

Book Reviews

Implementing *Just Mercy*

JUST MERCY: A STORY OF JUSTICE AND REDEMPTION.
By Bryan Stevenson. New York: Random House, LLC, 2014.
336 pages. \$28.00.

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Introduction

I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do.¹

—Harper Lee, *To Kill a Mockingbird*

In his recent book, *Just Mercy: A Story of Justice and Redemption*, Alabama Equal Justice Initiative founder Bryan Stevenson describes the challenges and struggles of representing indigent individuals accused of serious crimes.² More than a memoir, Stevenson's book provides a vivid picture of the systemic injustice that often persists in the administration of criminal justice, particularly in the South.

The title of the book—*Just Mercy*—demonstrates the criminal justice paradigm shift that Stevenson attempts to undertake through his narrative. In many modern understandings of criminal law and criminal punishments, the concepts of justice and mercy appear oppositional, as two pillars of a zero-sum game. Under such an approach, the conservative view often favors a punishment that achieves “justice,” while the liberal view often favors a punishment that offers “mercy,” such that to require justice denies mercy and to give mercy undermines justice.³

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* 128 (HarperCollins 1999) (1960).

2. See generally BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (paperback ed. 2015).

3. Much of the academic literature describing just-deserts retribution makes exactly this point. See, e.g., Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1421–28 (2004) (describing this

Stevenson's title and the thematic approach of his book take the opposite tack, marrying the two concepts of justice and mercy.⁴ For Stevenson, to achieve justice means to exhibit mercy—to treat the individual accused of a crime as a person possessing human dignity. Likewise, to offer mercy—meaning to appreciate the circumstances surrounding the actions of the criminal defendant, including his personal story—is the best way to achieve justice. Put differently, Stevenson's theoretical frame advocates using mercy as a means by which to achieve justice rather than a means to avoid it.

Interestingly, this philosophical approach tracks the Court's reasoning in *Miller v. Alabama*,⁵ the recent juvenile life-without-parole case that Stevenson argued before the Supreme Court and that encompasses part of his narrative. In *Miller*, the Court held that mandatory juvenile life-without-parole (LWOP) sentences were cruel and unusual punishments in violation of the Eighth Amendment because they denied the court an opportunity to consider the individual characteristics of the defendant.⁶ Extending the holding from *Woodson v. North Carolina*,⁷ which barred the imposition of mandatory death sentences,⁸ the Court made clear in *Miller*⁹ that the possibility of mitigating evidence, including evidence related to the offender's culpability and the harm caused by the crime, foreclosed mandatory juvenile LWOP sentences.¹⁰

literature and arguing that equality, not conflict with justice, is the better retributive argument against mercy).

4. Stevenson is certainly not the first to marry these concepts. See, e.g., *Micah* 6:8 (King James) ("He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?").

5. 132 S. Ct. 2455 (2012).

6. *Id.* at 2460.

7. 428 U.S. 280 (1976).

8. *Id.* at 305; William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 81–83, 96–97 (2011) (exploring the relationship of the *Woodson* doctrine to the concept of proportionality); see also *Roberts v. Louisiana*, 428 U.S. 325, 335–36 (1976) (holding another mandatory death penalty statute unconstitutional).

9. This issue remains timely, as the Supreme Court will decide next term whether *Miller* applies retroactively. See *Louisiana v. Montgomery*, 141 So. 3d 264 (La. 2014), *cert granted*, 135 S. Ct. 1546 (2015).

10. *Woodson*, 428 U.S. at 304. In the aftermath of *Miller*, then, the concept of individualized consideration of offenders opens the door, in theory, to constitutional attacks on mandatory sentencing in other contexts. See William W. Berry III, *The Mandate of Miller*, 51 AM. CRIM. L. REV. 327, 329 (2014) (explaining that mandatory sentences deny offenders their day in court by prohibiting individual considerations and foreclosing the introduction of mitigating evidence). Such challenges have unfortunately not succeeded to date. See, e.g., *United States v. Coverson*, 539 F. App'x 747 (9th Cir. 2013) (rejecting the argument that a mandatory life sentence violates the Eighth Amendment because it denies individual sentencing); *United States v. Ousley*, 698 F.3d 972, 975–76 (7th Cir. 2012) (holding that the Eighth Amendment does not preclude mandatory life sentences for dealers of crack cocaine); *United States v. Cephus*, 684 F.3d 703, 709–10 (7th Cir. 2012) (holding that the Eighth Amendment does not preclude mandatory life sentences for sex traffickers).

Another area in which increased individualized consideration of the character and actions of criminal offenders is now possible is in the sentencing of federal offenders under the now-advisory sentencing guidelines after *United States v. Booker*.¹¹ Despite the many provisions of the guidelines that disfavor considering such personal characteristics, the Supreme Court has held that courts must consider such circumstances to the degree that they inform the applicable purposes of punishment enumerated by the federal sentencing statute, 18 U.S.C. § 3553.¹²

Given these steps toward individualizing sentencing, this Review imagines a serious application of the principles of just mercy that Stevenson has championed in his legal career to the criminal justice system. Specifically, this Review argues that individualized consideration of criminal offenders throughout the criminal justice process—from policing to sentencing—is necessary to achieve the compatible (not competing) goals of justice and mercy.

The Review proceeds in three parts. Part I describes Stevenson’s book, highlighting the principles of just mercy latent in his narrative and their connection to the individualized consideration of criminal offenders. In Part II, the Review shifts to argue that many of the current shortcomings of the criminal justice system result directly from stigmatizing alleged offenders rather than considering them individually as people possessing human dignity.¹³ Finally, in Part III the Review outlines a series of criminal justice reforms drawn from Stevenson’s experiences and the concepts of individualized consideration that emerge from pursuing just mercy.

11. 543 U.S. 220, 245 (2005).

12. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 49–50 (2007) (holding that a sentence may be set below the benchmark sentence under the guidelines in exceptional circumstances); *Rita v. United States*, 551 U.S. 338, 364–65 (2007) (Stevens, J., concurring) (“Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines. These are, however, matters that § 3553(a) authorizes the sentencing judge to consider. As such, they are factors that an appellate court must consider under *Booker*’s abuse-of-discretion standard.” (citations omitted)); William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 247, 254–57 (Julian V. Roberts ed., 2011) (explaining that § 3553 may require the court to examine whether the advisory guideline sentence sufficiently reflects the applicable purposes of punishment).

