attention its discussion would produce, would help shed light on an important defect that may persist in no small part simply because most people do not appreciate its significance. This focus could, in turn, inspire some state officials to tackle the issue on their own, even if the federal assistance never materializes.

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<sup>51</sup> CAL. BUDGET PROJECT, FINISHING THE JOB: MOVING REALIGNMENT TOWARD COMPLETION IN 2012 (2012); *Constitutional Protections for Realignment: Proposition 30 a Win for Counties as Well as Schools*, CAL. ST. ASS'N COUNTIES, <https://www.counties.org/post/constitutional-protections-realignment> [<https://perma.cc/96H5-MTMS>].

<sup>52</sup> An argument could be made that the funds should be restricted just to improving current facilities, or replacing old capacity without increasing total capacity, in order to ensure that the overall size of the incarcerated population declines, rather than just transferring it from prisons to jails. For this to work, however, we would need to be confident that *jail* overcrowding could be policed in the same manner as *prison* overcrowding. More generally, the question of how to shrink overall prison capacity and spending in the long run without making conditions in facilities worse in the short to medium run is a rather difficult one to answer easily.

## III. THE PRISON-PUBLIC SECTOR WAGES COMPLEX

One constant target of reformers' ire is the private prison industry, by which most people mean corporations such as CoreCivic and GEO Group which operate privately-run prisons under contracts from state departments of corrections.<sup>53</sup> In both his 2016 and 2020 presidential bids, Senator Bernie Sanders emphasized the unjustness of private prisons, and Senator Elizabeth Warren has done the same thing during her 2020 campaign.<sup>54</sup> Putting aside any concerns about whether private prisons are somehow inherently more immoral than public ones (a distinction I think is ultimately much more one of style than substance),<sup>55</sup> the emphasis on private prisons is problematic because they are actually quite minor players in the criminal justice system. Focusing on them distracts us from targeting the institutions that matter far more, in this case the public sector correctional officers and their unions.

As noted above in Part I, the numbers are clear. Only eight percent of prisoners are held in private facilities, compared to ninety-two percent in public ones.<sup>56</sup> In fact, half of all people held in private prisons are held in just five states, and there is no evidence that prison populations grew any faster in those states than in states that relied less on private prisons or did not use them at all.<sup>57</sup> Most significantly, of the \$50 billion states spend annually on prisons, about \$4 billion of it goes to private prisons (with profits of about \$300 million), while about two-

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<sup>53</sup> There is a second layer of privatization, namely the companies and corporations that provide services *within* prisons, ranging from healthcare to phone services to commissary supplies. The revenues of these companies are close to those of the prison management ones (approximately \$3 billion versus \$4 billion for the management companies), but they receive substantially less attention. See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/PK83-YP9Q>].

<sup>54</sup> John Pfaff, *Five Myths About Prisons*, WASH. POST (May 17, 2019), [https://www.washingtonpost.com/outlook/five-myths/five-myths-about-prisons/2019/05/16/953304ea-7759-11e9-b3f5-5673edf2d127\\_story.html?utm\\_term=.355acafe6cc5](https://www.washingtonpost.com/outlook/five-myths/five-myths-about-prisons/2019/05/16/953304ea-7759-11e9-b3f5-5673edf2d127_story.html?utm_term=.355acafe6cc5) [<https://perma.cc/A7VQ-ACEC>].

<sup>55</sup> Jeffrey A. Butts & John Pfaff, *It's About Quality: Private Confinement Facilities in Juvenile Justice*, 18 CRIMINOLOGY & PUB. POL'Y 361 (2019).

<sup>56</sup> BRONSON & CARSON, *supra* note 25.

<sup>57</sup> Pfaff, *The Complicated Economics of Prison Reform*, *supra* note 17.

