In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration

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Article

In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration

S. David Mitchell*

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I. Introduction

   New Year’s Eve, 2003. Genarlow Wilson, a seventeen year old high school senior, and several classmates, gathered at a local hotel in Douglasville, Georgia to ring in the New Year.\(^1\) After engaging in oral sex with a fifteen year-old girl that evening,\(^2\) Wilson was later charged with aggravated child molestation,\(^3\) though both asserted that it was consensual.\(^4\) He refused to plead guilty, and at trial was convicted and sentenced to the mandatory minimum of ten years in prison without the possibility of parole.\(^5\) Upon his eventual release, Wilson would be subject to a host of

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2. See Cash, supra note 1, at 227.
4. Wilson, 631 S.E.2d at 393 n.9 (“The state [of Georgia] disputes the accuracy of Wilson’s characterization of the sexual activity between himself and T.C. as ‘consensual’ or ‘voluntary,’ because it has been held that children do not have the capacity to give consent to or to resist a sexual act directed at them.”); see also Michael Kent Curtis & Shannon Gilreath, Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature After Lawrence v. Texas, 43 WAKE FOREST L. REV. 155 (2008); Jeremy Redmon, Girl’s Mother Defends Wilson, ATLANTA J. CONST., June 14, 2007, at A1.
5. Wilson, 631 S.E.2d at 392; see also Cash, supra note 1, at 227.
“civil disabilities,” most notably a lifetime registration requirement as a convicted sex offender. Dissatisfied with the trial outcome, Wilson appealed, arguing that the significant sentence disparity under then-Georgia law between statutory rape and aggravated child molestation violated the Equal Protection Clause. He further argued that existing Georgia child protection laws created doubt as to whether the legislature intended any “consensual” sexual activity between teenagers aged fourteen to seventeen to be treated as a felony, so that the rule of lenity required imposition of the misdemeanor punishment.

In the meantime, the case became a cause célèbre. The district attorney was accused of abusing his prosecutorial discretion for charging Wilson with aggravated child molestation and for taking a hard line in the plea negotiations. But, it was the statutory inconsistency in the sexual crimes statute that created the problem. At the time, an adolescent under the age of eighteen who engaged in sexual intercourse with another under the age of sixteen could be charged with statutory rape, a misdemeanor that carried a maximum one-year sentence. That same adolescent, however, who committed an act of sodomy, such as oral sex, could be charged with aggravated child molestation, a felony that carried a mandatory minimum ten-year sentence. Several legislators that had passed the aggravated child molestation statute acknowledged that their intent was not to ensnare adolescents engaging in consensual sexual activity. The purpose of the


8. See Wilson, 631 S.E.2d at 392–93.

9. Id. The rule of lenity is inapplicable to Genarlow because he, unlike Marcus Dixon, another teen charged with aggravated child molestation, was not convicted of another sexual crime along with his aggravated child molestation conviction. See infra notes 16–17 and accompanying text. The rule of lenity applies when the same conduct satisfies two statutes with inconsistent penalties, requiring the lesser penalty to be applied. See Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (discussing the rule of lenity).


12. See Thomas, supra note 1, at 146 (“McDade says that he agrees that consensual teenage sex, including oral sex, does not necessarily warrant a decade-long prison sentence, but he insists that there were no other options to consider in this case as long as that law remains on the books.”).

13. GA. CODE ANN. §§ 16-6-3(a), (c) (1997).

statute was to apprehend adult pedophiles preying on children. These legislators called for Wilson’s release. While Wilson’s appeal was pending, however, the Georgia Legislature amended the statute. Heeding an earlier recommendation of the Georgia Supreme Court, the Georgia Legislature inserted what is commonly referred to as a “Romeo and Juliet” provision in the aggravated child molestation statute to reflect what the legislature, and society, viewed as the proper degree of culpability for such adolescent conduct.

With this new provision (hereinafter referred to as the “2006 Amendment”), a defendant, eighteen years old or younger, convicted of aggravated child molestation based upon an act of sodomy with a victim at least thirteen years of age, but not older than sixteen, would now be found guilty of a misdemeanor with a maximum sentence of one year and would no longer have to register as a sex offender upon release. Wilson’s conduct fell clearly within the ambit of the 2006 Amendment, but the Georgia Legislature decided not to apply the changes, which can be classified as ameliorative, retroactively to Wilson or anyone else who

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17. “Romeo and Juliet” clauses are named for the two star-crossed adolescent paramours in William Shakespeare’s play of the same name. See Byron Williams, The Incarceration of Marcus Dixon, Mar. 8, 2004, http://www.workingforchange.com/article.cfm?ItemID=16557 (explaining Romeo and Juliet laws as decriminalizing the behavior or minimizing the offense to misdemeanor status for consensual teenage relations). But see Cash, supra note 1, at 240 (citing Rep. Trowery who stated that he was unable to get support for such a provision initially with respect to the “age of consent laws”).

18. GA. CODE ANN. § 16-6-2(a)(1) (2009) (“A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.”).


20. This change in Georgia law can best be characterized as a reclassification of conduct with a sentence reduction. See infra Part III.A (discussing the various types of amelioration).

21. See H.R. 1059 § 30(c), 152nd Gen. Assem., Reg. Sess. (Ga. 2006) (providing that the provisions of the amendments do not affect the status of a crime that occurred before the Act’s effective date). There is a question as to whether the Georgia Legislature was prohibited from applying the ameliorative changes retroactively because of Georgia’s general saving statute. See infra Part II.B.2 (discussing the effect of a general saving statute). Georgia furthermore has a constitutional retroactive clause, which also suggests that legislative changes are denied retroactivity. GA. CONST. art. I, § 1, Para. X (“No . . . retroactive law . . . shall be passed.”). However, a minority of jurisdictions has routinely given retroactive effect to ameliorative changes despite the existence of a general saving statute. See infra Part V.A. Furthermore, the use of the constitutional retroactive clause to prevent such changes has been applied mostly in the civil law context. See Bryant Smith, Retroactive Laws and Vested Rights, 6
may have been similarly situated. Wilson eventually secured his release through the Georgia Supreme Court, which held that the mandatory minimum ten-year sentence for aggravated child molestation was cruel and unusual punishment in light of the magnitude of the change in the penalty in the 2006 Amendment.

On its face, the decision of the Georgia Legislature to deny the retroactive application of the 2006 Amendment appears as if it were either an abuse of legislative discretion or constitutionally infirm, especially given the substantial change in punishment and the judicial statements that retaining the original penalty violated the Eighth Amendment. However, neither is true of this case under current law. The action of the Georgia Legislature, as well as those of other legislative bodies that elect not to apply ameliorative legislative changes retroactively, are in accord with the principles governing statutory retroactivity. Under the concept of statutory retroactivity, statutes are presumed, generally, to operate prospectively only (i.e. against conduct that took place after the effective date of the statute or amendment). There are, however, certain circumstances, such as an ameliorative change, where statutory retroactivity is permissible. The Georgia courts therefore could have relied upon the changes to the aggravated child molestation, which were ameliorative, to rebut the presumption against statutory retroactivity. The courts were precluded from doing so because the Georgia Legislature inserted an express saving clause in the 2006 Amendment, thus preventing its retroactive application.

TEX. L. REV. 409, 414 (1928) ("[R]etrospective lawmaking will perhaps be found not necessarily to be such [a] gross abuse of legislative power as has been assumed. That this is so is strongly suggested by the great variety of such laws that are sustained by the courts, even in jurisdictions whose constitutions expressly forbid retrospective legislation.") (hereinafter Smith II); see also infra Appendix II (listing other jurisdictions with constitutional retroactive clauses).


23. Humphrey v. Wilson, 652 S.E.2d 501, 502 (Ga. 2007) ("[T]he habeas court properly ruled that Wilson’s sentence of ten years in prison for having consensual oral sex with a fifteen-year-old girl when he was only seventeen years old constitutes cruel and unusual punishment, but erred in convicting and sentencing Wilson for a misdemeanor crime that did not exist when the conduct in question occurred . . . [T]his case must be remanded to the habeas court for . . . an order reversing Wilson’s conviction and sentence and discharging him from custody.").

24. U.S. CONST. amend. VIII; see also GA. CONST. art. 1, § 1, Para. XVII (prohibiting cruel and unusual punishment).

25. 82 C.J.S. Statutes § 415 (1999) ("[I]t is a well-settled and fundamental rule of statutory construction that unless it is expressly stated, statutes should not be construed so as to be retroactive, but should be construed prospectively, from their effective date."); see also 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41:4 (Norman J. Singer ed., 6th ed. 2002).

26. SUTHERLAND, supra note 25, § 41:4 (noting that there are three circumstances where statutory retroactivity is warranted: (1) the legislative intent, expressly or impliedly, indicates its desirability; (2) the statutory change is ameliorative or curative; or (3) the "reasonable expectations" of the parties require it); see also infra Part IV.

27. Landgraf v. USI Film Prod., 511 U.S. 244, 257–58 (1994) (outlining circumstances that can defeat the presumption against statutory retroactivity).

28. 2006 Ga. Laws 30; see also 82 C.J.S. Statutes § 431 (1999) ("A saving clause or general saving clause . . .")
While the express saving clause prohibited the retroactivity of the 2006 Amendment, it also prevented the operation of the common-law doctrine of abatement, which was its original, intended purpose.

Under the abatement doctrine, following a legislative repeal, repeal and reenactment, or amendment of a statute, all pending prosecutions are terminated in the absence of an express contrary legislative intent. To demonstrate that intent, a legislative body will rely upon an express saving clause and its progeny—the general saving statute or the constitutional statute preserves rights and liabilities which have accrued under an act repealed.

29. See infra Part IV.B. (discussing the common law doctrine of abatement). The earliest statements of the common-law doctrine of abatement are attributed to the seventeenth-century jurist Matthew Hale and the eighteenth-century serjeant-at-law William Hawkins. According to Hale: "[W]hen an offense is made treason or felony by an act of parliament, and then those acts are repealed, the offenses committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such a repeal, unless a special clause in the act of repeal be made enabling such proceeding after the repeal, for offenses committed before the repeal." 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 291 (George Wilson ed., 1778); see also 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 169 (6th ed. 1787).


30. Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. PA. L. REV. 120, 121--27 (1972) ("[Repeals] . . . historically include[d] the situation of repeal and re-enactment with different penalties.") [hereinafter Today's Law and Yesterday's Crime]. I will use the term "repeal" when referring to an "abrogation of an existing law by legislative act," BLACK'S LAW DICTIONARY 1325 (6th ed. 2004), and the phrase "repeal and reenactment" or "amendment" when referring to a statute that has undergone substantial substantive changes but has not been deleted from the criminal code entirely.

31. See Wall v. State, 18 Tex. 682 (Tex. 1857). The abatement doctrine also terminates civil proceedings following a legislative change and prior to final judgment, but courts have been less inclined to give effect to the abatement doctrine out of a particular concern for protecting accrued vested rights. See Carl Seeman, Jr., The Retroactive Effect of Repeal Legislation, 27 KY. L. J. 75, 93 (1938) ("The more conservative the court, the more likely will it feel that the rights involved (particularly property rights) should not be divested because it would be unreasonable or unfair or against elementary principles of justice to do so, and thus the court will be more likely to declare the right unalterable by legislative action—or vested.").

32. See Holiday v. United States, 683 A.2d 61, 66 (D.C. Cir. 1996) ("Pending criminal prosecutions would abate, unless there was a savings clause in the new legislation, whether the legislation was an outright repeal or merely an amendment or reenactment of the substantive crime, since any such revision effectively repealed the statute underlying the prosecution."); State v. Allen, 44 P. 121, 122 (Wash. 1896). But cf. People v. Alexander, 224 Cal. Rptr. 290, 298 (Cal. Ct. App. 1986) ("[W]e conclude that where . . . it is obvious that the Legislature inadvertently deleted the sanctions . . . because of a drafting error, such a 'repeal' cannot and does not reflect an intent to pardon illegal sales that were committed prior to the error. . . . [W]e hold that under such circumstances, the rule of abatement is inapplicable."); 82 C.J.S. Statutes § 431 (1999) ("It is not essential that there be an express saving clause in order to save rights under a repealed statute, if an intent to that effect sufficiently appears by legislative provision at the session of the legislature effecting the repeal.").

33. See Millard H. Ruud, The Savings Clause—Some Problems in Construction and Drafting, 33 TEX. L. REV. 285, 292--93 (1955) ("A savings clause may be general. . . . The general savings statute, in turn, is generally a part of a general interpretation act"); see also infra Part IV.
saving clause, or some combination of the three. The purpose of the saving clause is to prohibit the termination of previously commenced prosecutions and to retain the punishment in the original statute, particularly following a statutory amendment in which the penalty is increased and thus constitutionally barred. Over time, the saving clause has been used, however, to retain the prior, original penalty even though the legislative change decreased the penalty, which would not be barred but would result in a group of defendants serving sentences that, under the newly amended law, they would not have had to serve. Although the use of the saving clause to retain a more severe penalty in light of an ameliorative change—for example, the denial of retroactive amelioration—may be neither an abuse of discretion nor constitutionally infirm, it is inconsistent with traditional theories of punishment and thus fails to achieve legitimate goals of deterrence and retribution. This Article proposes a retroactive amelioration statute that broadens the scope of amelioration beyond pre-final judgment defendants to include defendants with finalized convictions, or post-final judgment defendants. The broadening of retroactive amelioration makes the proposed statute consistent with the theories of punishment and promotes legitimate goals of punishment.

Presently, a minority of jurisdictions, uncomfortable with denying ameliorative changes, practice judicial or legislative retroactive

34. Ruud, supra note 33, at 293 n.38. Four jurisdictions had constitutional saving clauses, but following the 1968 repeal and reenactment of its constitution, Florida neglected to include one in its new constitution. N.M. CONST. art. IV, §§ 33–34; OKLA. CONST. art. V, § 54; ARIZ. CONST. art. XXII, §§ 1–2 (applies only to the transition of Arizona from a territory into a state).