13. Indeed, Justices Anthony Kennedy and Stephen Breyer recently testified before Congress about mass incarceration, complaining that the criminal justice system is “broken.” Editorial, *Justice Kennedy’s Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), <http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html> [http://perma.cc/9FBH-G3T8].

I. Stories of Just Mercy—Fighting Criminal Injustice

People generally see what they look for, and hear what they listen for¹⁴

—Harper Lee, *To Kill a Mockingbird*

Stevenson's compelling narrative begins with the story of his first visit to death row while working as a legal intern for the Southern Prisoners Defense Committee.¹⁵ Stevenson's job was simply to tell the client Henry that the state of Georgia would not execute him for at least a year.¹⁶ The description of this interaction has the effect of humanizing Henry—portraying him not as a monster awaiting the wrath of society, but as a compassionate, generous man suffering nobly. Stevenson sounds one of the central themes of his book as he reflects upon this interaction:

My short time on death row revealed that there was something missing in the way we treat people in our judicial system, that maybe we judge some people unfairly. The more I reflected on the experience, the more I recognized that I had been struggling my whole life with the question of how and why people are judged unfairly.¹⁷

From the beginning, Stevenson asks his audience to grapple with the same question—how and why the criminal justice system fails to administer true justice.

But he does not leave the response to chance, indicating at the outset that it has to do with the absence of mercy. Early in the book, he explains:

This book is about . . . how easily we condemn people in this country and the injustice we create when we allow fear, anger, and distance to shape the way we treat the most vulnerable among us.¹⁸

And he makes clear that this approach to criminal justice has reached epic proportions, extending far beyond the series of anecdotes he subsequently offers in his book. Before one reads his stories, Stevenson wants to be sure his readers understand *the story*—the broader context of mass incarceration, the widespread use of capital punishment, the epidemic of child life-without-parole sentences, the large number of innocent individuals in prison, and the exorbitant economic costs of this system.

At the heart of this system, Stevenson makes clear, is the rejection of mercy in the name of justice. As he explains:

14. LEE, *supra* note 1, at 199.

15. STEVENSON, *supra* note 2, at 5–7.

16. *Id.* at 7.

17. *Id.* at 13.

18. *Id.* at 14.

We've institutionalized policies that reduce people to their worst acts and permanently label them "criminal," "murderer," "rapist," "thief," "drug dealer," "sex offender," "felon"—identities they cannot change regardless of the circumstances of their crimes or any improvements they might make in their lives.¹⁹

It is this dehumanizing approach to criminal offenders that Stevenson finds to be at the root of the injustice he encounters representing criminal defendants.²⁰ Indeed, he highlights the "vital lesson" about mercy that his work has taught him: "*Each of us is more than the worst thing we've ever done.*"²¹

Having painted this overview of just mercy, Stevenson then masterfully tells a series of stories that animate the core values he has articulated. Rather than tell them sequentially, Stevenson weaves together several narratives that play off of each other, uncovering in brutal detail the consequences of a system that attempts to achieve justice while ignoring the dignity of the individual offenders it condemns.

A. *The Tragic Story of Walter McMillan*

Perhaps the most moving story in Stevenson's book is the description of his representation of Walter McMillan, a man falsely accused of murder and sentenced to death in Alabama. The narrative demonstrates the many ways in which the collective actions of actors in the criminal justice system conspired to ruin McMillan's life.

One of Stevenson's early tastes of this climate of injustice (in the name of justice) occurs when he interacts with state trial judge Robert E. Lee Key.²² Judge Key suggests that McMillan might be a member of the "Dixie Mafia" and attempts to dissuade Stevenson from representing McMillan before abruptly ending the phone call.²³

Stevenson explains how McMillan, a middle-aged African-American man, was falsely accused and convicted of murdering an eighteen-year-old white girl, Ronda Morrison, in Monroeville, Alabama.²⁴ McMillan's real mistake, as inferred from Stevenson's narrative, was his affair with a married white woman, Karen Kelly, in the months preceding the murder.²⁵

19. *Id.* at 15.

20. *Id.* at 14–15.

21. *Id.* at 17–18.

22. *Id.* at 20–21.

23. *Id.*

24. *Id.* at 30, 66. Ironically, Monroeville is the home of Harper Lee, who wrote the famous novel *To Kill a Mockingbird* about a brave, white lawyer, Atticus Finch, who defends a black man in a racist community. *Id.* at 23. As Stevenson points out, however, Finch lost the case, and the town did not progress from its caricature in Lee's novel. *Id.* at 23–24. Indeed, Stevenson suggests McMillan is a modern version of the "Mockingbird"—the defendant on trial. *See id.*

25. *Id.* at 33–34.

The Alabama Bureau of Investigation (ABI) chose to believe the lies of Ralph Myers, a white man suspected in an earlier, different murder who had begun dating Ms. Kelly.²⁶ Myers stated that McMillan had accompanied him in the first murder and that McMillan had subsequently murdered Morrison.²⁷

The ABI ignored the overwhelming evidence that the two men had never met, including Myers's inability to identify McMillan.²⁸ Perhaps recognizing the ridiculous and unbelievable nature of Myers's story of the murder, Sherriff Thomas Tate and the ABI arrested McMillan and charged him with sodomy, as he potentially could have sexually assaulted Myers (another lie).²⁹

As McMillan's story continues, his progression through the criminal justice system is a series of encounters with bad government actors—police, district attorneys, and judges—who perpetuate a racially discriminatory legal system. It is an infuriating and tragic story, and yet the systemic nature of the problems in the case clearly extends far beyond McMillan's case. Stevenson eventually is able to win McMillan's release after many years, but by then the damage has already been done.³⁰

At the heart of the thorough and consistent imposition of injustice (in the name of justice) is the failure of any of the actors to view McMillan as a human being with dignity. Instead, the prevailing view of him as a dangerous criminal monster blinds, perhaps willfully, virtually every representative of the state of Alabama that participated in his case. The deep, baseless assumptions made by police, prosecutors, and judges in the name of justice make a mockery of the concept itself.