*thirds* of it, or about \$35 billion, is paid out to public prison staff in wages and benefits.<sup>58</sup>

That \$35 billion wage bill is, in effect, a type of profiteering off of prisons, and one that dwarfs the private sector's. Not surprisingly, such large payments create strong incentives on the part of correctional officers and their unions to fight against reforms in order to keep prisons open to preserve their jobs.<sup>59</sup> This is especially true in areas where the correctional institution is one of the few, if not the only, stable employers offering decent wages. In fact, the pressure extends beyond just the correctional officers. Many communities with prisons are already economically marginalized, and the facility often provides some of the only well-paying jobs in the region; a prison closure could lead to serious economic repercussions that extend well beyond the correctional officials who may get laid off.<sup>60</sup> Other gains from having prisons in the area, such as the electoral benefits of prison gerrymandering, further intensify resistance to reform.<sup>61</sup> Finally, unlike

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<sup>58</sup> *Prison Spending in 2015*, *supra* note 9; see also Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/PK83-YP9Q>]. I have never come across comparable data for the \$30 billion we spend on jails, although it is likely comparable. New York City spends \$1.4 billion to manage its jails on Rikers Island and elsewhere in the City, and nearly eighty percent of that is just wages and benefits. N.Y.C. COUNCIL, REPORT OF THE FINANCE DIVISION ON THE FISCAL 2019 PRELIMINARY BUDGET AND THE FISCAL 2018 MAYOR'S MANAGEMENT REPORT FOR THE DEPARTMENT OF CORRECTION (2018).

<sup>59</sup> See, e.g., Mike Riggs, *Public Sector Prisons Are Spending Almost as Much on Campaigns as Private Prison Companies*, REASON (Aug. 22, 2012, 4:53 PM), <https://reason.com/2012/08/22/what-does-it-mean-that-public-sector-pri> [<https://perma.cc/2AUA-CXBG>].

<sup>60</sup> See, e.g., JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* (2017).

<sup>61</sup> Prison gerrymandering has a clear political valence to it. In the forty-two states that still count prisoners as "residing" in prisons while denying them the vote, the policy works to inflate Republican representation above what it would otherwise be: prisons tend to be located in more-rural, more-White areas, at least outside the South, while prisoners tend to be people of color from urban areas. In other words, the prison gerrymander cuts voting power of people who lean Democratic and come from Democratic areas and transfers it to more Republican regions. John Pfaff (@JohnFPfaff), TWITTER (Dec. 10, 2017, 12:23 PM), <https://twitter.com/JohnFPfaff/status/939908381531394048> [<https://perma.cc/S3AM-AWGA>]. One paper looking at Pennsylvania found that eliminating the gerrymander there would transfer about five state House seats from rural Republican areas back to Democratic parts of Philadelphia and Pittsburgh. Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, DU BOIS REV. (forthcoming). Tellingly, all the states that have

the private prison firms, public prison correctional officers cannot diversify into, say, reentry and rehabilitation programs to offset the loss of prison jobs, which only intensifies this resistance.<sup>62</sup> It is unlikely that anyone has a bigger stake in supporting and maintaining mass incarceration than the *public sector* correctional officers and their unions, as well as their communities more broadly.

New York State provides a clear example of how this problem plays out—as well as a way that a Second Step Act could confront it. Between 1999 and 2015, New York State’s prison population fell by about 20,000 people—the largest sustained decline nationwide during that time—yet spending on corrections *rose* by nearly \$1 billion, and the state struggled in the face of intense union opposition to close any of its increasingly empty prisons.<sup>63</sup> Governor Andrew Cuomo eventually weakened the opposition to closures by offering \$50 million in aid and other tax benefits to areas that would be affected by the closures, with the hope that such aid would stimulate new employment opportunities.<sup>64</sup> It is not entirely clear if the funds did much good, since it has proven hard to bring new businesses to those areas, but the grants and tax breaks did succeed in reducing political resistance and thus helping the state close facilities.<sup>65</sup> No other state, however, appears to have followed in New York’s footsteps.

This is the sort of reform that a Second Step Act could assist with. Congress, for example, could offer millions, or even billions, in direct aid and tax assistance over several years to states that agree to close

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abolished the prison gerrymander have done so when Democrats controlled both chambers of the legislature and the Governor’s mansion.