37. See infra Part III and Appendix I.

38. The use of final judgment as a line to determine whether a defendant should benefit from an ameliorative change creates a temporal divide between defendants charged with the same offense. It is defined differently across jurisdictions. Generally, the line of when a prosecution becomes final is drawn at the conclusion of an individual's direct appeals. Collateral review is a judicial action that occurs after final judgment. See Griffith v. Kentucky, 479 U.S. 314 (1987); Yeaton v. United States, 9 U.S. (S Cranch) 281 (1809) (discussing in admiralty cases that an appeal suspends the sentence until the appellate court has rendered its decision); Doren, supra note 36, at 1157 (citing Belt v. Turner, 479 P.2d 791 (Utah 1971), aff'd on reh'g, 483 P.2d 425 (Utah 1971)). In some jurisdictions, final judgment is realized after sentencing has occurred. See, e.g., People v. Oliver, 134 N.E.2d 197, 203 (N.Y. 1956). In still others, it is achieved when the highest court available has heard and made a decision. See, e.g., State v. Macarelli, 375 A.2d 944, 946 (R.I. 1977). The interests of justice would be best served if there was a singular conceptualization of when a conviction becomes final, but that discussion is beyond the scope of this Article.

39. But see Vicory v. State, 400 N.E.2d 1380, 1382–83 (Ind. 1980) ("The adoption of a new system as a better means of serving the constitutional purpose of our penal system does not mean that prior law did not serve that purpose. [T]he application of prior law to those who committed crimes and were convicted and sentenced under that prior law does not constitute vindictive justice.").
amelioration. State courts that practice judicial retroactive amelioration provide a number of reasons to justify their decisions to give retroactive effect to such changes despite the existence of general saving statutes in their jurisdictions. For example, some of these courts state that the denial of retroactive amelioration is contrary to theories of punishment. Others rely upon rules of statutory construction to permit retroactive amelioration or find the language of the general saving statute to be ambiguous, thus giving the court license to not adhere to it. And still others hold that the saving clause is meant to prevent technical abatement only, and thus should not be used to thwart retroactive amelioration. With the proposed statute, state courts no longer have the onus of creating a reason to justify the retroactive application of ameliorative legislative changes.

Federal courts, on the other hand, do not acknowledge that they engage in retroactive amelioration, but their actions suggest otherwise. For example, the Supreme Court has recognized two exceptions to the federal general saving statute: the passage of a constitutional amendment or the recognition of an affirmative right. When a constitutional amendment is passed, federal courts have held that allowing the federal general savings clause to prevent the amendment’s application would improperly elevate legislative authority over the expressed will of the people. Thus, courts have allowed retroactive application of such amendments, particularly when formerly proscribed conduct has been decriminalized. Under the other exception, courts have chosen to disregard the federal general saving statute when an affirmative right, that is contrary to existing law, is recognized. In both circumstances, courts have readily applied the ameliorative change retroactively, even though the federal general saving statute would suggest that the changes be prohibited. Unlike the courts, legislatures have elected a different approach to giving retroactive effect to ameliorative statutory changes.

When a legislature engages in legislative retroactive amelioration, it attaches an ameliorative amendment exception to the general saving

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40. See Holiday v. United States, 683 A.2d 61, 80 (D.C. Cir. 1996) (summarizing various state courts’ reasoning for applying ameliorative changes retroactively as well as federal courts’ reasoning for denying retroactive amelioration). See infra Part V.A.

41. See infra Part V.A.1.

42. See infra Part V.A.2.

43. See infra Part V.A.3.

44. 1 U.S.C. § 109 (2006); see Holiday, 683 A.2d at 80 (discussing the exceptions to the federal general saving statute that have been permitted); see also infra Part V.A..

45. See, e.g., Holiday, 683 A.2d at 80.

46. Id.

47. Id.

48. An ameliorative amendment exception is a part of a general saving statute and allows a reduced penalty in the amended statute to be applied retroactively automatically. An example of an ameliorative amendment exception can be found in the Vermont criminal code and reads: "If the penalty or punishment for any offense is reduced by the amendment of an act or statutory provision, the same shall be imposed in accordance with the act or provision as amended unless imposed prior to the date of
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statutes to give retroactive effect to ameliorative sentencing changes, thus the legislature is able to accomplish the dual goal of preventing abatement and giving automatic retroactive effect to an ameliorative change. The problem that legislatures encounter is that there is no singular conception of what constitutes amelioration, thus leaving courts without guidance as to which changes are to be given effect. Although both forms of retroactive amelioration succeed in giving effect to ameliorative changes, they are limited in scope to circumstances where there is no express saving clause in the new or amended statute and the case has not become final. Because of these restrictions, even these jurisdictions that are favorably disposed to retroactive amelioration deny an entire class of defendants the opportunity to have its sentences ameliorated. This Article therefore proposes a retroactive amelioration statute that not only broadens the scope of retroactive amelioration to include post-final judgment defendants but also adopts the legislative retroactive amelioration approach of attaching an ameliorative amendment exception to a general saving provision.

The proposed retroactive amelioration statute has a post-final judgment provision that permits defendants with finalized convictions to request either an expedited parole review or an administrative sentencing hearing (for jurisdictions without discretionary parole boards) following an ameliorative legislative change. This provision expands the pool of defendants eligible to have an ameliorative sentencing change applied. With this provision, no longer is the timing of the passage of an ameliorative legislative change determinative of who is to be eligible for such changes. Not only do benefits inure to post-final judgment defendants with a sentence reduction, but also society benefits in the reduction of incarceration costs. The placement of the post-final judgment process under the auspices of the executive branch is done purposefully. It leaves final judicial decisions undisturbed, avoids any potential separation of powers conflict, and does not impinge upon the executive’s ameliorative power—the pardon. In addition to broadening the scope of retroactive amelioration, the proposed statute also incorporates the existing practice of legislative retroactive in the minority of jurisdictions.

The proposed retroactive amelioration statute contains a general

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49. Similar to the inapplicability of the abatement doctrine for finalized convictions, see Effect of Repeal of a Criminal Statute Upon Prosecutions for Prior Acts, supra note 29, at 746 ("If the case has been carried to final conclusion either because of an affirmance upon appeal or because no appeal was taken, the repeal has no effect."). Ameliorative changes are also restricted.


51. See BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001 (discussing the cost of incarceration).
saving clause with an ameliorative amendment exception. Under the proposed statute, retroactive amelioration is given automatic effect and abatement is prevented from being triggered, thereby negating the necessity of the express saving clause. Jurisdictions should therefore cease using the express saving clause which only serves to prevent retroactive amelioration, which was not the original intent of such clauses. Moreover, by adopting this proposed statute, it is no longer necessary for state courts that want to apply ameliorative changes retroactively to ignore the jurisdiction’s general saving statute thereby increasing the uniformity in how retroactive amelioration is practiced within jurisdictions.

Part II discusses the traditional theories of punishment and why the denial of retroactive amelioration is at odds with those theories. In Part III, I present a proposal for a retroactive amelioration statute that expands the scope of retroactive amelioration to include defendants with finalized convictions and calls for jurisdictions to cease using the express saving clause. In Part IV, the principles of statutory retroactivity are discussed along with the circumstances in which retroactivity is permissible, as well as the intended purpose of the saving clause and its issue in preventing statutory retroactivity. And in Part V, the current judicial, both state and federal, and legislative retroactive amelioration practices are provided.

II. Denying Retroactive Amelioration Inflicts Unjustified Punishment

A. Theories of Punishment

Traditionally, the legitimate goals of punishment are classified as consequentialist and retributivist. For consequentialists, a system of criminal punishment is justified, if at all, by the good consequences that result from the threat and imposition of punishment. Punishment, after all, causes great harm to those punished and is otherwise a burden on the state. It is justified, then, if its good effects outweigh its harms.

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52. See supra note 45 and accompanying text.
53. See Holiday v. Park, 683 A.2d 61, 80 (D.C. Cir. 1996) (summarizing various state courts’ reasoning for applying ameliorative changes retroactively as well as federal courts’ reasoning for denying retroactive amelioration).
54. Richard S. Frase, Criminal Punishments, in THE OXFORD COMPANION TO AMERICAN LAW 197, 197 (Kermit L. Hall, et al. eds., 2002) ("[N]onretributive theories of punishment view criminal penalties as justified on the basis of the desirable consequences (other than fairness) which are intended to be achieved—in particular, the prevention of future criminal acts by this offender or other would-be offenders.").
55. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5(a)(6) (2d ed. 2003) ("[A]lso called revenge or retaliation, punishment ... is imposed by society on criminals in order to obtain revenge ... because it is only fitting and just that one who has caused harm to others should himself suffer for it. ... Some contend that when one commits a crime, it is important that he receive commensurate punishment in order to restore the peace of mind and repress the criminal tendencies of others. In addition, it is claimed that retributive punishment is needed to maintain respect for the law and to suppress acts of private vengeance. ... Today it is commonly put forward under the rubric of 'deserts' or 'just deserts'.")
A consequentialist legislator may think punishment produces good effects in a number of ways: (1) by deterring specific offenders from reoffending after release;\(^{56}\) (2) by deterring potential offenders from engaging in criminal activity;\(^{57}\) (3) by incapacitating offenders who have shown that they will violate the law;\(^{58}\) (4) by denouncing harmful conduct and, thereby, reinforcing socially acceptable norms;\(^{59}\) and (5) by rehabilitating or reforming offenders so that they become productive, law abiding members of society.\(^{60}\) The consequentialist justification for punishment, then, is forward-looking: it does not appeal to what wrongdoers deserve or how we may rectify the wrongs of the past, but rather it appeals to the good consequences produced by the threat and imposition of punishment.

In contrast, retributivism is backward-looking. For a retributivist, the purpose of punishment is to "exact retribution by imposing 'deserved' punishment in proportion to the offender's blameworthiness."\(^{61}\) The

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56. See Frase, supra note 54, at 197 ("Deterrence discourages future crimes by this offender ('special' deterrence) and by other likely offenders ('general' deterrence), by instilling and reinforcing fear of punishment."); LAFAVE, supra note 55, at § 1.5(a)(1) ("[A]lso called intimidation, or, when the deterrence theory is referred to as general deterrence, particular deterrence, criminal punishment aims to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again. The validity of this theory has been questioned by many, who point out the high recidivism rates of those who have been punished. . . . [I]t has been observed that our attempts at prevention by punishment may enjoy an unmeasurable degree of success, in that without punishment for purposes of prevention the rate of recidivism might be much higher. This assumption is not capable of precise proof, nor is the assertion that in some instances punishment for prevention will fill the prisoner with feelings of hatred and desire for revenge against society and thus influence future criminal conduct."); see also Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429 (2001).

57. Frase, supra note 54, at 197.

58. Id. ("Incapacitation prevents crime by imprisoning or executing dangerous offenders, thus physically restraining them from committing crimes against the public."); see also LAFAVE, supra note 55, at § 1.5(a)(2) ("[A]lso expressed as incapacitation, isolation, or disablement . . . society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society. If the criminal is imprisoned or executed, he cannot commit further crimes against society. Some question this theory because of doubts that those who present a danger of continuing criminality can be accurately identified. It has also been noted that resort to restraint without accompanying rehabilitative efforts is unwise, as the vast majority of prisoners will ultimately be returned to society. The restraint theory is sometimes employed to justify execution or life imprisonment without chance of parole for those offenders believed to be beyond rehabilitation.").

59. See Frase, supra note 54, at 197–98 ("[T]he theory of denunciation (sometimes referred to as the expressive function of punishment, indirect general prevention, or affirmative general prevention) views criminal penalties as a means of defining and reinforcing important social norms of appropriate behavior.").

60. See id. at 197 ("Rehabilitation is designed to prevent or lessen [an] offender's future criminal behavior by addressing the causes of that behavior (through counseling, treatment, education, or training."); see also LAFAVE, supra note 55, at § 1.5(a)(3) ("[A]lso called correction or reformation, we 'punish' the convicted criminal by giving him appropriate treatment, in order to rehabilitate him and return him to society so reformed that he will not desire or need to commit further crimes. It is perhaps not entirely correct to call this treatment 'punishment,' as the emphasis is away from making him suffer and in the direction of making his life better and more pleasant. The rehabilitation theory rests upon the belief that human behavior is the product of antecedent causes, that these causes can be identified, and that on this basis therapeutic measures can be employed to effect changes in the behavior of the person treated . . . [T]he theory of reformation has not as yet shown very satisfactory results in practice.").

61. See Frase, supra note 54, at 197 ("What some have called 'defining' retributivism seeks to
The retributive goal of punishment is to do justice: to make sure that wrongdoers suffer for their wrongdoing.

How much punishment is appropriate for a particular crime? Legislators must answer this question in devising and reforming a criminal code, and their opinions will depend on whether they focus on consequentialist or retributivist goals of punishment. The primary focus of consequentialist considerations will be deterrence, and the amount of punishment for a given crime should adequately deter individuals from engaging in that criminal behavior. On consequentialist grounds, punishment can be unjustifiably harsh if the good consequences it produces, including deterrence, could be achieved by a less harsh punishment. Retributivist legislators will focus primarily on the blameworthiness of actors who engage in that specific kind of criminal wrongdoing. If offenders receive a sentence that makes them suffer more than they deserve, then that punishment is unjustified on retributivist grounds. This Article argues that regardless of whether legislators aim to fulfill consequentialist or retributivist goals of punishment, the denial of retroactive amelioration is inconsistent with both of these traditional goals of punishment.\(^{62}\)

B. Denying Retroactive Amelioration Offends Theories of Punishment

Withholding a lesser punishment from a pre- or post-final judgment defendant is contrary to consequentialist and retributivist justifications for punishment because the ameliorative legislative change reflects the legislature’s assessment that the prior penalty is no longer an adequate deterrence or an appropriate penalty.\(^{63}\) In the leading case on retroactive amelioration in which the defendant’s conduct had been decriminalized,\(^{64}\)

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\(^{62}\) See Doren, supra note 36, at 1158.

\(^{63}\) Id. at 1159. ("The rationale in [People v. Oliver, 134 N.E.2d 197 (N.Y. 1956)] and [In re Estrada, 408 P.2d 948 (Cal. 1966)] . . . is that punishment serves to protect society, but that this protection must be achieved with as little injury to criminals as possible within legislative boundaries.").