B. *The Death Penalty*

Though the story of Walter McMillan provides the central narrative of Stevenson's book, he cleverly weaves a number of other stories of injustice through his account. In particular, these stories focus on the harsh realities of capital punishment and juvenile life without parole.

The story of Herbert Richardson and his execution raises important questions about the conception of justice adopted with respect to the death penalty. A Vietnam veteran, Richardson's psychological damage from war resulted in him making the reckless decision to detonate a small explosive outside the front porch of his would-be girlfriend.³¹ His plan was to save

26. *Id.* at 31–34.

27. *Id.* at 33.

28. *Id.*

29. *Id.* at 47.

30. *Id.* at 244.

31. *Id.* at 76.

her from the explosion to win her affection.³² Sadly, the woman's ten-year-old niece found the contraption and shook it, causing a premature explosion that killed her instantly.³³

Despite possessing no intent to kill, Herbert received a death sentence after a trial at which his incompetent lawyer, later disbarred, neglected to offer mitigating evidence.³⁴ Appellate courts refused to consider Herbert's ineffective assistance of counsel claims raised by Stevenson, his new lawyer.³⁵

Stevenson's moving description of Herbert's final appeals and ensuing execution provide a realistic picture of the reality of capital punishment and raise obvious questions as to its utility and propriety. As Stevenson explained,

There was a shameful about the experience of Herbert's execution that I couldn't shake. Everyone I saw at the prison seemed surrounded by a cloud of regret and remorse. The prison officials had pumped themselves up to carry out the execution . . . but even they revealed extreme discomfort and some measure of shame. Maybe I was imagining it but it seemed that everyone recognized what was taking place was wrong. Abstractions about capital punishment were one thing, but the details of systematically killing someone who is not a threat are completely different.³⁶

By clearly showing what the death penalty really looks like in practice, Stevenson casts serious doubt on whether, in many cases, it constitutes any kind of justice.

C. *Juvenile Life Without Parole*

Beyond the death penalty, Stevenson also offers several stories of juvenile offenders sentenced to LWOP, including some who received mandatory LWOP sentences. He tells the unsettling story of Trina Garnett, a fourteen-year-old girl sentenced to life without parole in Pennsylvania.³⁷ Trina accidentally started a fire that killed two young boys.³⁸ The judge who imposed the mandatory LWOP sentence on Trina called the case the "saddest case" that he had "ever seen."³⁹ A prison guard subsequently

32. *Id.*

33. *Id.*

34. *Id.* at 77.

35. *Id.* at 79–80.

36. *Id.* at 90.

37. *Id.* at 149–51.

38. *Id.* at 149.

39. *Id.* at 150.

raped and impregnated Trina, and the state took her newborn away and sent it into foster care.⁴⁰

Stevenson describes another case of juvenile LWOP—the case of thirteen-year-old Ian Manuel—that is similarly depressing.⁴¹ Ian participated in an armed robbery with two older boys and shot a woman in the cheek, almost killing her.⁴² The judge sentenced Ian to life without parole and sent him to solitary confinement—where he stayed for the next eighteen years.⁴³

The last part of Stevenson's book focuses on his role as the lead lawyer in *Miller v. Alabama*, which he argued before the United States Supreme Court.⁴⁴ The Court's holding that mandatory juvenile LWOP constituted a cruel and unusual punishment arguably affected over two thousand offenders.⁴⁵

At the center of the problem in these cases was the failure to consider mitigating evidence because of the mandatory nature of the sentence. The legislature's version of justice—mandatory juvenile LWOP sentences—precluded any consideration of mercy—the personal characteristics of these offenders, including their immaturity and youth.

D. *Brutality in the Name of Justice*

Although not involving the death penalty or LWOP, two additional stories that Stevenson shares are particularly disturbing and reflect how deep the problems in the criminal justice system extend. The first story involves Stevenson himself as the victim. Listening to a radio program in his car on the way home from work, Stevenson parked his car outside of his Atlanta apartment and continued to listen to the program.⁴⁶ The police pulled up behind Stevenson, ordered him out the car, and pointed a gun at his head.⁴⁷ They illegally searched his car while interrogating him, ignoring his explanation that he lived in the apartment building next to his parked car.⁴⁸ Perhaps even more disturbing, many of the neighbors came out and

40. *Id.* at 150–51.

41. *Id.* at 151–52.

42. *Id.*

43. *Id.* at 152–53.

44. *Id.* at 295–96.

45. *Id.* at 296 (noting that, as a result of the Court's holding in *Miller*, over two thousand individuals sentenced to life without the possibility of parole could potentially obtain reduced sentences); see also *Louisiana v. Montgomery*, 141 So. 3d 264 (La. 2014) (presenting the question of whether *Miller* creates a new substantive right and requires retroactive effect), *cert. granted*, 135 S. Ct. 1546 (2015).

46. STEVENSON, *supra* note 2, at 38–39.

47. *Id.* at 39–42.

48. *Id.*

began discussing whether he had robbed them or intended to rob them.⁴⁹ The attitude of the Atlanta police, both at the scene and in response to Stevenson's formal complaints, mirrors that described in the Department of Justice's recent report about police practices in Ferguson, Missouri.⁵⁰

Perhaps even more disturbing, Stevenson recounts the story of Charlie, a juvenile held for several days in a local jail.⁵¹ During his short time in the jail, others sexually assaulted and raped him multiple times.⁵² Again, the criminal justice system, in the name of justice, created opportunities for injustice to occur.

There are certainly other stories that Stevenson briefly mentions or alludes to in the book that echo the same pattern of unjust denial of mercy. It certainly would not be surprising to learn that Stevenson has many more similar stories that did not end up in his book.

II. Principles of Just Mercy—What Needs Change

You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.⁵³

—Harper Lee, *To Kill a Mockingbird*

In light of Stevenson's many examples of injustice, the obvious question is how state and federal governments ought to reform their criminal justice systems to attempt to eradicate such tragedies and prevent future ones from occurring. While policy reform is certainly essential, a theme of Stevenson's stories is that the injustices are a product of a set of deeper cultural norms.

This Part describes those proliferating norms and then argues that they stem from the stigmatization and dehumanization of alleged criminal offenders. In other words, the current system has, for the most part, embraced justice while ignoring mercy.

49. *Id.* at 41.

50. Compare U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 16–17 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<http://perma.cc/69U9-JHXU>], with STEVENSON, *supra* note 2, at 42–44.