<sup>62</sup> For a discussion of private prison firms shifting their attention to re-entry as the push for decarceration grows, see, e.g., Joshua Holland, *Private Prison Companies Are Embracing Alternatives to Incarceration*, NATION (Aug. 23, 2016), <https://www.thenation.com/article/private-prison-companies-are-embracing-alternatives-to-incarceration> [https://perma.cc/5GYL-56P5].

<sup>63</sup> Stier, *supra* note 21.

<sup>64</sup> *Governor Cuomo Announces Closure of Seven State Prison Facilities*, N.Y. ST. (June 30, 2011), <https://www.governor.ny.gov/news/governor-cuomo-announces-closure-seven-state-prison-facilities> [https://perma.cc/Z4RW-PE5J].

<sup>65</sup> Paul Post, *Closed Prisons in Rural Areas Are a Tough Sell*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/nyregion/closed-prisons-new-york.html> [https://perma.cc/C8F3-PR8P].

prisons and reduce prison populations,<sup>66</sup> targeting that money at the affected communities to help them transition away from prison-centered economies. As New York demonstrates, it may not even take that much money to have a real impact, suggesting that this is the sort of grant program that is well-suited to something like a Second Step Act, whose funding will always be quite small relative to what state and local governments are already spending. Moreover, like with the Realignment proposal, relying on the federal government here mitigates the risk that transitional funding will eventually become a permanent subsidy.

This sort of funding proposal aims to correct a major flaw in an earlier congressional effort along these lines, 2017's Reverse Mass Incarceration Act (RMIA).<sup>67</sup> The RMIA, like my plan here, would have given states that cut their prison populations billions of dollars in aid, but the grants would have gone to fund programs that were thought to be effective at reducing crime. Most effective crime-reducing programs operate closest to the problem, so the RMIA would have rewarded states that cut prison populations—and thus imposed costs on rural communities—with funds predominantly earmarked for more-urban areas. In other words, the RMIA did not think carefully about the fractured politics of punishment, and thus missed that it would have imposed uncompensated costs on politically powerful correctional officers, which would have produced serious political pushback at the state level. By targeting the funds at those impacted by the closures, the proposal here attempts to directly confront the political-economic challenges posed by correctional officer unions and their allies.

There is an important communicative aspect to this proposal as well. With very few exceptions, the power of public sector unions seems

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<sup>66</sup> Note that prison closures and prison population reductions need not be synonymous. Over the 2010s, for example, Texas closed at least six prisons, but its prison population fell by only 10,000, or slightly under six percent, from 174,000 to 164,000. Brandi Grissom, *With Crime, Incarceration Rates Falling, Texas Closes Record Number of Prisons*, DALL. MORNING NEWS (July 5, 2017), <https://www.dallasnews.com/news/texas-legislature/2017/07/05/crimeincarceration-rates-falling-texas-closes-record-number-lock-ups> [https://perma.cc/9N52-S5KS]; *Corrections Statistical Analysis Tool*, *supra* note 4.

<sup>67</sup> See generally John Pfaff, *Cory Booker Has a Plan to "Reverse" Mass Incarceration. It Won't Work.*, VOX (Sept. 26, 2017, 8:40 AM), <https://www.vox.com/the-big-idea/2017/9/26/16363230/mass-incarceration-cory-booker-reverse-bill> [https://perma.cc/PP94-73EX].

almost completely absent from our debates over prison reform.<sup>68</sup> A grant program aimed at weakening public sector union resistance to reform would likely get decent media coverage, which would make the issue more salient for local voters and legislators alike. This could, again, encourage local policymakers to think about how to address this problem, even if the Second Step Act fails to pass, or passes without any provisions addressing this issue.

There are also at least two collateral benefits to grants such as these, beyond addressing the political clout of public sector correctional officer unions. First, prison spending is often framed as “white rural welfare”: prisons are disproportionately full of people of color from more-urban areas, while the officers and their communities are thought to be disproportionately rural and White. And to the extent this is true, a grant program like the one proposed here raises some troubling issues. If these rural White communities benefitted from penal policies that often harmed poor minority urban neighborhoods, why should our immediate response then be to support those same rural communities when we start to decarcerate, before we address the harms mass incarceration did in the neighborhoods it hit hardest?