\(^{64}\) Oliver, 134 N.E.2d at 198–99. The defendant in Oliver was fourteen years old when he was indicted for the murder of his younger brother in 1945. Committed to a psychiatric hospital, he was eventually found not to be insane, at which point the state sought to proceed with the criminal prosecution that had begun nine years earlier. In the interim, however, the New York legislature had amended the law under which the defendant had been charged and indicted, specifically changing the age at which a juvenile could be prosecuted for murder or any other serious crime. Id.
the New York Court of Appeals stated that:

Th[e] application of statutes reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity [deterrence], (2) to confine the offender so that he may not harm society [incapacitation] and (3) to correct and rehabilitate the offender [rehabilitation].

Reasoning that the legislature’s decriminalization of the offense amounted to the clearest expression of legislative intent to ameliorate what was once a harsh penalty, the court held that to retain and apply the prior penalty to decriminalized conduct would serve no purpose except vengeance, which is an illegitimate aim of state-sanctioned punishment. The court’s premise was that the reduced penalty reflected the legislature’s belief that the lesser penalty was enough to satisfy the various goals of the criminal law, including deterring criminal activity, protecting society, and punishing the offender, among others. Failure to apply the new lesser punishment would therefore be a repudiation of the legislature’s tacit acknowledgement that the prior penalty was set too high. Moreover, the Court recognized that both consequentialist and retributivist justifications for punishment could be properly satisfied with the new punishment. Although the Court in Oliver was addressing the decriminalization of conduct, the argument remains equally valid for the reclassification of conduct and the reduction of a sentence.

65. Id. at 201-02.

66. Id. at 202 ("Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance."). The Rhode Island Supreme Court has also stated: "[I]n light of the legislative decision to mitigate penalties associated with the crime charged, we believe that all those whose cases have not been reduced to final judgment prior to the enactment of the ameliorative statute should be accorded the more lenient treatment. . . . To hold otherwise . . . would amount to nothing more than arbitrary retribution in contravention of the obvious legislative purpose behind the mitigation of the penalty." State v. Macarelli, 375 A.2d 944, 947 (R.I. 1977). In Macarelli, the State invoked the jurisdiction’s general saving statute to support the contention that the statute as it existed at the time of the commission of the crime should govern, thus challenging the retroactive application of the ameliorative legislative change arguing that the statutory amendment was an implied repeal of the original statute. Even though the court agreed that the amended statute was an implied repeal and that the general saving statute was applicable, the court still applied the ameliorative changes retroactively because in the court’s opinion to deny the application of the less severe penalty would "contravene the manifest legislative intent" behind the reduction of the penalty. Id.

67. Oliver, 134 N.E.2d at 201.

68. Id. at 202 ("A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.").

69. Id.
1. Retention of Prior Penalty is Contrary to Consequentialist Theories

As stated, the consequentialist goals of punishment include the specific deterrence of those who have committed crime, the general deterrence of potential offenders, and the incapacitation and possible rehabilitation of wrongdoers. The denial of retroactive amelioration, however, fails to accomplish any of those goals. Thus, a failure to retroactively apply ameliorative legislation does not produce the good effects morally necessary to outweigh the harms and burdens of keeping in prison those offenders sentenced under the old law.

First, the denial of an ameliorative change does not do anything to undermine the deterrent effect of any criminal sanction. The offender has already been convicted and is being punished. The retroactive application of ameliorative legislation will not undermine deterrence on anyone because no potential criminal will decide to commit a crime because of the chance that even if he gets caught, one day the legislature might reduce the punishment for that crime. It is rare that legislatures make their criminal sentencing less harsh.

If, however, the prior penalty is retained in light of an ameliorative change, then the current offender may perceive that the punishment was unfair and that re-offending is not only warranted but also justified. Thus, denial of retroactive amelioration may have the effect of contributing to recidivism. For the future offender, on the other hand, the decision to deny retroactive amelioration is without merit. With the legislative change, the original statute no longer exists except to continue to punish the current offender; thus, any potential offender will not face the original punishment but the new, ameliorated punishment. Apart from failing to deter future criminal activity, the retention of the prior punishment following an ameliorative legislative change fails to maximize the benefits to society and is more costly, particularly under a theory of incapacitation.

The decision to retain a harsher punishment will result in an offender remaining in custody and separated from society for a greater

70. Carol Crowther, *The Future of Corrections*, 381 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 147, 149 (1969), ("The implicit assumptions have been: The more time served, the more deterrence, the more rehabilitation, the more community protection. We found no solid evidence that these assumptions are correct, and substantial evidence that they are wrong."). *But see In re Estrada*, 408 P.2d 948, 956–57 (Cal. 1965) (Burke, J., dissenting) ("The certainty of punishment has always been considered one of the strongest deterrents to crime. That certainty is best afforded when the punishment described by the law existent at the time of commission of the crime is promptly and inexorably meted out to those who violate the law. By changing the rules to make punishment uncertain the risk assumed by those contemplating committing a crime is substantially reduced."); *see also* Vicory v. State, 400 N.E.2d 1380, 1383 (Ind. 1980) ("A severe sentence is presumably more of a deterrent than a lesser sentence. Those who are not deterred by the more severe penalty exhibit greater depravity and should not reap the benefits of the subsequent reclassification.").

71. See, e.g., Mike Allen, *President Urges Harsher Penalties For Accounting Fraud Criminals*, THE TECH (Cambridge, Mass.), July 10, 2002, at 2 (discussing Congressional Democrats' claims that President Bush's proposals are "much weaker" than the ones they proposed regarding sentencing for those convicted of accounting fraud).
period of time, which might increase society’s safety from that individual. That increased safety, however, comes with tangible financial and social costs that could have been reduced or avoided altogether if the retroactive application of the ameliorative legislative changes were allowed. Upon reducing the penalty for the conduct, the legislature once again has made a determination that less punishment will suffice to protect society, which means that the conduct is no longer considered to be as serious. Thus the individuals need not remain separated from society for as long as was initially thought to keep others safe. To retain the original penalty means that individuals who could have had their sentences reduced and been released earlier remain wards of the state. Consequently, the jurisdiction will continue to incur incarceration costs, such as housing, food, and health care for inmates who could have been released sooner. In addition, the failure to apply ameliorative changes retroactively will keep offenders incapacitated longer and thus occupy space needed for more dangerous inmates. Apart from the incarceration costs, there are social costs associated with prolonged unnecessary incarceration, such as continued social disruption of families and loss of family income.\textsuperscript{72}

Denying retroactive application also does nothing to serve punishment’s expressive denouncing function\textsuperscript{73} aimed at reinforcing social norms and behavior. The retention of a prior penalty in light of an ameliorative change does not contribute to the moral condemnation expressed by society and may, in fact, detract from it. The ameliorative penalty reflects society’s new views about the conduct being punished. When the legislature reduces the penalty, it represents a new social view about the conduct and how it should be punished—specifically, that society no longer views it to be as serious and thus the penalty need not be as severe.\textsuperscript{74}

Finally, the decision to deny retroactive amelioration and to retain the original penalty does not assist in creating more productive members of society. For adherents of the rehabilitative theory of punishment, the goal is to create productive members of society by addressing the root causes of

\textsuperscript{72} See Drug Policy In America—A Continuing Debate: Report of the Task Force on the Use of Criminal Sanctions to the King County Bar Association Board of Trustees, 30 FORDHAM URB. L. J. 499, 555 (noting that non-economic costs, including social disruption, are involved in drug statutes and stressing the potential gains in these areas through drug reform).

\textsuperscript{73} See State v. Tapp, 490 P.2d 334, 336 (Utah 1971) (“[I]t is the prerogative of the legislature, expressing the will of the people, to fix the penalties for crimes; and the courts should give effect to the enactment and the effective date thereof as so declared. . . . [T]o insist on the prior existing harsher penalty is a refusal to accept and keep abreast of the process which has been continuing over the years of ameliorating and modifying the treatment of antisocial behavior by changing the emphasis from vengeance and punishment to treatment and rehabilitation.”).

\textsuperscript{74} It is also a rationale of the federal courts’ disregard of the federal general saving statute to apply the ameliorative changes retroactively. See infra Part V.A.4. But see Holiday v. United States, 683 A.2d 61, 80 (D.C. Cir. 1996) (“When a newer social view decides that certain conduct is no longer to be punished, the general [savings] statute steps in and imposes the punishment fixed by an earlier generation.”).
criminality. However, the longer that an individual is incarcerated, the more those root problems will become exacerbated, and the more time that the offender has to become a “better” criminal.

2. Retention of Prior Penalty is Contrary to Retributivist Theories

For retributivists, the purpose of punishment is to penalize the individual for his wrongful conduct. The punishment that is set needs to be proportional to the offender’s blameworthiness, but society can only approximate a wrongdoers’ blameworthiness. The setting of punishment is simply inexact. However, an ameliorative change represents a legislative acknowledgement, and by proxy a societal acknowledgement as well, that the prior penalty was disproportionate to the conduct. To deny the ameliorative change to previously convicted individuals would be to acknowledge that the punishment was too harsh—it was unjustified—but then not to do anything about it. To continue to apply the former, more severe punishment following an ameliorative change is a repudiation of the proportionality principle and undermines the retributivist goal of punishment. According to the legislature, the new punishment is sufficient enough to satisfy the retributive criminal law goals and a more excessive penalty would therefore be morally unjustified.

The decision of the Georgia Legislature to deny the retroactive application of the 2006 Amendment to Wilson is unsupported by either utilitarian or retributivist justifications for punishment. The Georgia Legislature’s decision to amend the aggravated child molestation statute was an acknowledgement that the original penalty was too severe; thus, the legislature reduced it to reflect a new legislative intent for punishing adolescents that engage in consensual sexual conduct. Recognizing the disproportionality of the penalty for the aggravated child molestation statute compared to the statutory rape statute for adolescents, the Georgia Legislature decided that the original penalty was inappropriate and amended the statute. In doing so, the Georgia Legislature initially acted contrary to utilitarian and retributivist principles because the original punishment neither satisfied the consequentialist justifications nor was proportional to the conduct, and therefore exceeded the “just deserts” of the offenders. When the Georgia Legislature amended the child molestation statute, not only was it an acknowledgement that the prior penalty was too harsh, but it also demonstrated that society was ill-served by giving adolescents a mandatory minimum ten-year sentence for consensual sexual conduct whereas elsewhere in the criminal code such

75. For a discussion of the proportionality principal as it applies to non-capital criminal cases, see Donna H. Lee, Resuscitating Proportionality in Noncapital Criminal Sentencing, 40 ARIZ. ST. L. J. 527 (2008).


77. See infra note 134 and accompanying text.
actions are punished with less severe penalties. Society does not derive a benefit by continuing to punish Wilson at the original penalty level and incurs a variety of costs, such as increased incarceration costs, for the additional time that Wilson was to serve.

While the current practice of retroactive amelioration is a step in the right direction, the partial retroactive amelioration, which is limited in scope to pre-final judgment defendants and applies only in the absence of express saving clauses, also fails to support the legitimate goals of punishment. Therefore, this Article advocates for full retroactive amelioration, enacted by the legislature, which seeks to make the current practice more uniform by having jurisdictions do away with the express saving clause and adopt a retroactive amelioration statute that includes a general saving statute and an ameliorative amendment exception. More importantly, such a change would expand the scope of retroactive amelioration to individuals with finalized convictions.

III. The Proposed Retroactive Amelioration Statute

Legislatures bear the responsibility for setting the appropriate punishment level for an offense as they seek to pursue legitimate goals of punishment, such as retribution, deterrence, or incapacitation. By adopting a retroactive amelioration statute, the legislature can orchestrate the manner in which retroactive amelioration will be conducted. The retroactive amelioration statute allows legislatures the opportunity to correct knee-jerk, reactive lawmaking that may have occurred in response to a perceived criminal justice epidemic. By adopting a retroactive amelioration statute, the legislature can formulate a uniform and consistent practice within a jurisdiction, and the courts will no longer have to ascertain whether the legislature intended to allow a defendant to be the beneficiary of an ameliorative change. The goal of the retroactive amelioration statute is to apply ameliorative changes retroactively, not only to defendants whose cases are pending, but also to defendants whose cases have become final. It is aimed at removing the temporal distinction that prevents defendants with finalized convictions from benefiting from ameliorative criminal

78. I disagree with the position that retroactive law-making is best left to the discretion of the courts. Particularly in the context of ameliorative changes, courts can decide either to implement such changes or not, resulting in a lack of uniformity with respect to retroactivity. See Dan M. Kahan, Some Realism About Retroactive Criminal Lawmaking, 3 ROGER WILLIAMS U. L. REV. 95, 116–17 (1997) ("The way to secure the benefits of retroactive lawmaking while minimizing the risks associated with it is to confine the exercise of that power to the institution most likely to exercise it wisely [i.e. the courts]. The Ex Post Facto Clause helps to achieve that objective by denying retroactive lawmaking powers to the legislature, which as a result has all the more incentive to delegate this vital power to courts."); see also Harold J. Krent, Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause, 3 ROGER WILLIAMS U. L. REV. 35, 40 (1997) (arguing that although ex post facto principles apply to courts in the criminal context, courts have not in fact afforded individuals significant protection from retroactive judicial change).

79. GRUPP, supra note 35, at 4.
legislation. The proposed statute encourages legislatures to expand the scope of retroactive amelioration to defendants with finalized convictions, to cease using the express saving clause as a legislative device to thwart the triggering of the abatement doctrine, and to rely exclusively on the retroactive amelioration statute, which contains a general saving clause. In advance of discussing the details of the proposed statute, it is necessary to define what constitutes amelioration.

