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Judicial Dismissal in the Interest of Justice

Valena E. Beety

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Judicial Dismissal in the Interest of Justice

*Valena E. Beety**

ABSTRACT

Of the 1.6 million Americans in prison, most inmates are serving sentences for non-violent offenses. Who is responsible? Hyper-incarceration is not simply due to outdated drug laws or stringent sentencing. Courts in the last thirty years have taken a lackadaisical back seat. Prosecutors are failing in their gate-keeping function nationally. Most simple arrests are prosecuted without even evaluating the substance of the case. Police stops can snowball into convictions through our plea system. In short, the criminal justice system provides no systemic accountability for its own results.

This Article focuses on this lack of accountability and proposes a conceptual shift, as well as a practical solution: pivoting accountability to the courts. Twelve states recognize the capacity of judges to dismiss cases in the interest of justice. Dismissal in the interest of justice allows a court to dismiss a procedurally proper, but unjust or unjustifiable, cause of action. Thus, dismissing cases in the interest of justice can provide a check where few exist for overzealous prosecutions, race-based patrolling, and overuse of “three strikes” laws. In addition, dismissals can require more consistency and reliability in evidence and in state prosecutions, whether on the misdemeanor or felony level. And ultimately all states can create this capacity through state laws and state rules of criminal procedure.

Transforming our prison paradigm moves beyond shifting individual laws; court-initiated dismissals can address the underlying problem of accountability. By finding a practical application already in use by some states, this Article creates a useful framework for both ends of the spectrum: conceptually reforming our system while practically assisting individual cases and lives.

* Associate Professor, West Virginia University College of Law. Many thanks for the valuable opportunities to present this paper and receive feedback: University of Texas School of Law through the Big XII Scholar Program, the University of Virginia School of Law Neighborhood Roundtable, and the University of Minnesota Law School through the Robina Institute of Criminal Law & Criminal Justice. In particular, special thanks go to Jordan Steiker, Carol Steiker, Jennifer Laurin, Darryl Brown, Brandon Garrett, Jenny Roberts, Corinna Lain and Josephine Ross for their thoughtful review and suggestions. My appreciation finally goes to Jared Dotson and Greg Siepel for their excellent research assistance.

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INTRODUCTION

*"I have always found that mercy bears richer fruits than strict justice."*¹
– President Abraham Lincoln

Crack cocaine offenders are getting a second chance. On January 30, 2014, the Obama Administration called on defense attorneys to locate inmates who had been harshly sentenced under drug laws and to encourage them to apply for clemency.² One month prior, President Obama granted clemency to eight federal inmates sentenced under the old crack-cocaine law. He commuted their sentences saying,

Because of a disparity in the law that is now recognized as unjust, they remain in prison, separated from their families and their communities, at a cost of millions of taxpayer dollars each year. . . . Commuting the sentences of these eight Americans is an important step toward restoring fundamental ideals of justice and fairness.³

These steps toward "restoring . . . justice and fairness" signal a changing response to American drug crime prosecution and hyper-incarceration. They indicate a return to the natural rights and principles of the Constitution to be executed by multiple branches of government.⁴

In the judicial branch, some state courts have the power to dismiss cases *sua sponte*. Acting "in the furtherance of justice," these courts can consider context, as well as the just or unjust application of laws. Where this responsibility has traditionally lain with prosecutors, this Article advocates a shift of accountability to the courts. Courts may dismiss cases that should never have been filed "in the interest of justice."

Accountability lies at the heart of the criminal justice system. In the face of hyper-incarceration, this Article seeks to address this underlying lack

1. Erika Andersen, *Abraham Lincoln: 10 Quotes To Help You Lead Today*, FORBES (Dec. 17, 2012, 12:35 PM), <http://www.forbes.com/sites/erikaandersen/2012/12/17/abraham-lincoln-10-quotes-to-help-you-lead-today/>.

2. Matt Apuzzo, *Justice Dept. Starts Quest for Inmates to Be Freed*, N.Y. TIMES (Jan. 30, 2014), http://www.nytimes.com/2014/01/31/us/politics/white-house-seeks-drug-clemency-candidates.html?emc=eta1&_r=0.