51. STEVENSON, *supra* note 2, at 115–26.

52. *Id.* at 123–24.

53. LEE, *supra* note 1, at 33.

A. *The Rise of Mass Incarceration*

These norms reflect a culture that fears crime and criminals. Race plays a significant role in these cultural norms, with minorities perceived as more dangerous individuals.⁵⁴ This cultural response to crime reflects a departure from the 1960s, when rehabilitation of criminal offenders through “correctional” institutions marked the dominant response to crime.⁵⁵ The replacement of this penal welfarism with a “tough on crime” penal populism has led to a prison crisis not seen before. An entire generation of politicians, Democrat and Republican alike, has continued to ratchet up the penalties for crime in the United States.⁵⁶

It is no secret that the United States suffers from a crisis of mass imprisonment. As noted above, one in a hundred American citizens reside in prison.⁵⁷ Studies estimate that one in fifteen people born in 2001 will spend time in prison.⁵⁸ And one in three African-American men will spend time in prison.⁵⁹

At the heart of this crisis are excessive sentences, in many cases for nonviolent crimes.⁶⁰ Federal and state statutes that impose mandatory sentences contribute to this problem,⁶¹ as do recidivist premiums in sentences for repeat offenders.⁶² Likewise, sentencing guidelines have promoted excessive sentences for decades.⁶³

54. Perhaps the best account of the tragedy of the widespread racial discrimination that infects the criminal justice system is Michelle Alexander’s book, *The New Jim Crow*, which argues that the criminal justice system constitutes a modern recreation of the Jim Crow system of racial segregation. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2011).

55. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 27–28 (paperback ed. 2002) (asserting that there was a “consensus” in the 1960s accepting a correctionalist framework).

56. See *id.* at 172–74.

57. See ANNE-MARIE CUSAC, *CRUEL AND UNUSUAL: THE CULTURE OF PUNISHMENT IN AMERICA* 1–2 (2009) (“One percent of [the United States’] population is now in prison.”).

58. STEVENSON, *supra* note 2, at 15; see also Oliver Roeder, *The Prisoner’s Dilemma*, FIVETHIRTYEIGHT (Feb. 12, 2015, 12:01 AM), <http://fivethirtyeight.com/features/the-imprisoners-dilemma/> [<http://perma.cc/4DZA-2HZE>].

59. ALEXANDER, *supra* note 54, at 9; Roeder, *supra* note 58.

60. CONNIE DE LA VEGA ET AL., UNIV. OF S.F. SCH. OF LAW, CTR. FOR LAW & GLOB. JUSTICE, *CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT* 22–23 (2012), <http://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> [<http://perma.cc/D6UD-88MQ>] (noting the widespread use of life-without-parole sentences in nonhomicide or nonviolent offenses).

61. See, e.g., Michael Tonry, *The Mostly Unintended Consequences of Mandatory Penalties: Two Centuries of Consistent Findings*, in 38 *CRIME AND JUSTICE* 65, 105–06 (Michael Tonry ed., 2009) (suggesting that mandatory sentencing rules have resulted in increasing the number of prisoners being held after they no longer are dangerous).

62. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 *HARV. L. & POL’Y REV.* 307, 323 (2009).

63. See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 *COLUM. L. REV.* 1315, 1328 (2005) (claiming that the guidelines resulted

These policies have been part and parcel of the penal-populism movement, including the war on drugs, over the past three decades.⁶⁴ Politicians of both parties have run on tough-on-crime platforms, playing on the electorate's fear of crime.⁶⁵ The policies that result from such campaigns are both reactionary and incoherent, resulting in widespread overpunishment for crime.⁶⁶ This is particularly true with punishments for nonviolent drug offenders.⁶⁷ Without a doubt, the scope of mass imprisonment in the United States, both in terms of number of offenders and length of sentences, far exceeds anything any country has ever done in the history of the world.⁶⁸

B. *Attacking Mercy in the Name of Justice*

To understand why the culture has embraced penal populism and aggressive punishment of criminal offenders, one must first understand the dominant cultural conception of justice. The idea that prevails is one of in-group/out-group psychology.⁶⁹ Essentially, there are two groups in society—those that abide by the law and those that transgress it.⁷⁰

Under this approach, individuals in the first group deserve a benefit of the doubt and receive a presumption of innocence.⁷¹ They are, for all practical purposes, the “good” people.⁷² Individuals in the second group

in an increase in the severity and length of punishments). Indeed, prior to the Court's decisions in *Blakeley v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), many of these guideline ranges were mandatory. William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 647–50 (2008).

64. ALEXANDER, *supra* note 54, at 53–57.

65. GARLAND, *supra* note 55, at 13–14, 131–32, 172.

66. *Id.* at 132.

67. *Id.*

68. See ALEXANDER, *supra* note 54, at 4 (describing mass incarceration in the United States as a “stunningly comprehensive” regime of social dominance); CUSAC, *supra* note 57, at 1 (stating that the United States has the highest imprisonment rate of any country and the most expansive prison system in the world, housing almost 25% of the world's prisoners while accounting for only 5% of the world's population); DE LA VEGA ET AL., *supra* note 60, at 7–9 (noting that the United States often employs a number of harsh sentencing practices—such as life without parole, “three strikes” laws, and consecutive sentencing—in ways that the rest of the world does not, and concluding, “[n]ever before have so many people been locked up for so long and for so little as in the United States”).

69. Molly Townes O'Brien, *Criminal Law's Tribalism*, 11 CONN. PUB. INT. L.J. 31, 42–43 (2011).

70. See *id.* (characterizing criminal law as group self-defining, separating those who keep the group's rules from those who do not).

71. See Robert J. Boeckmann & Tom R. Tyler, *Commonsense Justice and Inclusion Within the Moral Community: When Do People Receive Procedural Protections from Others?*, 3 PSYCHOL. PUB. POL'Y & L. 362, 367 (1997) (showing that a community is much more likely to give members of its in-group procedural protections than it is to do the same for members of its out-group).