A. Amelioration Typology

Amelioration is difficult to define. Borrowing from a previously established typology, amelioration can be classified as either the decriminalization of conduct, the reclassification of conduct, or the reduction of a sentence. For example, when a legislature repeals a statute, deleting it entirely from the criminal code and not replacing it, this constitutes the decriminalization of conduct, also known as an “unqualified repeal.” Also, when there is a change in the designation of an offense from a criminal violation to a civil one, this too is the decriminalization of conduct. The change in the designation of conduct from criminal to civil

80. 1 WHARTON'S CRIMINAL LAW § 42 n.3 (12th ed. 1932) (noting that there is some controversy over what constitutes the mitigation of a prior penalty).
81. See Today’s Law and Yesterday’s Crime, supra note 30, at 131–45.
82. Id. at 141.
83. Id. at 139–40.
84. Id. at 131–39.
85. Id. at 121 n.10 (“For present purposes, an unqualified repeal is defined as a repeal without express language that pending prosecutions and liability for past violations will not be extinguished.”); see also Jessie A. Amos, Case Law Update September 1, 1999–August 31, 2000, 2 TEX. TECH J. TEX. ADMIN. L. 1, 99 (2001) (“When a right or remedy is dependent on a statute, the unqualified repeal of that statute operates to deprive the party of all such rights that have not become vested or reduced to final judgment.”).
86. See, e.g., United States v. Blue Sea Line, 553 F.2d 445, 446 (5th Cir. 1977) (considering the reclassification of a federal offense from criminal to civil offense); United States v. Mechem, 509 F.2d 1193, 1194–96 (10th Cir. 1975) (same).
87. Another example of the decriminalization of conduct is when a constitutional provision is passed that decriminalizes conduct and creates a protected right, e.g., the repeal of the Eighteenth Amendment and its replacement with the Twenty First Amendment. In that same vein, the decriminalization of conduct occurs when the legislature repeals a statute and then replaces it with an affirmative right, e.g., the repeal of discriminatory laws with the Civil Rights Act of 1964, 42 U.S.C. § 1971 (2006), and establishing an affirmative right not to be discriminated against. See Hamm v. City of Rock Hill, 379 U.S. 306, 316 (1965). While the change in forum from a juvenile hearing to an adult criminal trial has also been labeled as the decriminalization of conduct. This author disagrees and has therefore classified this type of change as the reclassification of conduct. The change in forum from an adult criminal trial to a juvenile proceeding has been considered by at least one court to be equivalent to the decriminalization of conduct. See, e.g., People v. Oliver, 134 N.E.2d 197, 202 (N.Y. 1956) (reclassifying offenses committed by individuals between the ages of twelve and fourteen from criminal to juvenile offenses, thereby reducing the penalty and changing the legal forum). Juvenile proceedings, technically, are considered non-criminal because the process lacks the full safeguards of an adult trial, such as the right to jury trial. The process, however, has more elements associated with a criminal prosecution rather than a civil proceeding. Thus, I categorize this type of change as a reclassification of conduct.
In With the New, Out With the Old

signals that the legislature no longer considers the conduct serious enough to deprive an individual of liberty. In the second category, conduct is reclassified resulting in an ameliorative sentencing change.

When a legislature changes the previous categorization of conduct from a higher class felony to a lower one or from a felony to a misdemeanor and reduces the punishment attached to a specific criminal offense, it is the reclassification of conduct. This type of ameliorative change often occurs in two steps. Initially, the conduct is reclassified to a lower degree and then the sentence is reduced accordingly so that it is proportional to the other categories. The last remaining category of ameliorative changes is the reduction of a sentence.

Reducing the sentence for an offense occurs when the legislature lessens the penalty for proscribed conduct without changing the offense. Theoretically, it is easy to assess whether this has occurred because the new, or amended, statute has a penalty that is lower than the penalty in the original statute. Practically, however, it is more complex because sentencing is often presented as a range with minimum and maximum values. For example, if the penalty for an offense is five years and the legislature reduces it to three, then it is evident that the penalty has been ameliorated. If, however, the penalty for an offense has a minimum and a maximum value, then amelioration will be said to occur if the minimum is decreased regardless of what happens with the maximum.

When a legislature amends a statute and the change can be categorized as either the decriminalization or the reclassification of conduct or a sentence reduction, the change is therefore ameliorative and should be given retroactive effect. Under the current framework, these changes are either denied outright or restricted to pre-final judgment defendants. The proposed statute removes the limitations and expands the scope of

88. The importance of protecting an individual from being deprived of liberty can be seen in the numerous cases identifying under what circumstances counsel should attach in order to protect an individual’s liberty interest. See, e.g., Alabama v. Shelton, 535 U.S. 654 (2002) (holding that a lawyer must be appointed for a defendant before the imposition of a suspended prison sentence); Nichols v. United States, 511 U.S. 738 (1994) (holding that a court can only consider a defendant’s uncounseled misdemeanor in conviction in sentencing for a subsequent offence if that misdemeanor conviction did not result in imprisonment); Scott v. Illinois, 440 U.S. 367 (1979) (holding that a state can only imprison a defendant that had been represented by counsel); Argersinger v. Hamlin, 407 U.S. 25 (1972) (incorporating the Sixth Amendment right to counsel against the states through the Fourteenth Amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment requires defendants who cannot afford their own attorneys be provided with counsel).

89. See Today’s Law and Yesterday’s Crime, supra note 30, at 139.

90. Id. The Reclassification of Conduct category of amelioration raises concerns in the post-Booker and Blakely era that the new penalty must be proven to a jury because the substantive elements of the offense have changed. See supra note 53. However, Booker and Blakely focused on sentence enhancements, not reductions, thus the Booker and Blakely restrictions are not applicable.

91. The following are examples of when an ameliorative change has occurred following a decrease in the minimum sentencing value: (a) the minimum is decreased and the maximum remains unchanged; (b) the minimum is decreased and the maximum is increased; and (c) both the maximum and the minimum are decreased.
retroactive amelioration to encompass all defendants to whom the amended statute may apply

B. Expand the Scope of Retroactive Amelioration

A minority of jurisdictions has adopted an ameliorative amendment exception to their general saving statutes that gives retroactive effect to ameliorative legislative changes. It is restricted, however, to pre-final judgment defendants, resulting in a limited number of defendants being eligible to receive the benefits of an ameliorative sentencing change. The proposed retroactive amelioration statute provides a post-final judgment provision where individuals with finalized convictions can seek to have an ameliorative sentencing change applied to them through a sentence readjustment hearing.

After the passage of a statutory amendment that ameliorates the sentence for specific conduct, a defendant who was formerly convicted under the original statute should have his sentence adjusted accordingly. It is the responsibility of the State to change a defendant's sentence to adequately reflect the new penalty. The procedure will be for an administrative sentencing board to review the legislative changes in which the penalty for an offense has been ameliorated, identify the pool of eligible defendants, and adjust their sentences accordingly. If, however, the administrative sentencing board fails to adjust the sentence, then the defendant can request a sentence readjustment hearing to have his sentence readjusted in accordance with the new penalty. The sentence readjustment hearing is an administrative procedure in which a duly elected or appointed sentencing officer will adjust the defendant's sentence so that it comports with the new ameliorative change. Once the sentence has been adjusted, the defendant can petition for an expedited parole review if the jurisdiction has retained its discretionary parole board process. Otherwise, the adjusted sentence establishes the new parameters of the defendant's sentence. Neither the change in the sentence nor the request for a readjustment will provide the defendant with any additional rights to further challenge the adjudication of guilt or to seek additional opportunities for judicial review apart from the preexisting challenges that the defendant may already

92. Sundberg v. State, 652 P.2d 113, 116 (Alaska Ct. App. 1982) ("[W]hile not binding on the trial court, the new code does give an indication of current legislative intent and, absent factors in a specific case warranting a harsher sentence, the defendant should be sentenced within the range of sentences provided by the new code, at least to the extent that his conduct corresponds exactly to conduct prohibited by a specific provision, or provisions of the new code."). One potential argument against sentence readjustment is that the defendant may receive a sentencing windfall. For example, the prosecution accepted a plea on a statute that is ameliorated later in exchange for the dismissal of charges that have not been ameliorated. The defendant would then get the benefit of the reduced penalty. While it appears to be windfall for the defendant, the process also holds true for the defendant. The defendant may have been convicted under the non-ameliorated statute and thus would not be entitled to the change. While leaving it up to chance may appear unseemly, defendants frequently take similar chances whenever they elect to go to trial and take a chance on a jury verdict.
possess. While the process is beneficial for the defendant, such as the reduction of the sentence, it is also beneficial for society in the form of the reduction of incarceration costs.

C. Cease Using the Express Saving Clause

Under the current practice, courts and legislatures have been willing to permit retroactive amelioration provided that the newly amended statute does not have an express saving clause. Yet, the purpose of such clauses has expanded considerably. The proponents of the express saving clause initially created it to prevent the triggering of the common-law doctrine of abatement. While the clause continues to perform that function, preventing the premature termination of pending prosecutions, it is also used to retain the original penalty following an ameliorative legislative change. To prevent that manifest injustice from occurring, jurisdictions need to cease using the express saving clause and adopt a retroactive amelioration statute that has a general saving clause that will prevent the abatement of prosecutions and also allow for the retroactive application of ameliorative changes. At present, there are only a few jurisdictions that do not have a general saving statute and thus rely on either the express saving clause or a constitutional saving clause to prevent abatement. This Article recommends that jurisdictions cease using the express saving clause altogether. If jurisdictions were to adopt the proposed retroactive amelioration statute, then there would be no need for such a clause. Moreover, the adoption of the proposed retroactive amelioration statute would rein in courts that apply ameliorative changes despite the existence of a general saving statute.

While the proposed retroactive amelioration statute appears to be a monumental change to the criminal justice system, it is not. Legislatures and courts allow exceptions such as amelioration even in the face of principles that emphasize prospectivity. And, the original purpose of the saving clause is to prevent the common-law doctrine of abatement, not retroactive amelioration.

IV. Statutory Retroactivity and the Saving Clause

In general, retroactivity is a disfavored legal principle because it

93. See infra Part V.
94. See infra Appendix I.
95. See infra Appendix II (showing that only three jurisdictions—Alabama, Delaware, and Mississippi—do not have general saving statutes).
96. SUTHERLAND, supra note 25, § 41:1 ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably.").
97. Courts are reluctant to give retroactive effect to constitutional rule changes, and also rely on a presumption against statutory retroactivity to prevent the retroactive application of legislation. See Landgraf v. USI Film Prod., 511 U.S. 244, 270 (1994) ("The presumption against statutory retroactivity
is considered unfair to change the laws upon which conduct is based and then apply the new law to that conduct. Statutory retroactivity is no different. The prevailing thought is that applying a new or amended statute retroactively to antecedent conduct is disadvantageous because an individual should be aware of the law in advance of acting. Retroactive lawmaking may be disfavored, but it is not unconstitutional provided that the new or amended statute does not criminalize new conduct or impose a more severe penalty for an existing crime. Moreover, retroactive statutes are often necessary. Even still, statutes are presumed to operate prospectively. To insure that legislative changes are not given retroactive effect, this principle of nonretroactivity is reflected constitutionally, in the ex post facto, retroactive, and saving clauses, statutorily, in the

has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.”; Teague v. Lane, 489 U.S. 288, 307 (1989) (“First, a new rule should be applied retroactively if it places ‘certain kinds of primary, private individual contact beyond the power of the criminal lawmaking authority to proscribe. Second, a new rule should be applied retroactively if it requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty.’.”).

98. Seeman, supra note 31, at 93; Elmer E. Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 MINN. L. REV. 775, 777 (1935); Bryant Smith, Retroactive Laws and Vested Rights, 5 TEX. L. REV. 231, 237 (1927) [hereinafter Smith I]; see also SUTHERLAND, supra note 25, § 41.2 (“A fundamental principle of jurisprudence holds that retroactive application of new laws is usually unfair.”) There are, however, two exceptions to this general principle. If the statute: (1) confers benefits, provided that a class of persons is not arbitrarily deprived of the benefits; and (2) “bring[s] legal rights and relationships into conformity with what people thought they were.”).

99. See Smith I, supra note 98, at 231–32 (“The term retroactive, as applied to legislation, seems to be used with a number of different meanings. One is that a law is retroactive if it extinguishes or impairs legal rights already acquired by the individual under the laws previously existing. . . . Another meaning is that a law is retroactive if it assumes to give effect to a past event, in order to create a present right or duty. And a third is that a law is retroactive when it assumes to give to a past event the effect of creating rights and duties ab initio, or as of some time prior to the retroactive law.”).


101. SUTHERLAND, supra note 25, § 41.2 (“There is general consensus that notice or warning of a rule should be given in advance of the actions whose effects will be judged.”); see also Prospective Overruling and Retroactive Application in the Federal Courts, supra note 47, at 944–45.

102. Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 HARV. L. REV. 692 (1960); Smith I, supra note 98, at 234 (“Since there is no provision, either in the Federal Constitution or in most state constitutions, which expressly forbids retroactive legislation . . . ‘retroactive laws which do not impair the obligations of contracts or partake of the character of ex post facto laws are not condemned or forbidden by any part of the constitution.’”).

103. See Smith I, supra note 98, at 237 (“It is perhaps always preferable to legislate before rather than after the event, but situations arise where a law may be better late than never and a retroactive law than no law at all.”); Smith II, supra note 21, at 411 (“The first thought . . . is that American authorities denounce retroactivity in the abstract but frequently sustain it in the particular case.”).


express saving clauses and general saving statutes and, judicially, in a presumption against retroactivity. There are, however, several recognized exceptions to the principle of nonretroactivity.

First, the legislature’s intent to allow statutory retroactivity is expressly or impliedly indicated. Second, the statutory amendment is either ameliorative or curative. And finally, legislative retroactivity is required when the “reasonable expectations” of the parties require it. These circumstances permit the retroactive application of a statute, provided that the legislative change does not result in an injustice, but they do not require retroactive amelioration. The saving provisions are a legislative device that were created and are used for a limited purpose. The purpose of the clauses is specifically to counter the common-law doctrine of abatement, a doctrine that has been both widely accepted and roundly

106. See COLO. CONST. art. II, § 11 (“No . . . law . . . retrospective in its operation . . . shall be passed by the general assembly.”); GA. CONST. art. I, § 1, Para. 10; IDAHO CONST. art. XI, § 12; MD. CONST. DECL. OF RIGHTS art. 17 (“That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty . . . .”); MO. CONST. art. I, § 13; N.H. CONST. part 1, art. 23 (“Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.”); N.C. CONST. art. I, § 16 (“Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty . . . .”); OHIO CONST. art. II, § 28 (“The general assembly shall have no power to pass retrospective laws . . . .”); TENN. CONST. art. I, § 20; TEX. CONST. art. I, § 16; see also infra Appendix II.