3. Press Release, The White House Office of the Press Secretary, Statement by the President on Clemency (Dec. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/19/statement-president-clemency>.

4. As President Abraham Lincoln put it, "The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not [sic] do, at all, or can not [sic], so well do, for themselves – in their separate, and individual capacities." ABRAHAM LINCOLN, *Fragment on Government*, in THE LANGUAGE OF LIBERTY: THE POLITICAL SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 140 (Joseph R. Fornieri, ed., Regnery Publishing 2009) (1854). See also Jason A. Adkins, *Lincoln's Constitution Revisited*, 36 N. KY. L. REV. 211, 213 (2009).

of accountability and shift the system. Rather than piecemeal reform through individual laws, this systemic shift can alter public conceptualization of the criminal justice system and reinstate public trust.

And yet this Article is more than a concept; it is a practical application that some states are already implementing. Courts can apply this conceptually radical shift rather simply – as a small act of reprieve for misdemeanor convictions. This Article thus creates a useful framework for both ends of the spectrum: conceptually reforming our system while practically assisting individual cases and lives.

Courts, in the thirty years since the rise of hyper-incarceration, have largely been constrained as onlookers. Prosecutors control charging and plea offers. The final criminal and civil punishment is often accepted as a result of no one individual action – rather just the system in motion. Shifting accountability to the court may ensure justice and true service of the community by a criminal prosecution.

Twelve states permit trial courts to dismiss counts – either misdemeanor or felony – on their own accord. Eight of these states do so through statute, four through state rules of criminal procedure. For those state courts that do not currently have the capacity to *sua sponte* dismiss cases in the interest of justice, the further promulgation of state rules of criminal procedure can create this power for courts in support of judicial authority.

In the face of predominant prosecutorial power, court discretion can balance a system that indiscriminately undermines the future life choices of non-violent offenders through a simple arrest. Part I of this Article provides background on the current state of the criminal justice system. This Part discusses the War on Drugs, prison expansion, and heightened prosecutions, along with the elimination of parole and decreased judicial discretion. Part I also addresses civil punishments for criminal convictions and the burden of these punishments on other members of society. In brief, these punishments result in temporary or permanent exile.

Part II proposes a framework of judicial accountability and a shift away from the current justice model, specifically reclaiming the power of courts to dismiss cases – on their own initiative or that of defense counsel – in the interest of justice. This pivot away from prosecutors can provide greater transparency; shifting the responsibility may remedy how off-course our system has travelled.

Part III discusses the conceptual and ethical quandaries of judges facing unethical laws or punishments. These judges are charged with the responsibility of either upholding such laws and punishments or following internal or social morals and ethics. Part III examines the ultimate purpose of the Article's proposed shift in accountability, as well as potential drawbacks. This Part responds to those challenges using a philosophical analysis of the role of judges in criminal proceedings.

Part IV, in contrast, provides the most practical usage of dismissal in the interest of justice: three strikes laws. This Part discusses current dismissals and how this power can most practically be exercised. Part IV elaborates on

the usefulness of dismissal in the interest of justice in response to mandatory minimum sentences, focusing specifically on its relationship with three strikes laws.

Part V continues the application with the real usage of dismissal, predominantly in misdemeanor cases, offering a conceptual comparison to *de minimis* infractions. This Part also briefly explains the importance of misdemeanor dismissals, even though misdemeanors are often construed as insignificant, minor convictions.

Finally, Part VI details how differing state laws provide the avenue for courts to dismiss actions and compares the approaches implemented by different states. Part VI concludes by proposing that states consider creating a relevant rule of criminal procedure, promulgated by the state supreme court in most jurisdictions.

This Article considers how courts can rehabilitate our criminal justice system by reclaiming their own authority and dismissing cases in the interest of justice. By creating this capacity for courts, either through legislation or through state rules of criminal procedure, society can prevent criminal prosecutions that are against the interests of justice.