72. O'Brien, *supra* note 69, at 45.

receive immediate condemnation.⁷³ Their choice to commit a crime changes their identity in society.⁷⁴ For all practical purposes, they become the “bad,” or the “evil,” and cease to merit any human dignity or individualized consideration.⁷⁵

Once the state arrests or indicts an individual, that individual almost always automatically shifts from the “good” law-abiding category to the “bad” law-breaking category.⁷⁶ The stigmatization that ensues is real and in many cases permanent.⁷⁷ Disturbingly, this dehumanizing societal condemnation often persists even in cases where a court finds the defendant innocent.⁷⁸ As Stevenson demonstrates, this was certainly the case for Walter McMillan.

This cultural approach permeates the criminal justice system precisely because it occurs on the level of individual identity. Once one transgresses, that becomes his societal identity, often with no hope of redemption.⁷⁹

John Braithwaite, who has argued for adoption of a restorative-justice approach to criminal behavior, explains that the stigmatization of criminal offenders, which he terms “disintegrative shaming,” has the practical effect of increasing the crime rate.⁸⁰ Again, this occurs because once society condemns an individual to the “bad” group, it becomes his identity.

Excessive prison sentences reinforce this identity, with prisons becoming crime universities. The high recidivism rate that ensues is

73. See Boeckmann & Tyler, *supra* note 71, at 367 (demonstrating that a community is more willing to deny procedural protections to and presume guilt for out-group members); O'Brien, *supra* note 69, at 43 (“Violations of those boundaries result in symbolic or actual exclusion from the tribe—whether by expulsion, incarceration, ostracism or execution.” (internal quotation marks omitted)).

74. O'Brien, *supra* note 69, at 43.

75. *Id.*

76. See Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1297–99 (2000) (explaining that since we tend to agree that “most people who are arrested and charged with crimes are guilty of something,” merely being arrested and accused of a crime has negative consequences and changes our status within society).

77. Regina Austin, “*The Shame of it All*: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons”, 36 COLUM. HUM. RTS. L. REV. 173, 174–76 (2004).

78. See Leipold, *supra* note 76, at 1299 (“An innocent suspect may have the charges dismissed or may be acquitted, but the sequella of an indictment may leave the defendant’s reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused.”).

79. Victor Hugo’s Jean Valjean, a literary example of this phenomenon, has to change his identity in order to have a chance at redemption. See generally VICTOR HUGO, *LES MISÉRABLES* (Julie Rose trans., Random House 2008) (1862). By contrast, Nathaniel Hawthorne’s protagonist, Hester Prynne, cannot change her identity and must suffer the indignity of wearing the scarlet letter that marks her as an adulterer. See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Chandler Publ’g Co. 1968) (1850).

80. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 101–02 (1989).

likewise unsurprising and serves to feed the dominant in-group/out-group narrative.

To make things worse, certain types of individuals—often racial minorities and the poor—receive the out-group criminal stigmatization before they ever commit a crime.⁸¹ By ascribing such individuals with a criminal identity essentially from birth, communities marginalize such individuals.⁸² State and local governments go even further in some cases, criminalizing the innocuous behavior of such individuals through loitering and vagrancy laws.⁸³ Prosecutors and police also can target such individuals.⁸⁴ The presumptive “criminogenic” identity society has already ascribed to these individuals on the bottom end of the community simply reinforces the instinct to arrest and imprison them.⁸⁵ Targeting societal pariahs, minority citizens, and the poor becomes a self-fulfilling prophecy, making the premature perception of criminality come true.⁸⁶

Whether labeled as a member of the out-group from indictment or from birth, this really matters, because once clothed with a criminal identity, the offender faces a strong negative bias from a variety of actors in the criminal justice system.⁸⁷ In other words, the presumptive criminal identity of an alleged offender colors the perception of those policing, prosecuting, judging, sentencing, and imprisoning that individual. And the condemnation imposed strikes at the humanity and dignity of the accused.

Blindness results from this stigmatization of indicted or accused individuals.⁸⁸ The mark of justice ought to be blindness toward bias, not blindness toward truth. As actors in the criminal justice system buy more deeply into this narrative, as is certainly likely with its constant reinforcement in personal experiences, the blindness can become almost

81. ALEXANDER, *supra* note 54, at 162.

82. *See id.* at 171–72 (explaining how the “stigma of criminality” applied to black youth shames them, alienates them, and produces antisocial behavior).

83. *See, e.g.*, Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 775–76 (1999) (describing a high-profile Chicago loitering ordinance passed in 1992).

84. *See, e.g.*, Julie K. Brown, *In Miami Gardens, Store Video Catches Cops in the Act*, MIAMI HERALD (Nov. 21, 2013), <http://www.miamiherald.com/news/local/community/miami-dade/article1957716.html> [<http://perma.cc/Q2VX-HBWL>] (observing that police in Miami Gardens regularly stop and frisk poor black men).

85. *See* Roberts, *supra* note 83, at 817 (“[T]he ordinance permits police to remove and arrest perfectly law-abiding citizens because their race makes them appear lawless.”).

86. Conversely, Michelle Alexander also points out that the in-group (white, wealthier) often retains the benefit of the doubt and lessened suspicion despite committing crimes at similar rates, especially drug crimes. *See* ALEXANDER, *supra* note 54, at 130–31.

87. *Id.* at 162–65.

88. Indeed, it is perhaps ironic that mistakes in eyewitness testimony—stemming from an inability to see clearly—play such a significant role in the convictions of innocent individuals. *See* BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 48 (2011) (“The role of mistaken eyewitness identifications in these wrongful convictions is now well known. Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases).”).

willful, with certain criminal justice actors being unable to see the truth of the situation before them.⁸⁹

Indeed, Stevenson's book dramatizes many of the ways in which this pursuit of justice is often blind to the actual facts and circumstances related to the criminal defendant. Judge Robert E. Lee Key decided that McMillan was not worth representing—that he did not deserve the best available counsel.⁹⁰ The ABI chose to focus on McMillan's race and his "indiscretions" (an interracial relationship), willfully ignoring the complete absence of evidence linking McMillan to the murder.⁹¹ The prosecutor exhibited a stubborn refusal to consider the possibility of McMillan's innocence.⁹² The Court allowed McMillan to receive a death sentence in a case in which he was clearly innocent.⁹³ The predominately white jury bought the self-serving lies of witnesses at trial, failing to think critically about the evidence.⁹⁴ The appellate courts also presumed McMillan's guilt instead of looking critically at the evidence in the case.⁹⁵

Beyond the McMillan travesty, many of Stevenson's other stories about the criminal justice system reflect the move toward "justice" without humanity. The use of the death penalty certainly has the appearance of justice, but in Herbert's case it seemed to ignore his humanity. Even the individuals participating in the execution realized this incongruity.⁹⁶

Likewise, the juvenile LWOP cases, particularly the mandatory sentences, demonstrate a complete lack of individualized consideration of the criminal offenders, again in the name of justice. The United States remains the only country in the world that allows imposition of juvenile LWOP sentences.⁹⁷ The power of the criminal stigma often (and improperly) outweighs any consideration of the age of the offender.