107. See Margaret A. Burnham, Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth of the Caribbean, 36 U. MIAMI INTER-AM. L. REV. 249, 249 (2005) (discussing the use of the constitutional saving clause to retain the preexisting laws prior to a nation’s independence); see also infra Appendix II.

108. See infra Part IV.A.

109. See id.

110. Landgraf v. USI Film Prod., 511 U.S. 244, 264 (1994).

111. Kendal, 530 A.2d at 336 (“Under this exception, an amendment to a statute can be given retroactive effect if it is designed merely to carry out or explain the intent of the original statute . . . . [A]n amendment which falls within the curative exception can be retroactively applied consistent with the general rule of prospectivity because its purpose is to remedy a perceived imperfection in or misapplication of a statute and not to alter the intended scope or purposes of the original act.”); see also SUTHERLAND, supra note 25, § 41:11 (“A curative act is a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities . . . . Generally, curative acts are made necessary by inadvertence or error in the original enactment of a statute or in its administration . . . [and] can be given retroactive effect if it is designed merely to carry out or explain the intent of the original legislation.”).


113. SUTHERLAND, supra note 25, § 41:2; see also Fasching, 546 A.2d at 1096 (noting that legislative changes will not be given retroactive effect if it results in an injustice).

114. See Seeman, supra note 31, at 80; Effect of Repeal of a Criminal Statute Upon Prosecutions for Prior Acts, supra note 29, at 744-45 (reviewing the history of the rule, and noting that since the 19th century it has been applied consistently); Ruud, supra note 33, at 286 (“The function of the savings clause is to express the legislative intention to preserve the designated expectancies, rights or obligations from immediate destruction or interference.”); see also supra note 29 (discussing the origins of the doctrine).

115. See United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (adopting the abatement doctrine in American jurisprudence); see also Hamm v. City of Rock Hill, 379 U.S. 306, 323 (1964) (“The [abatement] doctrine has its origins in the English common law . . . and has been embraced in
criticized,\textsuperscript{116} not to prevent retroactive amelioration. To understand the intended limited scope of the saving provisions, it is necessary also to understand the abatement doctrine and its application.

A. The Saving Provisions

In order to be effective, a legislature is required to insert an express saving clause\textsuperscript{117} into a new or amended statute. The inclusion of an express saving clause in the newly amended statute demonstrates the legislature’s intent that all ongoing prosecutions should continue unabated and not be subjected to a “legislative pardon.”\textsuperscript{118} By inserting an express saving clause, the legislature makes a clear and unequivocal statement that the amended statute shall not have any effect on either the status or prosecution of prior conduct. With numerous statutory changes, legislatures have often failed to include an express saving clause in the amended statute, resulting in the unanticipated triggering of the abatement doctrine. In response to this “legislative inadvertence,”\textsuperscript{119} the general saving statute has been created and adopted at the federal level\textsuperscript{120} and in a majority of state jurisdictions.\textsuperscript{121}

The general saving statute’s purpose\textsuperscript{122} is to serve as a standing rule of the legislature’s intent to save previously commenced prosecutions from American state and federal jurisprudence.” (internal citations omitted)).

\textsuperscript{116.} See, e.g., Albert Levitt, \textit{Repeal of Penal Statutes and Effect on Pending Prosecutions}, 9 A.B.A. J. 715, 715 (1923) (claiming that there is no “adequate reason” for keeping the abatement doctrine as it is).

\textsuperscript{117.} For example, the specific saving clause contained in Georgia’s amended aggravated child molestation statute reads in pertinent part: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.” 2006 Ga. Laws 379 (emphasis added).

\textsuperscript{118.} See MacKenzie, supra note 29, at 173 (suggesting that the abatement doctrine is based on an inference of legislative pardon).

\textsuperscript{119.} See, e.g., Holiday v. United States, 683 A.2d 61, 66–67 (D.C. Cir. 1996) (“As a way of preventing abatements of criminal prosecutions and other liabilities when legislatures failed to provide special savings clauses in the repealing legislation, state legislatures began in the last century to adopt general savings statutes applicable thereafter to all repeals, amendments, and reenactments of criminal and civil liabilities.”); LaPorte v. State, 132 P. 563, 564–65 (Ariz. 1913) (“The history of legislation ... shows that through the inattention, carelessness, and inadvertence of the lawmakers body crimes and penalties have been abolished, changed, or modified after the commission of the offense and before trial in such material way as to effect many legislative pardons. To prevent such mistakes and miscarriages of justice many of the states have enacted general saving statutes.”).


\textsuperscript{121.} See infra Appendix II for a list of savings provisions in each state.

\textsuperscript{122.} Ruud, \textit{supra} note 33, at 292–93:

A savings clause may be general or specific; that is, it may be of general application to all acts of the legislature or it may apply to the specific act of which it is a part. The general savings clause may be found in either the constitution or the statutes. The general savings statute, in turn, is generally a part of a general interpretation act.

\textit{See also} Seeman, \textit{supra} note 31, at 80 (“The legislation may be of two sorts: it may be precise and definite, or it may be general in terms.”).
abatement. Most notably, the statute operates to prevent the premature termination of a prosecution following a legislative change in which the penalty is increased, i.e. a technical abatement, and would thus be barred under the Ex Post Facto Clause. With the general saving statute, and by extension the constitutional saving clause, the burden of having to include an express saving clause following each statutory change is alleviated thus removing the concern of unwarranted abatement which if triggered has dire consequences.

B. The Common-Law Doctrine of Abatement

The common law doctrine of abatement terminates all pending prosecutions following a legislative change unless the legislature expresses a contrary intent by the insertion of an express saving clause in the new or amended statute. The abatement doctrine is based upon the principle that a legislative change is tantamount to a repeal of the existing statute, even if the legislature has re-enacted the statute in much the same form or has simply amended portions of it. The abatement doctrine is based upon the fundamental premise that any legislative change without an express saving clause is equivalent to the statute having never existed.

123. See Ruud, supra note 33, at 298 ("The purpose in enacting a general savings statute is to establish a general legislative policy concerning the effect of repeals and to avoid having to include a specific savings clause in each act in order to carry out that policy.").

124. People v. Alexander, 224 Cal. Rptr. 290, 300 (Cal. Dist. Ct. App. 1986) ("[T]he California Supreme Court opined that this general saving clause was not meant to abrogate the common law rule, but only to prevent its mechanical application and forestall the 'technical abatement' of prosecutions where the repeal of a statute was clearly not intended as a pardon for past conduct.").

125. See supra notes 29–32 and accompanying text.

126. See Levitt, supra note 116, at 716 ("[T]he repeal of a statute was an absolute bar to a prosecution for an offense committed against the statute. . . . [I]t has consistently been affirmed that . . . the repeal of a statute without a saving clause has as its result the release or acquittal of any one who is under prosecution for an act committed against a repealed statute." (citing United States v. Passmore, 4 U.S. (4 Dall.) 372 (1804)); see also Bell v. Maryland, 378 U.S. 226, 230 (1964) (stating the "universal common-law rule" that "when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct."); R. Inhabitants of Mawgan (1838) 112 Eng. Rep. 927, 928 (Q.B.) ("[T]he repeal of a statute does not invalidate what has been done under its authority before the repeal. The effect of the repeal is . . . to prevent any step being taken under the authority of the repealed Act.").

127. See 1 HALE, supra note 29, at 291 ("[W]hen an offense is made . . . by an act of parliament, and then those acts are repealed, the offenses committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such a repeal, unless a special clause in the act of repeal be made enabling such proceeding after the repeal, for offenses committed before the repeal."). Later, the expression of that contrary intent would be manifested through the general saving statute or the constitutional saving clause.

128. See, e.g., Holiday v. United States, 683 A.2d 61, 66 (D.C. Cir. 1996) (explaining that, in the absence of a savings statute, legislative change abates criminal prosecutions "whether the legislation was an outright repeal or merely an amendment or reenactment").

129. Yeaton v. United States, 9 U.S. (5 Cranch) 281, 283 (1809) ("The court is . . . of opinion, that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no

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Jurists and scholars alike, however, have criticized the doctrine for being flawed and unsupported from its inception and for its continued use without thoughtful analysis. In defense of the doctrine, courts have reasoned that a legislative change is analogous to a pardon of the actual offense and results in a rescission of the court’s power and authority to continue the prosecution.

Commentators nonetheless have emphasized that the sole authority of the court does not emanate from the legislature, and thus total authority cannot be divested simply because a legislative change has occurred. These same commentators have also objected to the notion that a legislative change means that the statute never existed and that the conduct that was committed is no longer socially proscribed and is therefore not punishable. They have contended that this argument is flawed because it obscures the fact that not only was the conduct committed, but it was also illegal at the time of its commission. They have therefore suggested that the abatement doctrine is unjust because offenders who violate an existing statute are absolved from liability simply because the legislature enacted a penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force.

130. See Levitt, supra note 116, at 715 (“The writer [Albert Levitt] ventures to believe that the existing rule [the doctrine of abatement] is based upon the continued, thoughtless acceptance of an unsupported statement made by Hale, in his Pleas of the Crown[,]”); see also Effect of Repeal of a Criminal Statute Upon Prosecutions for Prior Acts, supra note 29, at 748.

131. See Levitt, supra note 116, at 716 (“[N]o court seems to have thought the matter worthy of a thorough analysis in light of its history. . . . That a rule of such importance to the general welfare should have been accepted without question and without change for two hundred and fifty years is . . . as remarkable an example of thoughtless judicial laissez faire as can be found in the history of the criminal law.”).

132. See Effect of Repeal of a Criminal Statute Upon Prosecutions for Prior Acts, supra note 29, at 749 (“It is argued that the repeal acts as a ‘legislative pardon’, that the legislature intended thereby to forgive past offenders.”); Seeman, supra note 31, at 80 (“The common law rule has always been that once a law has been repealed, it shall henceforth be as if it had never existed, but this rule has often been modified by legislation and by qualifying judicial rules.”); see also Sekt v. Justice's Ct. of San Rafael, 159 P.2d 17, 21 (Cal. 1945) (“[T]he common law rule of abatement is based on presumed legislative intent, it being presumed the repeal was intended as an implied legislative pardon.”).

133. See Levitt, supra note 116, at 716 (listing four reasons given by courts for the doctrine of abatement: the absence of a law to be enforced by the courts, the absence of an offense to be punished, the release of an offender's guilt, and the absence of power in the court to proceed with the prosecution).

134. Id. See also Effect of Repeal of a Criminal Statute Upon Prosecutions for Prior Acts, supra note 29, at 748–49 (arguing that the authority of the courts to enforce punishment does not depend on a repealed statute, but rather depends upon the Constitution or some other statute); John C. Eastman, Philosopher King Courts: Is the Exercise of Higher Law Authority Without a Higher Law Foundation Legitimate?, 54 Drake L. Rev. 831, 834–35 (2006) (asserting that it is universally acknowledged in this country that the Constitution represents a higher law than statutory law, and that in the event of a conflict, it is the duty of the judiciary to give effect to the Constitution).

135. See Effect of Repeal of a Criminal Statute Upon Prosecutions for Prior Acts, supra note 29, at 748 (“At the time of commission the act was wrong as a substantive matter; this fact cannot be changed by the repeal.”).
These commentators’ assessment of the abatement doctrine is partially correct. The court’s power and authority to maintain a previously commenced prosecution should continue unabated when the legislature repeals and reenacts or amends a statute. Its power and authority should, however, be divested when there is an unqualified repeal of a statute which amounts to the decriminalization of the conduct. In this instance, that which was once proscribed is no longer criminal and thus any existing prosecution should be terminated. An unqualified repeal is clearly ameliorative and should therefore be applied retroactively both to pre- and post-final judgment defendants. It is not the same however when the legislature repeals and reenacts or amends a statute.

Unlike the decriminalization of conduct which is a statement that once proscribed conduct is no longer illegal, a legislative repeal and reenactment or amendment of a statute is a reassessment of the appropriate penalty for that which is still proscribed conduct. Therefore, these changes should not trigger the abatement doctrine, regardless of whether there is a saving clause or whether the penalty is increased or decreased. The idea that the prosecution should be terminated in the absence of a saving clause ignores the objective indication of the legislature’s intent—represented by the retention of the offense and an associated penalty—that previously commenced prosecutions are not being pardoned. When the penalty is increased, the legislative intent to continue the prosecution is not in doubt, as the new penalty indicates that the previous punishment was set too low and thus was insufficient to accomplish legitimate goals of punishment. Under such circumstances, the prosecution should not be abated even if the legislature fails to insert an express saving clause or the jurisdiction lacks a general saving statute or a constitutional saving clause.

It is less clear whether the abatement doctrine should apply when the legislature repeals and reenacts or amends a statute and decreases the penalty, but the principle remains the same. The legislature did not intend to release the offender from criminal liability, but rather intended to properly reflect the amount of punishment necessary to achieve the goals of the criminal law. The newly amended statute therefore is a reflection of the

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136. See Levitt, supra note 116, at 715.
137. See Effect of Repeal of a Criminal Statute Upon Prosecutions for Prior Acts, supra note 29, at 748 ("A reason often given for the [abatement] doctrine is that upon the repeal of a statute it is as if the statute never existed; consequently prior acts cannot be criminal. . . . [T]his reason should apply with equal force to offenders who were convicted, a result which the courts have not admitted.").
138. Id. at 747 ("When there is an implied repeal, as when the second statute covers the same subject matter but increases the penalty, some courts have departed from the general rule [i.e. abatement of the pending prosecution]. The theory in these cases appears to be that the legislature intended only a partial repeal, i.e., the first statute is discontinued as to future acts, but remains in force as to conduct prior to the second statute.").
139. People v. Alexander, 224 Cal. Rptr. 290, 300 n.21 (Cal. Ct. App. 1986) ("[T]he Supreme Court has also expressed the view that under these particular circumstances (and even where a new statute lessens punishment), no saving clause is needed to prevent abatement because the reenacted proscription itself rebuts the presumption that the repeal was meant as a pardon.").
legislature’s evaluation that the former penalty was too harsh, not that the prosecution for the offense should cease.140 The use of the saving provisions to maintain the prosecution is appropriate, but they should not result in the retention of the prior original penalty following a reduction in the penalty because it would undermine the legislative intent of mitigation. Courts and legislatures in a minority of jurisdictions have adopted this distinction,141 by either circumventing their jurisdictions’ general saving statutes142 or adopting an ameliorative amendment exception to the general saving statutes, both of which achieve legitimate goals of punishment.143 A legislative change that reduces a penalty is an indication that the legislature, as the representative of the people, has determined anew that the prior penalty was excessive. To withhold that new penalty from defendants is inconsistent with the purposes of punishment and is unjust. A minority of jurisdictions that agree with that principle apply such ameliorative changes retroactively, either in the courts or in the legislature. While these jurisdictions are inclined to engage in retroactive amelioration, even they have constraints that the proposed retroactive amelioration statute addresses.