The reality, however, is a bit more complicated. Especially in the South, prisons tend to be located in smaller towns that themselves have larger-than-average minority populations.<sup>69</sup> Thus prison closures can often raise tricky issues of racial economic justice, and helping communities with prisons transition to other sources of employment would not only ensure that fewer people of color end up in prison (which would improve their economic outlooks) but would also support the more-minority communities that tend to host the prisons as well.

The second policy benefit of these decarceration grants stems from the nature of prisons themselves: prisons are generally awful places to work, so successfully transitioning away from them could make things better for those currently employed as correctional officers as well. Prison guards display strikingly high levels of suicidal ideation, and

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<sup>68</sup> See, e.g., Stier, *supra* note 21; Ed Krayewski, *Are For-Profit Prisons, or Public Unions, the Biggest Lobby No One’s Talking About?*, REASON (June 2, 2015, 5:02 PM), <https://reason.com/2015/06/02/are-for-profit-prisons-or-public-unions> [<https://perma.cc/UZ62-25PR>].

<sup>69</sup> EASON, *supra* note 60.

exhibit PTSD at rates comparable to veterans who have seen combat.<sup>70</sup> It's a well-worn adage that correctional officers and inmates are both doing time, with the only real difference being where they sleep at night. Perhaps some correctional officers truly enjoy the job, but it seems likely that many would welcome other employment opportunities, as long as the pay was commensurate.

The push to weaken public sector resistance to decarceration has to be handled carefully, however, and there are ways that the Second Step Act could help here as well. The financial math of decarceration is tricky. The long-run goal, one shared by reformers on both sides of the aisle, is to cut back on prison spending in order to invest in more effective non-prison options. Yet, since most prison spending is on wages, the only way to realize big savings is to either cut staffing or cut wages.<sup>71</sup> Either reduction, if done too quickly, runs the very real risk of making prisons much more dangerous places, as the violence in understaffed and underpaid facilities in places such as South Carolina and Alabama have made clear.<sup>72</sup>

Interestingly, since 2010, total staffing *has* fallen proportionately with the prison population, but the total wage bill has *risen* by about seventeen percent.<sup>73</sup> This is likely a *good* thing, but points to a role for the Second Step Act . During the transition away from prisons, we want

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<sup>70</sup> John F. Pfaff, *Locked Up: Why the Movement for Criminal Justice Is Stalled*, BAFFLER (July 2019), <https://thebaffler.com/salvos/locked-up-pfaff> [<https://perma.cc/NK2C-69HM>].

<sup>71</sup> We often hear claims that we spend on average \$35,000 per prisoner per year, so if we cut prison populations by, say, 576,000 people, we can save \$20 billion to spend on far more effective interventions. Press Release, Brennan Ctr. for Justice, *New Report: 39 Percent of Prisoners Are Unnecessarily Behind Bars* (Dec. 9, 2016) (on file with author). Releasing one person, however, only saves about one-third to one-seventh that much, since we do not cut staffing or other fixed costs (like heating) proportionally. Even when we close entire facilities, states often balk at laying off correctional officers. *See, e.g.*, Stier, *supra* note 21; John Agar, *Michigan Prison Closing Brings 51 Layoffs*, MLIVE (Sept. 14, 2016), [https://www.mlive.com/news/grand-rapids/2016/09/michigan\\_prison\\_closing\\_brings.html](https://www.mlive.com/news/grand-rapids/2016/09/michigan_prison_closing_brings.html) [<https://perma.cc/N5G2-RHED>].

<sup>72</sup> Letter from Eric S. Dreiband et al., Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Kay Ivey, Governor of Alabama (Apr. 2, 2019) (on file with the U.S. Department of Justice); John Pfaff, *South Carolina's Deadly Prison Riot Wasn't Inevitable—Policymakers Share the Blame*, NBCNEWS: THINK (Apr. 20, 2018, 1:20 PM), <https://www.nbcnews.com/think/opinion/south-carolina-s-deadly-prison-riot-wasn-t-inevitable-policymakers-ncna867821> [<https://perma.cc/C3LX-9Y5Q>].