The cruel policing behavior in Atlanta toward Stevenson, a Harvard-educated lawyer treated as a criminal because of the color of his skin, underscores the stigmatization problem even further. The lack of concern about the safety of Charlie, a child who suffered through two days of sexual abuse, similarly demonstrates the dehumanizing consequence of the criminal label awarded by society.

89. ALEXANDER, *supra* note 54, at 4 (discussing the role of racial bias in the criminal justice system in creating a well-disguised system of racialized social control).

90. *See supra* notes 21–22 and accompanying text.

91. STEVENSON, *supra* note 2, at 25, 29.

92. *Id.* at 58–59.

93. *Id.* at 33, 66.

94. *Id.* at 65–66.

95. *Id.* at 109–12.

96. *Id.* at 90.

97. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 985 (2008).

III. Achieving Just Mercy—Practical Steps for Reform

The one thing that doesn't abide by majority rule is a person's conscience.⁹⁸

—Harper Lee, *To Kill a Mockingbird*

What society needs, then, is a cultural shift away from the in-group/out-group paradigm to an approach that accords the accused a significant amount of human dignity. And yet, without a dominant alternative, such reform, at least in a meaningful way, remains unlikely.

Interestingly, Stevenson's book suggests a model—just mercy—that could replace the current destructive and dehumanizing approach. As explained above, this means that mercy becomes a complimentary value to justice, as opposed to an oppositional one. Stevenson explains:

The power of just mercy is that it belongs to the undeserving. It's when mercy is least expected that it's most potent—strong enough to break the cycle of victimization and victimhood, retribution and suffering. It has the power to heal the psychic harm and injuries that lead to aggression and violence, abuse of power, mass incarceration.⁹⁹

The central point is that by requiring criminal justice actors to pursue mercy as a part of the pursuit of justice, such individuals will be more likely to see, and in some situations embrace, the personhood of the accused.¹⁰⁰ This does not mean that those committing crimes will cease to serve punishments; rather, it will allow the imposition of a punishment that more accurately reflects what the accused deserves in light of the actual facts.¹⁰¹

Thus, to achieve justice, actors in the criminal justice system must afford accused individuals (and criminal offenders) some modicum of mercy.¹⁰² This conception of mercy is not an arbitrary sentence reduction in the name of sympathy.¹⁰³ Rather, the concept of mercy adopted here takes into account the personal circumstances of the offender, particularly as related to the commission of a crime.¹⁰⁴ In practice, this kind of individualized concern could give rise to lesser sentences, but not in all

98. LEE, *supra* note 1, at 120.

99. STEVENSON, *supra* note 2, at 294.

100. *Id.* at 290.

101. *Id.* at 291.

102. *Id.* at 18 (explaining that the closer our society gets to “mass incarceration and extreme levels of punishment,” the more it is “necessary to recognize that we all need mercy”).

103. Indeed, retributive theorists would object to a sentence reduction based on any factors other than culpability and harm. *E.g.*, Markel, *supra* note 3, at 1466–67 (arguing that “factors about someone's background” should not mitigate their sentence).

104. STEVENSON, *supra* note 2, at 17–18.

cases. The sentence reduction in this context does not undermine the proportionality inquiry—it sharpens it.¹⁰⁵

But it is important to be specific about what mercy means—the kind of individualized consideration it requires.¹⁰⁶ While not limited to the Eighth Amendment, the dignity of man rests at the core of this notion of mercy which one needs to achieve justice.¹⁰⁷ Indeed, denial of mercy often reflects the failures of the character of a government actor or a systemic structural defect that denies personal consideration of the defendant, furthers the instinct toward brutality and dehumanization, or both.

Mercy means policing without racial or socioeconomic bias.¹⁰⁸ Mercy means that prosecutors carefully consider the evidence before charging a crime.¹⁰⁹ Mercy means that prosecutors seek a punishment that foresees the offender rejoining society one day.¹¹⁰ Mercy means that district attorneys reward prosecutors not for the number of prison sentences or for their length, but for the exercise of wisdom in determining the appropriate punishment for the offender.¹¹¹

105. I have argued that Eighth Amendment concepts of proportional sentences do not have to rest solely upon retributive purposes of punishment; utilitarian purposes also have a limit with respect to proportionality. William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. IN BRIEF 61, 70 (2011) (responding to John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011)).

106. Interestingly, the Court has explained that the failure to consider individual circumstances in the death penalty and juvenile LWOP contexts violates the Eighth Amendment. *See Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding juvenile LWOP sentences unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (holding unconstitutional a North Carolina statute for “its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death”); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (“The limited range of [individualized] mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments.”). According to the Court, the failure to offer this kind of mercy constitutes a cruel and unusual punishment because it ignores the dignity of the offender.

107. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *see* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Meaning of the Eighth Amendment*, 2015 U. ILL. L. REV. (forthcoming).

108. *See* STEVENSON, *supra* note 2, at 18 (maintaining that the “true measure of our commitment to justice” is “how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned”).

109. *See id.* at 17 (noting society’s comfort with bias and “tolerance of unfair prosecutions and convictions”).

110. *See id.* at 15 (arguing that America needs to move away from “institutionalized policies that reduce people to their worst acts”).

111. *See id.* at 290 (noting that “simply punishing the broken . . . only ensures that they remain broken”).

Mercy means eliminating mandatory sentences.¹¹² Mercy means eliminating sentencing premiums for recidivists.¹¹³ Mercy means carefully judging a case from the bench, without preconceived biases or political agendas.¹¹⁴ Mercy means avoiding blatant, reversible error in criminal trials.¹¹⁵ Mercy means ensuring that criminal defendants receive competent representation.¹¹⁶ Mercy means selecting an unbiased, racially mixed jury.¹¹⁷ Mercy means rethinking the prison model and incorporating concepts of rehabilitation back into incarceration schemes.¹¹⁸ And mercy means eliminating the death penalty and juvenile life without parole.¹¹⁹

In light of the proposed cultural shift to just mercy, a number of obvious possible reforms surface. This Review concludes by sketching out some potential changes.