V. Current Retroactive Amelioration Practice

A minority of state supreme courts144 and legislatures145 give retroactive effect to ameliorative legislation.146 Nonetheless, the current

140. The legislature may have reduced the penalty to accomplish other goals and the penalty reduction may be a collateral consequence of such reasons. However, the penalty that is attached to an offense is an expression of the gravity of the offense, i.e., its nature and seriousness. Thus, if the legislature has reduced the penalty, it is the objective indicia of the legislature’s evaluation of what an appropriate sentence is for that offense and the length of time necessary to satisfy the goals of punishment.

141. See infra Part V.

142. See Holiday v. United States, 683 A.2d 61, 66 (D.C. Cir. 1996) (“We . . . focus on the quite different approaches the state courts . . . and the federal courts . . . have taken in construing general savings statutes . . . [T]he predominant state court view . . . favors retroactive application of ameliorative sentencing legislation despite a general savings statute . . . [T]he federal court approach—derived substantially from Supreme Court authority . . . uses the federal general savings statute to bar retroactive application unless the new sentencing legislation itself ‘expressly’ says it shall apply to pending cases.”).

143. See infra Appendix II.

144. See infra Part V.A.1–3.

145. See infra Part V.B.

practice of retroactive amelioration is inadequate because an entire class of defendants, namely post-final judgment defendants, is barred from benefiting from the ameliorative sentencing changes. The proposed retroactive amelioration statute provides full retroactive amelioration so post-final judgment defendants are treated similarly to pre-final judgment defendants.

A. Judicial Retroactive Amelioration

A minority of state supreme courts apply ameliorative legislative changes retroactively despite the existence of general saving statutes. In doing so, they argue that the principles of construction with respect to the general saving statutes are not prohibitive; the ambiguity in the language of the general saving statute allows for retroactive amelioration; and the purpose of the general saving statute was to prevent technical abatement and not retroactive amelioration. If the newly amended statute, however, contains an express saving clause or the case has become final, then the courts do apply the ameliorative changes.

1. Statutory Construction Rules Encourage Retroactive Amelioration

Courts have looked to principles of statutory construction as a basis to disregard the general saving statute and to apply ameliorative sentencing changes retroactively. Because the general saving statute is to be given effect when no contrary legislative intent exists, courts argued that the reduction in the sentence following a legislative change is an expression of that contrary intent. Thus, the court must give retroactive effect to
ameliorative legislative changes despite the fact that there is a general saving statute that is intended to save the prior statute in its entirety, including prosecution and punishment. Not to apply the changes would be to deny the intent of the legislature. Other courts, also relying on principles of statutory construction, have looked to past legislative conduct in which the legislature has vested in the court the discretion regarding whether ameliorative sentencing changes should be applied retroactively.\(^\text{153}\) Although similar to the relying upon the rules of statutory construction as determinative of whether the general saving statute be applied, other courts have looked to the language of the jurisdiction’s general saving statute and declared that because it is ambiguous, it does not prevent the retroactive application of ameliorative legislative changes.

2. Ambiguous Statutory Language Allows Retroactive Amelioration

The use of ambiguous language in the general saving statute has permitted courts to disregard the statute and apply ameliorative legislative changes retroactively.\(^\text{154}\). Because of a lack of specificity in the general saving statute—such as failing to identify whether the original or the amended statute should be applied to an offender—courts have concluded that ameliorative changes can be applied retroactively. According to these courts, the general saving statute was created to maintain the pending prosecutions, thereby prohibiting the triggering of the abatement doctrine, and not intended to retain the original, harsher penalty.\(^\text{155}\). Other jurisdictions also have focused on the language of the general saving statutes and similarly found that ameliorative statutory changes could be given retroactive effect even though the general saving statute suggested penalties; based on the reasoning in Oliver and Estrada the court was impressed, very simply, by the “compelling inference that . . . the former penalty was too harsh and that the [new] and lighter punishment was the appropriate penalty.”).

153. See State v. Von Geldern, 638 P.2d 319, 322 (Haw. 1981) (“The legislature . . . has thus established a pattern of conduct evidencing an inclination to allow the trial court in the exercise of its sound discretion to apply, in individualized circumstances, the ‘more enlightened sentencing provisions’ of the Code, even where the crime was committed before its effective date.”). The trial court imposed a mandatory minimum five-year sentence on the defendant following a conviction for promoting a dangerous drug in the second degree, coupled with the fact that the defendant had a prior conviction. Id. at 321-22.

154. See In re Estrada, 408 P.2d 948, 953 (Cal. 1966) (“[W]hile [the legislature] positively expressed its intent that an offender of a law that has been repealed or amended should be punished, [it] did not directly or indirectly indicate whether he should be punished under the old law or the new one.”). The defendant had been convicted of misdemeanor narcotics possession and was diverted to a drug rehabilitation center whereupon he, without using force or violence, effectuated his escape. At the time of the escape, the statute that governed his offense required a one-year minimum sentence from the date of return to the facility before the defendant could become eligible for parole. Id. at 950.

155. Id. at 951 (“When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act.”).
In one case where a defendant had pled guilty but fled the jurisdiction prior to sentencing, the court reasoned that the language of the general saving statute required the penalty to have been incurred in order to prevent the retroactive application of the ameliorative sentencing change. The court held this to be true even though it was the defendant’s action of leaving the jurisdiction that prevented the imposition of the penalty, remarking that the overriding concern was not that the defendant had benefited from his culpable conduct, but, more importantly, that the conditions as set forth in the general saving statute had not been satisfied. Apart from looking to the language of the general saving statutes as evidence that retroactive amelioration is permitted, a minority of courts has focused on the intended purpose of the saving provisions and emphasized that the saving provisions were created for the express purpose of preventing technical abatement, not the retroactive application of ameliorative legislative changes.

3. Preventing Technical Abatement, Not Retroactive Amelioration

Despite the existence of a general saving statute, courts have given retroactive effect to ameliorative legislative changes, stating that preventing the retroactive application of such changes was not the intended purpose behind the creation of the saving clause. Looking to the history

156. See Belt v. Turner, 479 P.2d 791, 793 (Utah 1971). The defendant in Belt pled guilty to issuing a fraudulent check and was subsequently placed on probation without a sentence being imposed. The Utah Supreme Court decided that the ameliorative provision of an amended statute should be applied to the defendant. By leaving the state without permission, the defendant subsequently violated a condition of his probation. At the probation revocation hearing, the defendant was sentenced to a maximum of five years in state prison. After the guilty plea, the legislature amended the statute and the offense under which the defendant had been charged was dramatically altered. Under the newly amended statute, however, the defendant would have faced a fine and a maximum sentence in the county jail of not more than six months. Id. at 792; see also Doren, supra note 36, at 1157.

157. See Belt, 479 P.2d at 792 ("A new policy having been adopted by the legislature concerning the punishment for the offense we are here concerned with [whether] it should inure to the defendant's benefit even though the offense had been committed and the plea thereto made prior to the amendatory legislation.").

158. Id. at 793 (Henriod, J, dissenting) ("The main opinion must concede that the defendant is compromising this court by the simple device of absenting himself, in complete defiance of his agreed conditions for probation, from appearance at court on the date for his sentence, which was long before the effective date of the statute that he now invokes.").

159. Id. at 792.

160. See People v. Schultz, 460 N.W.2d 505, 512 (Mich. 1990) ("Our general saving statute was adopted to amend a technically correct but logically absurd result that arose from a legislative oversight. To ignore the plain intent of the Legislature in this case would lead to an equally anomalous result."). In Schultz, one of the defendants, Shultz, was convicted of violating Michigan's drug possession statute and faced a mandatory minimum sentence of twenty years. The other defendant, Sand, was also convicted of drug possession and faced a mandatory minimum of ten and a maximum of twenty years. For Schultz, the legislative change occurred ten months after the sentence was imposed but while the case was on appeal. For Sand, however, the ameliorative change occurred approximately one month prior to the date of sentencing. Id. at 506-09.
surrounding the use and application of the general saving statute, courts have reasoned that the general saving statute was created to thwart technical abatement and that to deny retroactive amelioration would be to act contrary to the intent of the legislature. To reiterate, briefly, the general saving statute was created to remedy a historical legal anomaly in which a defendant would be released from liability following a legislative change where an increase in the existing penalty had occurred. It was not intended to be used to retain harsher punishments, but simply to prevent the triggering of the common-law doctrine of abatement. In refusing to apply the general saving statutes, the actions of these courts could potentially be labeled as judicial activism. These courts, however, are not demonstrating judicial activism but acting in accord with the original legislative purpose and intent of the saving provisions, thus exercising judicial restraint. Much like the majority of state courts, the federal courts have not been inclined to disregard the federal general saving statute, except on two occasions.

4. Exceptions to the Federal General Saving Statute

Enacted in 1871, the federal general saving statute was construed to

161. Id. at 509–10 ("The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.").

162. See supra note 134.

163. See Schultz, 460 N.W.2d at 527 ("The history ... indicates that the Legislature enacted the general saving statute in response to a factual scenario vastly different from that presented before our Court today. [I]t was specifically adopted to abrogate an anomaly resulting from the interplay between the common law abatement doctrine and the constitutional Ex Post Facto Clause.").

164. But see Gee v. State, 508 N.E.2d 787, 788 (Ind. 1987) ("The savings clause ... provides that an offense ... shall be prosecuted and remains punishable under ... the statute in force at the time the offense was committed."); State v. Cramer, 413 P.2d 994, 996 (Kan. 1966) (noting that the general savings statute preserves "all rights and remedies under a repealed statute when the repealing statute is silent as to whether such rights and remedies shall be abrogated or not."); State v. Dodge City, 470 N.W.2d 795, 797 (Neb. 1991) ("[U]nder the general saving clause, a pending action is not affected by the repeal or amendment of a statute, and the laws in effect at the time of the commencement of the action are controlling.").

165. Judicial restraint is defined as "A philosophy of judicial decision-making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent." BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

166. The federal general savings statute reads:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.
prevent the "technical abatement" of a pending prosecution.\textsuperscript{167} Over time, similar to the general saving statutes in use at the state level, the federal general saving statute has exceeded its original scope and prevented the retroactive application of ameliorative legislative changes.\textsuperscript{168} While the courts have maintained this rule, there have been two noteworthy exceptions which suggest that these courts practice retroactive amelioration without acknowledging it: the repeal of a constitutional amendment or the replacing of formerly proscribed conduct with an affirmative right.\textsuperscript{169} In both circumstances, the defendants have been allowed to benefit from the ameliorative legislative changes despite the federal general saving statute.

a. Constitutional Amendment Exception

When the National Prohibition Act was repealed, there were several pending prosecutions that the Supreme Court decided to terminate.\textsuperscript{170} According to the Court, adherence to the federal general saving statute would have been inappropriate because it would have broadened the constitutional authority of Congress\textsuperscript{171} to prevent an ameliorative constitutional change from being given effect. This would permit the preemption of a constitutional amendment with a legislative statute, thereby elevating the intent of the legislators over the expressed will of the people. While the Court may have relied upon a "technical" reason to forgo adherence to the federal general saving statute, it was engaging in retroactive amelioration. The Court's action in practice was no different than those of the state courts that have applied ameliorative changes retroactively despite a general saving statute. The fact that the ameliorative change was a constitutional amendment provided the Court with reasons to deny giving effect to the federal general saving statute and thus allow retroactive amelioration to take place. Although the Court based its reason on the idea of a superseding legal authority, the will of the people over congressional statutory authority, the practical effect is that the Court engaged in judicial retroactive amelioration. In the other instance, the

\textsuperscript{167} See MacKenzie, supra note 29, at 181–82.
\textsuperscript{168} Id. at 174.
\textsuperscript{169} See Hamm v. City of Rock Hill, 379 U.S. 306, 314–15 (1965) ("[T]he Civil Rights Act works no such technical abatement. It substitutes a right for a crime. So drastic a change is well beyond the narrow language of amendment and repeal. It is clear, therefore, that if the convictions were under a federal statute they would be abated.").
\textsuperscript{170} United States v. Chambers, 291 U.S. 217, 222 (1934).
\textsuperscript{171} The Court in Chambers stated:

The law here sought to be applied was deprived of force by the people themselves as the inescapable effect of their repeal of the Eighteenth Amendment. The principle involved is thus not archaic, but rather is continuing and vital—that the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it.

\textit{Id.} at 226.
Court applied an ameliorative change retroactively by terminating prosecutions in which the proscribed conduct became an affirmative right.

b. Affirmative Right Exception to the Federal General Saving Statute

The other notable example of the Court giving effect to an ameliorative change was the passage of the Civil Rights Act of 1964 where the Court recognized an affirmative right exception to the federal general saving statute. The Court ignored the federal general saving statute and applied an ameliorative legislative change retroactively to several pending state prosecutions following the passage of the Civil Rights Act of 1964 in *Hamm v. City of Rock Hill*.172 In *Hamm*, a consolidation of several sit-in cases, the Court chose not to adhere to the federal general saving statute which would have prevented the abatement of the pending prosecutions of defendants who had violated state trespass laws.173 The Civil Rights Act of 1964174 effectively outlawed public accommodation discrimination and “remove[d] peaceful attempts to be served on an equal basis from the category of punishable activities.”175 With the passage of the Act, the conduct for which the various defendants were prosecuted and convicted had been decriminalized. Prosecutors argued, however, that the prosecutions should continue unabated and the prior convictions allowed to stand based on the federal general saving statute. The Court disagreed, reasoning that the existing state trespass laws had been supplanted and no longer existed following the passage of the Civil Rights Act. It held that the purpose of the federal general saving statute was to prevent technical abatement,176 not amelioration.