<sup>73</sup> John Pfaff (@JohnFPfaff), TWITTER (Aug. 21, 2008, 4:12 PM), <https://twitter.com/JohnFPfaff/status/1031997397960941569> [<https://perma.cc/DRW5-RLZC>].

the institutions to be safe, and that likely means paying correctional officers even more than they currently earn—but any such increase only increases the incentives the officers and their unions have to fight reforms. The Second Step Act could thus provide *temporary* wage assistance for correctional officers, with the assistance scheduled to be phased out and replaced with grants and tax supports for new employment opportunities of the sort discussed above. And again, the federal nature of the Second Step Act reduces the risk of political pressures turning the grants into some sort of permanent program (as happened with Realignment).

#### IV. VIOLENCE: THE SLIGHTLY LESS THAN THIRD RAIL OF REFORM

Perhaps the single biggest policy challenge that criminal justice reform faces is rethinking how we address violent behavior. As noted earlier, a majority of people in prison are serving time for violence, with twenty-five percent of those in prison having been convicted *just* of murder, manslaughter, rape, or sexual assault; a plurality of the people admitted to prison each year have been convicted of a violent crime; and over ninety percent of those serving long sentences have been convicted of a serious violent crime. Moreover, these numbers *understate* the role played by violent offenses, since they do not account for substantive plea bargain discounts (i.e., people who could be convicted of violence but plead guilty to a non-violent crime as part of the deal struck with prosecutors). If we emptied our prisons of all people convicted of non-violent crimes, we would still have one of the highest incarceration rates in the developed world.<sup>74</sup> Yet as that Vox poll indicates, the public remains quite wary of changing how we punish—or respond to—violence.<sup>75</sup>

The public is wary, but not immutable, and there have been some recent steps that suggest change is possible. Perhaps most dramatically, a public defender and political outsider, Tiffany Cabán, ran to be the next district attorney for Queens, New York, on a platform that

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<sup>74</sup> See John Pfaff (@JohnFPfaff), TWITTER (Apr. 2, 2019, 6:51 AM), <https://twitter.com/JohnFPfaff/status/111307643024044417> [<https://perma.cc/Z25U-JZKC>].

<sup>75</sup> Words can matter. Just framing it as “punishing violence” as opposed to “responding to violence” likely encourages punitiveness and incarceration.

explicitly embraced the idea of reforming how we approach violent crimes and lost the Democratic primary to a far more established opponent by the absolute slimmest of margins.<sup>76</sup> With slightly less fanfare, the Brooklyn prosecutor's office has been referring some cases of serious violence, including homicides, to restorative justice alternatives run by a group called Common Justice.<sup>77</sup> Philadelphia's progressive district attorney, Larry Krasner, has pushed to punish homicide cases less harshly than his predecessors.<sup>78</sup> And at the legislative level, California recently scaled back its felony murder rule, while in 2014, Mississippi—not a liberal, progressive state when it comes to criminal justice—made it easier for people convicted of a violent crime to petition for parole.<sup>79</sup>

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<sup>76</sup> Cabán officially lost to Melinda Katz by a mere fifty-five votes out of over 85,000 cast (a margin of about 0.06%). Danielle Muoio, *Cabán Concedes to Katz in Queens DA Primary Race*, POLITICO (Aug. 6, 2019, 10:13 PM), <https://www.politico.com/states/new-york/albany/story/2019/08/06/caban-concedes-to-katz-in-queens-da-primary-race-1132852> [https://perma.cc/BF9L-SZKH]. To be fair, the race was as close as it was in no small part because the more conservative candidates in the Democratic primary split the vote. Cabán won about forty percent of the vote, while Katz and Gregory Lesak, two more traditional candidates, won forty percent and fifteen percent—or over fifty-five collectively. Had Lesak not been in the race, or had Queens adopted rank-choice voting, Katz almost surely would have won the race outright. Even so, given the specific politics of the race—Cabán was a young political outsider, while Katz was a seasoned politician with the full backing of the Queens Democratic Party machine—Cabán's forty percent is a remarkable achievement. See Jeffrey C. Mays & Jasmine C. Lee, *Queens District Attorney Democratic Primary Election Results*, N.Y. TIMES (July 1, 2019, 10:22 PM), <https://www.nytimes.com/interactive/2019/06/25/us/elections/results-queens-district-attorney-primary-election.html?action=click&module=inline&pgtype=Article> [https://perma.cc/KA2L-UU5H]; Vivian Wang, *The Queens D.A. Has a Winner. Here's Why It's Still Not Over*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/nyregion/melinda-katz-caban-queens-da.html> [https://perma.cc/7GQB-RGT9].