A. *Legal Education Reform*

Education lies at the core of any successful reform movement, and the shift toward just mercy is no different. The current model of legal education discourages the development of attorneys to represent indigent criminal defendants. Despite the best efforts of innocence clinics and criminal law faculty to equip students to engage in this kind of practice, the economic realities remain a major impediment in this context.

The average student debt load is, in many cases, adequate to dissuade law students from pursuing this career path.¹²⁰ While some schools offer debt-relief programs for students that choose to represent the indigent or

112. *See id.* at 148–50 (illustrating how mandatory minimum sentencing meant that a court, during sentencing, could not consider evidence of a defendant’s age, mental illness, poverty, prior abuse, or absence of intent, or other mitigating circumstances).

113. *See id.* at 258–59 (describing how a thirteen-year-old boy was labeled a “‘serial’ . . . ‘violent recidivist’” and sentenced to life imprisonment without the possibility of parole).

114. *See id.* at 70 (noting that Alabama’s partisan judicial elections encourage judges “to be the toughest on crime”).

115. *See id.* at 16 (describing America’s criminal justice system, in which scores of innocent people have been exonerated after receiving death sentences, as being “defined by error”).

116. *See id.* at 7 (recalling a time in the Deep South where “most of the people crowded on death row had no lawyers and no right to counsel” and the “growing fear that people would soon be killed without ever having their cases reviewed by skilled counsel”).

117. *See id.* at 60 (noting that the historic use of peremptory strikes to strike all or almost all African-Americans led to “nearly everyone on death row” having been tried by an “all-white or nearly all-white jury”).

118. *See id.* at 17 (observing that “deep in the hearts of many condemned and incarcerated people” there are the “scattered traces of hope and humanity—seeds of restoration that come to astonishing life when nurtured by very simple interventions”).

119. *See id.* at 15–16 (describing modes of execution and noting that America is the only country in the world that condemns children to life in prison without the possibility of parole).

120. *See* Christopher Gorman, Note, *Undoing Hardship: Applying the Principles of Dodd-Frank to the Law Student Debt Crisis*, 47 U.C. DAVIS L. REV. 1887, 1899 (2014) (highlighting that in 2011 the average law graduate carried more than \$92,000 debt).

work as public defenders, these programs are not widespread enough to ensure a sufficient number of law students choose criminal defense work.¹²¹

The ironic nature of the current situation is that there are an insufficient number of jobs for law school graduates, while there remains an insufficient number of lawyers to represent defendants who cannot afford to pay a lawyer.¹²² Solving this economic conundrum, of which law school tuition debt plays an important part, would be an important first step in promoting just mercy for criminal defendants.

B. *State Bar Reform*

The state bar likewise can play a role in helping to provide support for individuals willing to represent indigent defendants. Likewise, the bar, through interest on lawyers trust accounts or other similar mechanisms, can continue to help subsidize the cost of representing indigents.

Perhaps more important though, in terms of just mercy, is the ability of the bar to respond to the denial of mercy in the criminal justice system by bad actors, whether prosecutors or judges. Rather than simply focus on issues such as the commingling of funds, state bar disciplinary branches can more stringently regulate the kind of willful blindness and overt racism exhibited in many of the cases described by Stevenson.

Passivity has often been the hallmark of such organizations, particularly with reference to conduct by prosecutors and judges. Rather than simply deferring to such actors, the state bars can create standards to promote a more coherent and humane approach to prosecuting criminal defendants.

Recent anecdotal and empirical evidence both suggest that some prosecutors are responsible for many of the problems that plague the criminal justice system. Alex Kozinski, a conservative judge on the Ninth Circuit Court of Appeals, and two other judges have condemned the

121. See Kaela Raedel Munster, *A Double-Edged Sword: Student Loan Debt Provides Access to a Law Degree but May Ultimately Deny a Bar License*, 40 J.C. & U.L. 285, 303–04 (2014) (noting that, as of 2012, only approximately 100 law schools offer loan repayment assistance programs and that “these programs are only a starting point to aiding graduates to pursue careers in public service”).

122. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 22 (2009) (finding that there is one legal aid attorney per 6,415 poor people and one private attorney for every 429 people in the general population); Jules Lobel & Matthew Chapman, *Bridging the Gap Between Unmet Legal Needs and an Oversupply of Lawyers: Creating Neighborhood Law Offices—The Philadelphia Experiment*, 22 VA. J. SOC. POL’Y & L. 71, 81–82 (2015) (“[I]t is clear that an already overburdened legal job market will not have room for the 100,000 newly minted attorneys that are produced over the next decade.”).

epidemic of prosecutorial misconduct in California.¹²³ Even worse, “they are going to keep doing it because they have state judges who are willing to look the other way,” Kozinski said.¹²⁴

Professor John Pfaff’s research likewise suggests that prosecutors have played an important role in the mass incarceration epidemic that Stevenson denounces.¹²⁵ Prior to the early 1990s, according to Pfaff, prosecutors filed felony charges against one in three arrestees.¹²⁶ Since the advent of penal populism, prosecutors have begun filing felony charges against two in three arrestees, effectively doubling the prison population.¹²⁷

For prosecutors, the problem remains the same—there is no mechanism for transparency, much less accountability. Most prosecutors are not political appointees that have to worry about reelection, meaning that some increased level of transparency may not be difficult to establish.¹²⁸ In the end, finding ways to hold prosecutors and judges accountable, particularly for acting in bad faith, is essential to advancing the cause of just mercy.

C. *State and Federal Statutory Reform*

State and federal criminal statutes similarly contribute to the absence of mercy in the criminal justice system. In the legislative context, this happens in several ways related to criminal sentencing.

First, mandatory sentences, particularly mandatory minimums, remove individual consideration from the sentencing determination. As such, the prosecutor becomes the only actor with the power to consider the character and circumstances of the accused. Eliminating all mandatory sentences,

123. Maura Dolan, *U.S. Judges See ‘Epidemic’ of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015, 7:20 PM), <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html#page=1> [<http://perma.cc/743A-Q4YB>].