The Court reiterated the fundamental premise of the abatement doctrine that a prosecution could not continue because the governing statute had been repealed following a legislative change177 and in the same breath, also recognized the principle that a continued prosecution in light of a change that decriminalizes the conduct may in fact undermine legitimate goals of punishment, such as deterrence, incapacitation, rehabilitation, and

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172. *Hamm*, 379 U.S. at 307. The group of defendants in *Hamm* had been prosecuted for violating state laws for trespassing following lunch counter sit-ins. In each case, the defendants were prosecuted and convicted, and the respective state supreme court had affirmed the trial court decisions. *Id.* at 307–08.

173. MacKenzie, *supra* note 29, at 174 (“[T]he Court found that the Civil Rights Act of 1964 caused all such nonfinal prosecutions to abate even though the act did not expressly so provide. No barrier to this decision was found in the federal savings statute, despite the broad interpretation indicated by prior case law and the clear language of the statute itself.”).


175. *Hamm*, 379 U.S. at 308.

176. See MacKenzie, *supra* note 29, at 182 (“[A]though the savings provision was not specifically discussed, the legislative history of the act of 1871 does lend some support to the Court’s conclusion in *Hamm* that the purpose of the savings statute was to obviate mere technical abatements.”).

177. *Hamm*, 379 U.S. at 313 (1964) (noting that the Civil Rights Act is federal legislation and the court applies it to the instant cases by using the Supremacy Clause).
Although the Court relied heavily on principles of the common-law doctrine of abatement, the language that the Court invoked reflects the language of retroactive amelioration. For example, the Court opined that Congress clearly did not mean to prohibit the retroactive application of the ameliorative changes embodied in the Civil Rights Act. Further, the Court noted that the federal general saving statute was not meant to prevent the retroactive application of ameliorative criminal legislation because it was created specifically to prevent the triggering of the abatement doctrine following a legislative change in which the penalty for an offense was increased. Thus, the federal general saving statute was to prevent a "technical abatement only." The Court declared that because it was "so drastic a change," it was beyond the scope of the "narrow language of amendment and repeal."

According to the Court, the magnitude of the change from illegal conduct to an affirmative right was such that ordinary rules of statutory construction were inapplicable. Moreover, given the circumstances, the purpose of the federal general saving statute was not meant to prohibit the granting of new rights. In short, the Court's reasoning appears to differentiate its actions from that of its state court counterparts but it does not. The state courts also rely upon similar reasoning when disregarding the general saving statutes. Furthermore, the Court's retroactive amelioration process is even more so like that of its state court counterparts in that the retroactive application of the ameliorative changes is also restricted to cases that have not yet reached final judgment.

Other federal courts have consistently held that in the absence of express language applying an ameliorative change retroactively, the federal general savings statute is to be enforced and the defendant will not receive

178. Id. at 313-14 ("[T]he principle takes the more general form of imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive.").

179. Id. at 310-11.

180. Id. at 314 ("The federal saving statute was originally enacted in 1871... It was meant to obviate mere technical abatement such as that illustrated by the application of the rule in [United States v. Tynen, 78 U.S. 88 (1871)] decided in 1871.").

181. Id.

182. Id. at 314-15 ("We cannot believe the Congress... intended the Act to operate less effectively then the run-of-the-mill repealer. Since the provisions of the Act would abate all federal prosecutions it follows that the same rule must prevail under the Supremacy Clause which requires that a contrary state practice or state statute must give way. Here the Act intervened before either of the judgments under attack was finalized. Just as in federal cases abatement must follow in these state prosecutions. Rather than a retroactive intrusion into state criminal law this is but the application of a long-standing federal rule... that since the Civil Rights Act substitutes a right for a crime any state statute, or its application, to the contrary must... give way under the normal abatement rule covering pending convictions arising out of a pre-enactment activity.").

183. Id. at 313-15 ("Although Chambers specifically left open the question of the effect of its rule on cases where final judgment was rendered prior to ratification of the Twenty-First Amendment, and petition for certiorari sought thereafter, such an extension of the rule was taken for granted in the per curiam decision in [Massey v. United States, 291 U.S. 608 (1934)].... [T]he Act intervened before either of the judgments under attack was finalized...").
the benefits of a newly amended statute. 184 These courts have explicitly rejected the state court arguments that have been used to apply ameliorative changes. 185 Federal courts have further emphasized that the federal general savings statute is not an optional rule of statutory construction that need not be followed, 186 a proposition that the Supreme Court has also confirmed. 187 The failure to give retroactive effect to ameliorative changes, however, has been challenged on the grounds that a statute’s effective date signaled not only the prospective date in which the application of the amendment was to take place, but the more important fact that the amendment should also be given immediate retroactive effect to all pending prosecutions. 188 Courts have, however, disagreed with this characterization, stating that immediate retroactive effect would not be unjust on equal protection grounds. 189 Although the position of the courts appears undeniable, it has not been fully foreclosed. These courts have questioned whether it would matter at what stage a prosecution was in when the ameliorative change was passed. 190

184. See Holiday v. United States, 683 A.2d 61, 71 (D.C. Cir. 1996) (“In 1931, two federal circuit courts of appeals, including the United States Court of Appeals for the District of Columbia Circuit, considered that amendment, which substantially reduced the maximum penalties for selling not more than a gallon of liquor. They held that, in the absence of a provision applying the amendment to previously committed offenses, the general savings statute applied; the amendment ‘had no application to pending cases.’”); see also Hurwitz v. United States, 53 F.2d 552, 552 (1931) (citing Maceo v. United States, 46 F.2d 788 (5th Cir. 1931)).

185. Holiday, 683 A.2d at 72 (discussing United States v. Ross, 464 F.2d 376 (2d Cir. 1972)) (“Ross gave short shrift to the proposition that the general savings statute applied only to ‘technical abatement’ of an entire prosecution, not to mere sentencing issues. Ross also rejected the contention that, because § 109 literally applied only to save a ‘penalty, forfeiture, or liability incurred’ under the repealed statute, the savings statute must apply only to collateral attacks on sentences already imposed. If the court in Ross emphasized the plain language of § 109 that ‘[t]he repeal of any statute shall not . . . extinguish any penalty, forfeiture, or liability incurred under such statute,’ and concluded that, because ‘sentencing is an integral part of the prosecution,’ it was ‘incurred’ (meaning it had accrued) as of a time when the criminal act was committed, before the new sentencing provisions became effective.”) (citations omitted).

186. See id. at 79–80 (“In applying the general savings statutes we are not dealing with optional rules of statutory construction. . . . These general statutes . . . cannot be flicked aside as though legislative intent can, and must, be divined without reference to them.”).

187. Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908) (“[T]he provisions of [the savings statute later recodified as 1 U.S.C. § 109] are to be treated as if incorporated in and as a part of subsequent enactments, and . . . under . . . general principles of construction requiring . . . that effect be given to all the parts of a law, the section must be enforced unless, either by express declaration or necessary implication.”).

188. See Holiday, 683 A.2d at 78 (“The only way to conclude . . . that the Council ‘expressly’ provided for application of the repealer to all pending prosecutions where sentence had not been imposed (or adjudicated to a final conviction) is to say that there is some kind of objectively discernible imperative—inherent in adopting ameliorative sentencing legislation—which unambiguously means that the very reference to an effective date signals effectiveness immediately, including application to proceedings in pending prosecutions commenced at a time when harsher sentences were anticipated.”); see also People v. Oliver, 134 N.E.2d 197, 202 (N.Y. 1956).

189. See Holiday, 683 A.2d 61 at 78–79 (“We cannot say that a legislature could not rationally conclude that the best approach would be a purely prospective one, so that all defendants who committed crimes before the statute became effective would be treated equally.”).

190. Id. at 71 n.23 (“[N]either Hurwitz’s nor Maceo’s sentence had been finally adjudicated before the ameliorative amendment had become effective. . . . [W]e do not decide whether there may be situations in which the apparently different timelines in Maceo and Hurwitz would produce different
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Hence, the retroactive application of an ameliorative change may be proper under the right circumstances. With the inconsistency at the state and federal courts, judicial retroactive amelioration lacks uniformity and is inconsistent in its application. The legislatures, however, have a better approach to provide effective retroactive amelioration.

B. Legislative Retroactive Amelioration

The legislatures in a minority of jurisdictions engage in retroactive amelioration by attaching an ameliorative amendment exception\(^{191}\) to their general saving statutes.\(^{192}\) In doing so, the legislature accomplishes the goals of preventing a defendant from being released from criminal liability while still applying a less severe penalty.\(^{193}\) An ameliorative amendment exception therefore insures not only that the proscribed conduct will be punished, but also that the punishment is set at a sufficient level to achieve the goals of punishment. While the current legislative amelioration practice results in the defendant receiving the benefits of an enlightened legislative decision to reduce the punishment for an offense, there are limitations.

Presently, the ameliorative amendment exception is given effect if there is no express saving clause and the prosecution has not become final.\(^{194}\) With these limitations, the legislature’s recognition that the original penalty is too harsh and its retention is vindictive is meaningless. The benefits that are to be received from ameliorative sentencing changes should therefore not be limited to circumstances where there is neither an express saving clause nor has the case become final. In restricting retroactive amelioration with these parameters, the only defendants that are

\(^{191}\) See, e.g., VT. STAT. ANN. tit. 1, § 214(c) (2007) (“If the penalty or punishment for any offense is reduced by the amendment of an act or statutory provision, the same shall be imposed in accordance with the act or provision as amended unless imposed prior to the date of the amendment.”).

\(^{192}\) See infra Appendix II. Each ameliorative amendment exception provides for the retroactive application of such changes. Some, however, such as Illinois, Kentucky, Virginia, and West Virginia, allow the affected party to select whether the new change should apply.

\(^{193}\) State v. Flagg, 624 A.2d 864, 866–67 (Vt. 1993) (“The purpose of § 214(b)(3) and § 214(c) is to ensure that an accused is not relieved of liability due to a repeal of a statute, while . . . ensuring that outdated, harsh penalties are not imposed after the Legislature has deemed them no longer necessary or appropriate.”); see Holiday, 683 A.2d at 70 (discussing W. VA. CODE § 2-2-8 (2009): “The general savings clause of West Virginia expressly provides for retroactive application of mitigating statutes enacted before the sentence is pronounced but not for retroactive application thereafter.”); see also People v. Thomas, 525 P.2d 1136, 1137 (Colo. 1974) (en banc) (holding that it was error to refuse to apply a change in the law mitigating penalties).

\(^{194}\) The mitigated penalty will be applied unless the defendant chooses the prior penalty. See Wall v. State, 18 Tex. 682, 682 (Tex. 1857) (“The penal code provides that no offense committed prior to the taking effect thereof, shall be affected by the repeal therein, of existing laws, but punishment shall take place as if the laws repealed had remained in force; except that where the punishment shall have been mitigated by the code, its provisions shall apply to and control any judgment to be pronounced after its taking effect, for any offense theretofore committed, unless the defendant elect the former punishment.”); see also Doren, supra note 36, at 1162 (noting that the defendant has choice of punishments).
eligible to benefit from such changes are pre-final judgment defendants. The problem with a temporal division of eligibility is that worthiness of a reduced sentence is a quirk of circumstance or a manifestation of ambiguous statutory language and the defendant’s additional culpable conduct. The proposed retroactive amelioration statute removes the temporal distinction from the application of such changes and expands the scope of retroactive amelioration equally to the entire class of defendants. By doing so, defendants charged with, being prosecuted or convicted under the same offense will receive the same penalty regardless of when the conduct occurred but based upon the concept of equity. Critics of the proposed retroactive amelioration statute will object on a number of criminal justice grounds. This Article responds to several concerns that may be offered.

VI. Objections to Proposed Retroactive Amelioration Statute

Opponents to the proposed retroactive amelioration statute will raise several concerns in support of retaining the current retroactive amelioration practice. The statute in existence at the time the conduct was committed, for example, should govern and remain in force. Also, the process of reevaluating the sentencing not only disturbs final judgments, but it also undermines the concept of a unified prosecution (i.e. adjudication and sentencing as one process). Others may propose that the legislature’s decision to change a sentence may be based on considerations wholly different than mitigation, thus the penalty should not be given retroactive effect because the legislative motivation for that outcome was not present. And still others may assert that extending the scope of retroactive amelioration will place an undue burden on the criminal justice system. In essence, the proposed statute adds an additional stage in the process and further impacts limited resources. The proposed retroactive amelioration is conceived in a manner that will have the least impact on the criminal justice system as a whole and the greatest impact on the individual as discussed below.

A. “Snapshot” Justice

The first concern is a temporal one and is based upon the premise that an individual should be punished under the statute in existence at the time the conduct is committed. This concern focuses on the defendant but also on the circumstances under which the prior statute may have been passed. To apply a statute retroactively neither gives the individual fair notice of the law nor does it respect the decision of the previous legislature.

195. See infra. Part VI.B.
196. See infra. Part VI.E.
and may contravene the will of the people. This view of criminal conduct and punishment can be viewed as the snapshot approach, where the event was committed at a discrete and finite point in time thus requiring the application of the penalty that existed at that specific point in time.

While the commission of the act may have occurred at a static point in time, criminal justice and punishment constantly evolve. The change in the penalty reflects a greater knowledge on the part of the legislature about the relationship between the conduct and the punishment. The reduction or increase in the punishment is an objective indication that the previous punishment was either too harsh or too lenient to satisfy the goals of punishment. Whereas a retroactive increase in punishment is constitutionally barred, a decrease is not. Denying the retroactive application of an ameliorative legislative change simply under the snapshot approach to justice ignores the fundamentally important concept that the standards of justice should and do evolve.