<sup>77</sup> See, e.g., Amy Goodman & Nermeen Shaikh, *To Reduce Prison Population, We Must Confront Violence in Radically New Ways*, TRUTHOUT (Mar. 14, 2019), <https://truthout.org/video/mass-incarceration-and-the-radical-possibilities-of-restorative-justice> [https://perma.cc/3C8Y-VCPM].

<sup>78</sup> Bobby Allyn, *Philly DA Says He's Striving for Justice Not Harshes Sentence in Homicide Cases*, WHYY (Nov. 19, 2018), <https://whyy.org/articles/philly-da-says-hes-striving-for-justice-not-harshest-sentence-in-homicide-cases> [https://perma.cc/UWC2-PXTK].

<sup>79</sup> NICOLE D. PORTER, SENTENCING PROJECT, THE STATE OF SENTENCING 2014: DEVELOPMENTS IN POLICY AND PRACTICE (2015); Jordan Smith, *Landmark California Law Bars Prosecutors from Pursuing Murder Charges Against People Who Didn't Commit Murder*, INTERCEPT (Nov. 23, 2018, 11:30 AM), <https://theintercept.com/2018/11/23/california-felony-murder-rule> [https://perma.cc/MHH6-Q5HK].

Yet, these examples remain few and far between. In general, our policy and rhetoric remain tough when it comes to violence. Even progressive prosecutors struggle on this front. Krasner, for example, recently responded to accusations that his less-harsh policies were leading to more gun violence in Philadelphia not by arguing that tougher prosecution likely would have little to no impact on gun violence, but by strongly asserting that his office remained committed to aggressively prosecuting all gun cases brought to it.<sup>80</sup> Violence might not be the third rail of prison reform anymore, but it is at best the second-and-three-quarters rail.

There may not be much that the federal government can do directly here, but I think any sort of symbolic act could prove significant. I have long felt that President Barack Obama made a serious mistake during his final year in office when he turned his attention to criminal justice reform: of all the commutations he issued, for all intents and purposes, none were for a violent crime.<sup>81</sup> Obviously, commuting a few federal prisoners convicted of serious violent crimes would not change our national numbers at all. But Obama's commutations all received intense media scrutiny, so had he commuted the sentence of someone convicted of serious violence and used his bully pulpit to explain why (long sentences do not deter, people age out of violence, and so on), even a single commutation could have forced the debate about how we manage violence into a wider public sphere.<sup>82</sup>

A Second Step Act could succeed where Obama failed. The Second Step Act could authorize funds to states that, say, adopt new parole procedures or laws that expand parole eligibility explicitly for those

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<sup>80</sup> Tom MacDonald, *Philly DA Says It's Not His Fault Violence Is Getting Worse*, WHYY (June 18, 2019), <https://whyy.org/articles/philly-da-says-its-not-his-fault-violence-is-getting-worse> [<https://perma.cc/YP2Q-854V>].

<sup>81</sup> As far as I can tell, the lone exception was the commutation of Carolyn Yvonne Butler, a woman convicted of armed bank robbery—but, tellingly, a robbery in which the gun was never fired and no one was hurt. See *United States v. Butler*, No. 92-5666, 1993 WL 277176 (5th Cir. July 19, 1993) (per curiam); Press Release, The White House, President Obama Grants Commutations and Pardons (Dec. 18, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/18/president-obama-grants-commutations-and-pardons> [<https://perma.cc/MGH8-NGVZ>].