124. *Id.*

125. Leon Neyfakh, *Why Are So Many Americans in Prison: A Provocative New Theory*, SLATE (Feb. 6, 2015, 6:30 PM), http://www.slate.com/articles/news_and_politics/crime/2015/02/mass_incarceration_a_provocative_new_theory_for_why_so_many_americans_are.html [<http://perma.cc/743A-Q4YB>].

126. *Id.*

127. *Id.*

128. *See, e.g.,* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983, 1000–01 (2009) (“While federal prosecutors are appointed, most chief prosecutors are elected at the county, judicial circuit, or district level. . . . In Alaska, Delaware, and Rhode Island, the attorney general has primary responsibility for prosecutions throughout the state. In Connecticut, the attorney general appoints state’s attorneys, while in New Jersey, the governor appoints county prosecutors. The statewide hierarchies enabled Alaska’s attorney general to ban plea bargaining for a time and New Jersey’s attorney general to regulate charging decisions. As Dan Richman suggests, these unusual structures can create direct control and political accountability, promoting consistent enforcement of statewide laws. The Department of Justice plays the same role in regulating federal prosecutors across the country.” (citations omitted)).

particularly ones involving long sentence terms, would make a significant difference in the attempt to cultivate just mercy.

Further, many such sentences impose a recidivist premium—an aggravated sentence resulting from the presence of the prior conviction.¹²⁹ These increases presume that the individual has not really paid the penalty for the initial crime and ignore the personal characteristics of the offender.

Another problem is the careless and overbroad drafting of criminal statutes. This is particularly true of many federal criminal statutes that seem to encompass wide ranges of unrelated types of behavior.¹³⁰ The theory behind such statutes is to provide flexibility to allow prosecutors to address unforeseen malfeasance that should fall under the statute but that the legislature did not specifically contemplate.¹³¹

The unintended consequences of such statutes, though, outweigh their prosecutorial convenience. They reward prosecutors with wide charging power, as broad language can give rise to a number of situations and cast a wider criminal net. But the uncertainty of the statutory meaning can raise due process problems based on the vagueness of such language in violation of the rule of legality. Such unfettered discretion coupled with the lack of linguistic clarity can give rise to situations in which the pursuit of justice denies the accused any modicum of mercy.

D. *Reallocation of Resources*

Finally, the just mercy paradigm shift would likely require a reallocation of resources. Currently, state and federal governments spend an exorbitant amount of money on prisons.¹³² Many states similarly spend

129. Youngjae Lee, *Repeat Offenders and the Question of Desert*, in *PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES* 49, 49–50 (Julian V. Roberts & Andrew von Hirsch eds., 2014).

130. See Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 1, 4–6 (1997) (discussing the vagueness of criminal statutes and the “void-for-vagueness” challenges and statutory construction issues that these statutes create).

131. See Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 646 n.20 (2002) (stating that one of the policy justifications for prosecutorial discretion is that it gives prosecutors flexibility to take into account individual circumstances when enforcing criminal codes that deal with general categories of conduct).

132. See TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, STATE CORRECTIONS EXPENDITURES, FY 1982–2010, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf> [<http://perma.cc/APP7-YT6E>] (tracking the increase in states' corrections expenditures since 1982); NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., *THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2* (2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412693-The-Growth-amp-Increasing-Cost-of-the-Federal-Prison-System-Drivers-and-Potential-Solutions.PDF> [<http://perma.cc/HX9E-HA98>] (noting that President Obama's 2013 fiscal year budget requested \$6.9 billion for the Federal Bureau of Prisons); Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, 25 FED. SENT'G REP. 68, 71 (2012) (calculating the taxpayer costs of state prisons in 2010 for forty states).

significant funds to defend death penalty appeals and to administer the death penalty.¹³³

As shown, though, these expenditures fall far short of achieving justice. Making better initial decisions could have a significant impact on reducing the population of offenders in prison and on death row. To do this, however, requires financial resources, as looking at the entire character of the offender to make an individualized sentencing determination becomes a far more involved process than simply applying a mandatory sentence.

The shift in resources should be from carceral institutions to judicial and mental-health ones. Instead of locking up the poor, minorities, and mentally ill people and throwing away the key, the just mercy approach seeks to make a better initial sentencing decision, considering the individual characteristics of the accused. Given the severe overpunishment and mass incarceration, more careful sentencing decisions will likely result in shorter sentences, creating savings from prison budgets for reallocation.

A related area for reallocating funds would be for the education of prisoners and societal reentry programs. As Walter McMillan's case demonstrates, reintegration into society after spending time in prison can be quite difficult. Focusing more energy on rehabilitation and reentry would reduce the overall prison population by decreasing the high recidivism rate. Perhaps even more important, such an approach would make mercy a more relevant part of justice.

Conclusion

Bryan Stevenson's book, *Just Mercy*, provides an important narrative contribution in revealing the extent to which racism and injustice continue to define the American criminal justice system. As discussed, he makes the important rhetorical move of shifting the concept of mercy from one oppositional to justice into one compatible with justice.

This Review has argued that reimagining mercy in the form of individualized consideration with an emphasis on human dignity is necessary to remedy the injustices that Stevenson describes, many of which continue to persist. Specifically, the Review has demonstrated how mercy, when conceived through Stevenson's lens, provides an important means by which to achieve justice, and without which injustice is likely to flourish.

133. *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/costs-death-penalty#financialfacts> [<http://perma.cc/72FX-29F8>].

It is only by according those accused of crime a level of dignity and humanity that state and federal governments can achieve more reasonable, accurate, and positive criminal justice outcomes for society. In the epilogue of his book, Stevenson explains why such reforms are so important:

Walter made me understand why we have to reform a system of criminal justice that continues to treat people better if they are rich and guilty than if they are poor and innocent. A system that denies the poor the legal help they need, that makes wealth and status more important than culpability, must be changed. Walter's case taught me that fear and anger are a threat to justice; they can infect a community, a state, or a nation and make us blind, irrational, and dangerous.¹³⁴

One can only hope that Stevenson's powerful narrative can serve as a catalyst for criminal justice reform.

134. STEVENSON, *supra* note 2, at 313.