B. Finality of Judgments Undermined

Another concern likely to be raised is that the proposed retroactive amelioration statute undermines final judgments. The proposed statute however does not disturb finalized convictions. The proposed statute does not require that defendant seek relief in the courts. The statute provides a post-final judgment process that allows convicted defendants to receive the same benefits of ameliorative sentencing changes as pre-final judgment defendants are likely to receive. Because the retroactive amelioration process is under the control of the executive branch, the courts have no role in the processing of sentencing readjustments or potential sentencing hearings which can be adjudicated by an administrative law judge. The process of assessing whether a defendant is eligible requires an evaluation of the new statute using the amelioration typology.

The failure to expand the scope of amelioration statute does however lead to problems of equity as it encourages potential abuse or inconsistent application. For example, a defendant who followed the rules, such as appearing for hearings, was convicted under a statute, while another defendant who had fled the jurisdiction was allowed to receive the ameliorative benefits following a legislative change. While the latter may have been more culpable and blameworthy, the former was denied the ameliorative benefits. The sentencing readjustment would occur after the defendant who has been convicted has been transferred to the department of corrections and thus no longer the responsibility of the court, depending on that jurisdiction’s determination of what constitutes final judgment. Apart from the concern that such a process interferes with finality, another

198. See P.H. v. State, 504 P.2d 837, 841 (Alaska 1972) ("[A]s a general rule, the punishment for an offense is governed by the law in effect at the time the offense is committed.").

Concern is that it will undefined the concept of the unitary prosecution.

C. Undermining the Concept of a Unitary Prosecution

Interference with the “unitary criminal prosecution”\(^{200}\) is a concern. Under the current practice of retroactive amelioration, the prosecution process—namely, adjudication and sentencing—is left undisturbed. Critics may argue that a prosecution is incomplete without both the adjudication and sentencing phases, and the concept of giving retroactive effect to an ameliorative change separates the two.\(^{201}\) While this argument may be theoretically correct, it is not correct in practice.

The sentencing process is already bifurcated in capital trials.\(^{202}\) The response is that capital punishment is different and that this division of adjudication and sentencing is unique to this particular punishment. The sentencing process, while a part of a trial, is by all accounts distinct from the adjudication of guilt. During the sentencing phase, for example, there is a lower level of proof for the admission of evidence.\(^{203}\) Moreover, there are additional actors for the State that have no other role except to conduct a pre-sentence investigation and create a profile of the defendant. With these minor differences, the notion of a unitary prosecution is in name only. Sentencing as a practice therefore is treated fundamentally differently from the adjudication phase. Furthermore, a defendant’s sentence is revisited and reviewed by a number of different entities at various stages, such as collateral review, parole boards, and the power of the executive to pardon. Finally, critics may suggest that an ameliorative change may not have been prompted by a legislative concern for the harshness of a penalty but for other reasons.

\(^{200}\) State v. Reis, 165 P.3d 980, 988 (Haw. 2007)

\(^{201}\) See Holiday v. United States, 683 A.2d 61, 72 (D.C. Cir. 1996) ("In construing the savings clause—'Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals or amendments made by [it] . . . or abated by reason thereof'—the Court confirmed in Bradley v. United States, 410 U.S. 605 (1973) that sentencing is part of the prosecution; the sentence is not part of a subsequent, severable proceeding.").

\(^{202}\) See Richard A. Rosen, Innocence and Death, 82 N.C. L. Rev. 61, 80 n.72 (2004) (noting that American death penalty jurisdictions typically provide for separate guilt and penalty trials in capital cases).

\(^{203}\) During the adjudication phase, the standard is beyond a reasonable doubt, but the threshold is lower with respect to sentencing. See Christoph Engel, Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law, 33 VT. L. REV. 435, 439 n.38 (2009) (discussing the preponderance of the evidence standard at sentencing hearings); Note, The Due Process Roots of Criminal Collateral Estoppel, 109 HARV. L. REV. 1729, 1745 n.95 (1996); see also United States v. Conley, 92 F.3d 157 (3d Cir. 1996) (discussing clear and convincing standard at sentencing hearings); Scott M. Brennan, Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings, 77 IOWA L. REV. 1803, 1819 (1992).
D. Amendment Reasons May Be Wholly Unrelated to Amelioration

The legislature's decision to amend a statute and reduce a penalty may have been motivated by reasons wholly unrelated to a desire to mitigate the penalty. For some jurisdictions, the decision may be based upon fiscal concerns or due to overcrowding. As a result, the legislative decision to change a penalty may be focused on addressing these issues. Regardless of motivating factor, the legislature has linked those practical concerns with goals of punishment. The legislature may not desire to ameliorate the punishment, but its decision to reduce the punishment reflects an assessment that the offender no longer needs to be punished as long. On the other hand, the decision to ameliorate may be in reaction to prior legislative changes that occurred in response to perceived criminal justice epidemics.

Responding to the public, legislators may have engaged in law-making merely to appease their constituents. For instance, the disparity\(^{204}\) between crack and powder cocaine sentencing is a prime example.

> [P]artly by design, more by default, and in response to pressures on legislators who are expected to initiate action to do something about the crime problem, we continue to pass criminal laws with drunken abandon as if the laws themselves had a sacrosanct or charismatic quality. Further, the passage of laws is too often done without asking whether or not it is reasonable to assume that the behavior can be effectively controlled by the system of criminal justice.\(^{205}\)

After time, however, the effect of the changes can be analyzed and adjusted accordingly, as in sentencing disparities between crack cocaine and powder cocaine. The reasoning also operates in the other direction. A legislature may respond to the fact that an earlier body made the penalties too lenient and subsequently increases. While the legislature is constitutionally barred from applying the newly increased punishment retroactively, it does not mean that the change cannot occur. The retroactive amelioration statute reflects society's new assessment of what is an appropriate punishment. And while the constitutional prohibition exists to prevent the tyranny of the state, there is no need to prevent the benevolence of the state. Lastly, the proposed statute has the potential to be burdensome for the criminal justice system.

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204. See infra. notes 209–211 and accompanying text.
205. GRUPP, supra note 35, at 4.
E. Undue Burden on Criminal Justice System

The final argument against the proposed retroactive amelioration statute is that the retroactive application of ameliorative changes will be burdensome to the criminal justice system,\textsuperscript{206} further straining limited resources. Critics might claim that the system will face challenges in providing a post-final judgment amelioration process. Inconvenience, however, should not serve as a barrier to achieving justice.\textsuperscript{207}

In 2007, the United States Sentencing Commission reduced the advisory sentence for crack cocaine under the Federal Sentencing Guidelines in an attempt to address the sentencing disparity between crack and powder cocaine.\textsuperscript{208} The obvious question then arose as to how to handle those individuals that had already been sentenced. It was estimated that over nineteen thousand federal prisoners would be affected by the change.\textsuperscript{209} After acknowledging the sentencing disparity, the Commission held that it would be unjust to allow sentenced prisoners to remain incarcerated under their original sentences.\textsuperscript{210} Thus, the Sentencing Commission was faced with the challenge of remedying this past inequity and did so by calling for the gradual release of crack cocaine offenders, as determined by federal sentencing courts. The retroactive amelioration statute would present similarly manageable challenges.

Pre-final judgment defendants would have ameliorative changes applied as they currently do, so the increased administrative burdens to that class of defendants would be minimal. The difference would be that rather than have the court assess whether an ameliorative change had occurred, the

\textsuperscript{206} Vicory v. State, 400 N.E.2d 1380, 1383 (Ind. 1980) ("[A]s a practical matter, a legislature would not likely want to burden the courts with massive sentence reviews.").

\textsuperscript{207} See Metter, supra note 22, at 244 ("if equal protection may be denied on the grounds of administrative convenience, the guarantee of equal protection of the law becomes fictional.").

\textsuperscript{208} U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 706 (2007). The Supreme Court has also recognized this sentencing disparity. See Spears v. United States, 129 S.Ct. 840, 844 (2009) (holding that district courts are entitled to vary categorically from the crack-cocaine Guidelines based on policy disagreements about the sentencing disparity rather than individual determinations); Kimbrough v. United States, 552 U.S. 85, 91 (2007) (holding that a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times as much powder cocaine and that a district judge may consider this disparity when finding a sentence within the Federal Sentencing Guidelines unreasonable).


\textsuperscript{210} The Commission decided to apply the 2007 amendment retroactively. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. (2008); see also Press Release, United States Sentencing Commission, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at http://www.uscc.gov/PRESS/rel121107.htm (noting that the decision to apply the amendment retroactively will not apply to every crack cocaine offender and that it will be up to federal sentencing courts to determine whether and by how much each offender's sentence should be lowered).
legislature would have already made that predetermination. The difficulty would rest largely with post-final judgment defendants. The process would be relegated to an administrative body that would be notified by the legislature that a penalty for an offense had been ameliorated. The administrative sentencing board would be responsible for noting the change and providing notice of the change to the defendant. If, however, the board failed to do so or did not apply the change, then the defendant could seek a sentencing review hearing to petition to have the ameliorative change applied. The impact of the existing cases could be handled by having existing parole boards adopt the responsibility as a part of their existing duties.

VII. Conclusion

The proposed retroactive amelioration statute provides a mechanism for post-final judgment defendants to have ameliorative legislative changes applied to them. Currently, retroactive amelioration is either denied outright or limited to circumstances where the legislature has not included an express saving class and final judgment has not been attained. As a result, ameliorative legislative changes are limited to pre-final judgment defendants whose cases are still pending when the legislature amends a statute. The restriction of ameliorative changes in this manner is based not upon the degree of culpability but temporality. To deny the application of change based upon such an arbitrary distinction offends the theories of punishment whether one is a consequentialist or retributivist.

The proposed statute builds upon the existing saving clause framework which was created to prevent the unintended and premature termination of pending prosecutions following any legislative change. Using the general saving statute along with an ameliorative amendment exception as a framework and adding a post-final judgment provision, the proposed retroactive amelioration statute seeks to make the application of retroactive amelioration uniform not only within but also across jurisdictions. In denying an ameliorative legislative change, jurisdictions are engaging in vindictive justice, and that is manifestly unjust.

211. There may be challenges as to whether a change should be designated as ameliorative, but according to the amelioration typology, see supra Part III.A and the definitions set forth in the Proposed Statute, infra Appendix I, that should be easy to ascertain.
Appendix I—Proposed Retroactive Amelioration Statute

Retroactive Amelioration Statute Purpose: THE PURPOSE OF THIS STATUTE IS: (1) to increase the intra-jurisdictional uniformity with respect to legislative changes by providing clear definitions when a legislative repeal, repeal and reenactment or amendment of a statute constitutes an ameliorative change; and (2) to expand the scope of applying ameliorative changes to individual whose convictions have become finalized and no longer have any judicial recourse.

§ 1. Definitions
(a) Amelioration:
   (i) Decriminalization of Conduct. The reduction of a sentence through either:
       (A) The unqualified repeal of a statute; or
       (B) The change of an offense from a designation of criminal to civil; or
       (C) The replacing of criminal offense with an affirmative right.

   (ii) Reclassification of Conduct. The reclassification of conduct is the legislative categorization of an offense into different degrees or classes. Example: The change of a felony from a Class A to a Class B; or from a felony to misdemeanor; or

   (iii) Reduction of Sentence. The reduction of the sentence is when the penalty is lessened without repeal or reclassification. The rule of thumb is that whenever the lower boundary, the minimum, is decreased, then the change will be considered ameliorative. Example: Assume that a statute has the following penalty: a minimum of five years and a maximum of ten years. Whenever the minimum is changed to a sentence that is less than five years then that will constitute an ameliorative legislative change.
(iv) The following are examples of when an ameliorative change has occurred:
(A) the minimum is decreased and the maximum remains unchanged; or
(B) the minimum is decreased and the maximum is increased; or,
(C) both the maximum and the minimum are decreased.

(v) The following are examples of when an ameliorative change has not occurred:
(A) the minimum is increased while the maximum remains unchanged; or
(B) the maximum is increased while the minimum remains the same; or
(C) both the minimum and the maximum are increased; or the minimum is increased and the maximum is decreased.

(b) Amelioration Clause. An amelioration clause is a statutory provision that allows an ameliorative change to be applied retroactively.

(c) General Saving Clause. A general saving clause preserves rights and liabilities which have accrued under a repealed act.

(d) Retroactive (or retrospective). Extending in scope or effect to matters that have occurred in the past.

(e) Unqualified Repeal. The unqualified repeal of a statute operates to deprive a party of all such rights that have not been reduced to final judgment.

§ 2. General Saving Clause. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless provided for elsewhere in this Act, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless provided for elsewhere in this Act, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability unless provided for in this Act.

§ 3. Amelioration Clause. If the penalty or punishment for any offense is reduced by the amendment of an act or statutory provision, the same shall
be imposed in accordance with the act or provision as amended and shall be applied to defendants whose cases have not become final and to defendants who have finalized convictions in accordance with the provisions set forth below.

(a) Pre-Final Judgment Application

   (i) Ameliorative legislative changes will be applied retroactively:
       (A) in the absence of an express saving clause; and
       (B) if the defendant’s case has not reached final judgment.

   (ii) if the case has become final, then the provisions of 3(b) will become effective

(b) Post-Final Judgment Application

   (i) Ameliorative legislative changes will be applied retroactively when the penalty for an offense has been mitigated. The ameliorative change will be applied by an Administrative Sentencing Board (“ASB”).

   (ii) If the ASB fails to give retroactive effect to the ameliorative sentencing change, then the defendant can petition to have the sentence reviewed at a Sentence Readjustment Hearing (“SRH”).
### Appendix II—Saving Provisions

<table>
<thead>
<tr>
<th>Jur.</th>
<th>GSS&lt;sup&gt;212&lt;/sup&gt;</th>
<th>GSS w/ ameliorative amendment exception</th>
<th>No GSS</th>
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<th>CRC&lt;sup&gt;214&lt;/sup&gt;</th>
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212. General Saving Statute.
213. Constitutional Saving Clause.
214. Constitutional Retroactive Clause.
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