<sup>82</sup> John Pfaff, *For True Penal Reform, Focus on the Violent Offenders*, WASH. POST (July 26, 2015), [https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7\\_story.html?utm\\_term=.be118be96359](https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html?utm_term=.be118be96359) [<https://perma.cc/S2F6-73CT>].

convicted of violence, perhaps even with no carve outs for serious violence such as homicide. Parole expansion like this would be good policy, from both a deterrence and incapacitation perspective. The evidence is clear that deterrence turns far more on the risk of detection than on the severity of the punishment later imposed, so expanded parole will have little impact on whatever deterrence incarceration was already providing. And the evidence is also quite clear that people consistently “age out” of violence as they get older, for a wide range of physical and biological and social reasons. Thus, expanding parole for older inmates (where “older” here means late thirties or early forties, not the sort of ages that start to implicate the separate issue of compassionate or geriatric release) should scale back prisons at little to no risk of greater violence.<sup>83</sup>

To make such a controversial policy more politically palatable, a Second Step Act could direct that the grants go to programs specifically aimed at preventing violence. Congress, for example, already has ways to funnel funding to police departments, such as the Department of Justice’s Community Oriented Policing Services program, or the Edward Byrne Memorial Justice Assistance Grant Program;<sup>84</sup> the Second Step Act could thus earmark money for more police to offset people’s fears. This, too, would not just be good politics but good (or at least better) policy. Despite the fact that it is detection, not punishment, that deters, our detection rates are shockingly low. According to the 2017 Uniform Crime Reports, the police made arrests in only sixty-two percent of all reported homicides, thirty-five percent of all reported rapes, thirty percent of all reported robberies, and fifty-three percent of all reported aggravated assaults.<sup>85</sup> And according to the 2017 National

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<sup>83</sup> When California released over 2,000 people convicted under the state’s three-strike law earlier than planned after a reform was made retroactive, the recidivism rate of those released was *one-tenth* the state average (five percent versus fifty percent). As several of them pointed out, if nothing else they were older and wiser and simply wanted to live out the rest of their days peacefully. Erik Eckholm, *Out of Prison, and Staying Out, After 3rd Strike in California*, N.Y. TIMES (Feb. 26, 2015), <https://www.nytimes.com/2015/02/27/us/california-convicts-are-out-of-prison-after-third-strike-and-staying-out.html> [<https://perma.cc/RR2Z-JZHV>].

<sup>84</sup> COMMUNITY ORIENTED POLICING SERVS., <https://cops.usdoj.gov> [<https://perma.cc/CSV4-LPPK>]; EDWARD BYRNE MEMORIAL JUST. ASSISTANCE GRANT PROGRAM, <https://www.bja.gov/jag> [<https://perma.cc/SU67-GYGZ>].

<sup>85</sup> *Crime in the United States 2017: Clearances*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/clearances> [<https://perma.cc/457Q-YH5E>].

Crime Victimization Survey, victims only reported approximately forty percent of all rapes, fifty percent of all robberies, and fifty-seven percent of all aggravated assaults.<sup>86</sup> Thus, if only half of all aggravated assaults are reported to the police, and the police make an arrest in only fifty-three percent of those cases, then nearly seventy-five percent of all aggravated assaults produce no arrest. Scaling back incarceration and scaling up detection of serious violence would be a significant improvement in how we respond to violence.

Increased policing, of course, is not the only way to address violent behavior,<sup>87</sup> and given concerns about police violence, Congress could consider other funding options as well (even if policing is the approach most likely to get solid bipartisan support). Funds could be directed to, say, other street-level interventions that do not rely on police, such as Cure Violence. Cure Violence, which is concerned primarily with gun violence, relies on trusted community members, not the police, to intervene after a shooting and try to negotiate resolutions that prevent retaliations.<sup>88</sup> Funds could also go to scale up restorative justice programs such as Brooklyn's Common Justice, which reject the idea of state-imposed punishment and work with those harmed and those who did the harm, as well as the broader community, to figure out what the injurer has to do to make amends, and what steps all the parties can take to prevent future violence.<sup>89</sup>

Given that some Senators, such as Arkansas's Tom Cotton and Texas's Ted Cruz, opposed the FSA because they saw it as being too lenient just toward *drug* cases, provisions in a Second Step Act that aim to cut punishments for *violence* may be impossible to pass. But as with the other issues here, simply having a debate over violence would garner critically important media attention, which could help shape the nature of political debates over violence at the city, county, and state level, where real progress may be more feasible.

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<sup>86</sup> RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2017, at 7 (2018).

<sup>87</sup> Quite often, this would be phrased as "way to respond to violent offenders," not "violent behavior." It is important to emphasize that we are targeting *behavior*, not *people*, since people can and consistently do change.

<sup>88</sup> CURE VIOLENCE, <http://cureviolence.org> [<https://perma.cc/KKR5-NXBA>].

<sup>89</sup> See generally DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019).

## V. DIRECT FEDERAL ACTION: THE PLRA AND THE CENSUS

So far, all the proposals here have acknowledged that there is little Congress or the President can do directly to change state behavior. Yet there are at least two other steps that a Second Step Act could take to change federal law in a way that would shape state and local behavior.

The first is that Congress could repeal, or at least amend and weaken, the PLRA. While the Violent Crime Control and Law Enforcement Act of 1994 received tremendous attention in the 2016 presidential campaign and is surfacing again during the 2020 Democratic primaries, its importance pales in comparison to the PLRA, another Clinton-era law, but one that receives almost no attention. Congress passed the PLRA to make it harder for state prison inmates to challenge their conditions of confinement in federal court, and to restrict the extent to which federal courts could intervene to regulate prisons and jails.<sup>90</sup> The adoption of the PLRA led to a discernable decline in prison litigation,<sup>91</sup> which has surely allowed states to lower their costs per prisoner by cutting back on both physical plans and staffing costs, and by avoiding large capital costs by crowding prisoners rather than expanding capacity. These lower costs in turn make it easier for the states to incarcerate more people. In short, by restricting litigation over conditions, the PLRA allows states to cut costs by making conditions more dangerous and harmful. By repealing the PLRA or softening its restrictions, a Second Step Act would increase the costs state face to incarcerate people and would thus encourage them to either cut back on prison populations or to increase funding so that those who are incarcerated at least are held in more humane environments.

Second, Congress could include a provision in a Second Step Act insisting that the Census count people in prison as residing at their last known addresses, not as residing in their prisons. While a few states have adopted such policies on their own, the official Census policy—which will be used again in the 2020 Census—is to count people in prison as “residing” in their prison for the purposes of drawing

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<sup>90</sup> Meredith Booker, *20 Years Is Enough: Time to Repeal the Prison Litigation Reform Act*, PRISON POL’Y INITIATIVE (May 5, 2016), [https://www.prisonpolicy.org/blog/2016/05/05/20years\\_plra](https://www.prisonpolicy.org/blog/2016/05/05/20years_plra) [<https://perma.cc/EA26-FS53>].

<sup>91</sup> Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015).

legislative maps. The Census Bureau, as an executive agency, could change this policy on its own, but a congressional act could compel the change as well. Ending this “prison gerrymander” would undermine at least some of the political opposition to reform from prison communities. They would still resist reforms that threatened jobs and economic stability, but at least one margin of resistance would be reduced. Moreover, such a change would shift political power back to the communities most affected by mass incarceration, increasing the chance that the state governments themselves would end up in better positions to adopt sounder, more effective policies.

#### CONCLUSION

The FSA was a good first step, but its perhaps-understandable focus on the federal system inherently limited its reach. If the goal is to have a Second Step Act that is *more* significant than the First, that Act will need to turn its attention to the state and local governments that have really driven mass incarceration and mass punishment over the past forty years. Furthermore, it should focus on the issues that right now are getting too little attention: these are areas both where relatively small amounts of money could have outsized effects, and where the media attention that any sort of major piece of federal legislation receives could help reshape the debates at the state and local level in important ways. The ideas set down here are intended to be just that—some ideas. There are certainly other proposals that people could come up with to include in a Second Step Act, but my goal here is to try to suggest a sort of over-arching tactic for how to think about what those other possibilities should look like.



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