I. THE CURRENT CRIMINAL JUSTICE SYSTEM: THE WAR ON DRUGS, PRISON EXPANSION, ELIMINATION OF PAROLE, AND THE DECREASE IN JUDICIAL DISCRETION

In his seminal book, *The Presentation of Self in Everyday Life*, Erving Goffman posits that artificial, willed credulity happens on every level of social organization – an attempt to ignore any reality that may disrupt the social structure.⁵ A woman trips and others look away, pretending that she did not fall. Until recently, increased policing and heightened sentencing served a similar purpose: to maintain a fiction that truly dangerous people in society can be identified, punished, and separated from the rest of society, primarily by prosecutors. The reality of hyper-incarceration and the disproportional application of drug laws to poor people of color began the shift away from containment policy, and instead, toward reinstating judicial discretion and solutions to rein in a problem that has become too large to ignore.

A. *The Growth of Prisons and a Rise in the Incarceration Rate*

In the words of Angela Davis, the 1980s prison ideologically became “an abstract site into which undesirables are deposited,”⁶ an othering that separates the felon from society, both morally and socially. Incapacitation

5. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 167–68 (1959).

6. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 16 (2003).

influenced the growth and functioning of prisons at that time.⁷ Incapacitation rose in popularity because the prevailing reasons of punishment – rehabilitation and deterrence – appeared to be failing.⁸ Indeed, shortly before prisons began expanding, there was a widespread belief that prisons might be abolished altogether as a failed project.⁹ Even the descriptive language changed: from “correctional institutions” and “reformatories” grew “detention centers” and “maximum security.”¹⁰

The real world consequences of this abstract creation have been catastrophic. Criminal and civil punishments have ballooned in the past thirty years; our criminal justice system expanded and transformed across all branches of government.¹¹ When our government and society accepted incapacitation to justify imprisonment, we adopted an expansionist vision of prison rather than the minimalist “worst of the worst” approach.¹² The number of inmates grew from 241,000 in 1975 to 1.6 million at the time of this Article;¹³ parole diminished or disappeared completely; sentences for crimes became mandatory and harsher, particularly for non-violent drug offenses; and over this thirty-year time period, individuals with drug convictions slowly lost their rights as citizens – long after their “punishments” and criminal sentences ended.¹⁴

The Federal Sentencing Guidelines of 1984 mandated fixed sentencing ranges for most federal crimes, leaving courts with little discretion.¹⁵ With

7. FRANKLIN E. ZIMMING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 3 (reprt. 1997).

8. *Id.* at 8–9; see also FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 33–34, 57–58 (1979) (“[T]he rehabilitative ideal constitutes a threat to the political values of free societies. . . . [R]ehabilitative objectives are largely unattainable and that rehabilitative programs and research are dubious or misdirected.”).

9. In 1973, the National Council on Crime and Delinquency had asserted “only a small percentage of offenders in penal institutions today” required incarceration. ZIMMING & HAWKINS, *supra* note 7, at 12.

10. *Id.* at 12–13. Interestingly, President Obama’s Chief of the Office of National Drug Control Policy, Gil Kerlikowske, also suggested a change in language: a shift away from war rhetoric used to discuss national drug problems, drug problems that should be equally thought of as a public health issue. See Douglas A. Berman, *Turning Hope-And-Change Talk into Clemency Action for Nonviolent Drug Offenders*, 36 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 59, 63 (2010) (citing Gary Fields, *White House Czar Call for End to ‘War on Drugs,’* *WALL ST. J.*, at A 3 (May 14, 2009)). In her words, “We’re not at war with people in this country.” *Id.*

11. This gives hope that a move toward clemency could also occur across the branches.

12. ZIMMING & HAWKINS, *supra* note 7, at 11.

13. Suzanne M. Kirchhoff, Cong. Research Serv., R41177, *Economic Impacts of Prison Growth*, 7–9 (Apr. 13, 2010), <http://www.fas.org/sgp/crs/misc/R41177.pdf>.

14. *Id.* at 9–10.

15. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3586 (2012); 28 U.S.C. §§ 991–998 (2012).

the adoption of the Sentencing Guidelines came the elimination of the Parole Commission, a major form of executive post-conviction review and adjustment.¹⁶ Prior to the implementation of the Sentencing Guidelines, the U.S. Parole Commission in the executive branch reviewed all sentences.¹⁷ In tandem with this significant loss of executive review, executive pardons likewise decreased.¹⁸

In 1986, Congress passed the Anti-Drug Abuse Act, which codified harsh punishments for drug crimes, in response to the “crack epidemic.”¹⁹ The intervening decades clarified the true distinctions between how crack was portrayed and its actual impact.²⁰ Courts now acknowledge that there is no true chemical distinction between crack cocaine and powder cocaine, despite the 100 to 1 sentencing ratio for the two drugs that was established by the Anti-Drug Abuse Act.²¹ Scientific studies now reveal that there is no verifiable connection between maternal cocaine use during pregnancy and severe harm to the child in utero.²² The alleged problem of “crack babies,”²³ which

16. Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons* 7 (2001), <http://ssrn.com/abstract=269343>. The U.S. Parole Commission still exists thanks to multiple U.S. Parole Commission Extension Acts; however, their review is limited to persons who committed a federal offense before November 1, 1987; persons who committed a D.C. Code offense before August 5, 2000; persons who committed a Uniform Code of Military Justice offense and are parole-eligible; and persons who are serving prison terms imposed by foreign countries and have been transferred to the United States to serve their sentence. See Peter B. Hoffman, *History of the Federal Parole System*, U.S. DEP'T JUST. 2–3 (May 2009), <http://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

17. Shanor & Miller, *supra* note 16.

18. *Id.*

19. Gerald M. Boyd, *Reagan Signs Anti-Drug Measure; Hopes for 'Drug-Free Generation'*, N.Y. TIMES (Oct. 28, 1986), <http://www.nytimes.com/1986/10/28/us/reagan-signs-anti-drug-measure-hopes-for-drug-free-generation.html>.

20. See also Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES (Jan. 26, 2009) <http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=all>.

21. Indeed, one state supreme court struck down a state statute mandating a heightened punishment for crack cocaine versus powder cocaine on an equal protection basis because the statute had a discriminatory impact on African Americans without any rational basis for the heightened punishment. *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991).

22. Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 JAMA 1613, 1626 (2001). The harm of cocaine to a fetus is comparable to smoking tobacco while pregnant. See *id.*

23. Today, poor women of color are still prosecuted for murder for imbibing cocaine while pregnant and suffering a miscarriage or stillbirth. See, e.g., *State of Mississippi v. Gibbs*, No. 2007-0031-CRI (Cir. Ct. of Lowndes Cnty. 2014) (Ms. Gibbs was charged with depraved heart murder, which carries a mandatory life sentence, but her case was dismissed in 2014), <http://www.cdispatch.com/files/30s60432014120102PM.pdf>. See also Ed Pilkington, *Outcry in America as Pregnant Women Who Lose Babies Face Murder Charges*, THE GUARDIAN (June 24, 2011),

even led to the recommended sterilization of some female cocaine users,²⁴ was based on junk science.²⁵

Following Reagan's Anti-Drug Abuse Act of 1986, President Clinton signed into law his own major crime bill in 1994.²⁶ The Violent Crime Control and Law Enforcement Act of 1994 granted \$30 billion to "crime control" and further enforced minimum sentencing.²⁷ Mandatory minimum sentencing was, and continues to be, particularly vindictive toward drug offenders. The most well known mandatory minimum sentencing laws are the "three strike laws."²⁸ First adopted in California in 1994, these laws have proliferated across the states, requiring long minimum terms, or even life sentences, when an offender is convicted of a third felony.²⁹ The shift in sentencing was even noted by former Chief Justice William Rehnquist, who stated that "[m]andatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to . . . get tough on crime."³⁰

<http://www.theguardian.com/world/2011/jun/24/america-pregnant-women-murder-charges>. National Advocates for Pregnant Women has advocated for women charged with felony crimes for having controlled substances in their system when giving birth, a charge that could lead to the twisted outcomes of pregnant women not going to doctors for check-ups and not giving birth in a hospital. See *Punishment of Pregnant Women*, NAT'L ADVOCATES FOR PREGNANT WOMEN, http://www.advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/ (last visited June 26, 2015).

24. Frank et al., *supra* note 22, at 1626 (describing C.R.A.C.K. (Children Requiring a Caring Kommunity) as "a controversial charity that raises money to give mothers with a history of illegal drug use financial incentives to accept long-acting contraception, or, in most cases, sterilization").

25. Lynn Paltrow & Kathrine Jack, *Pregnant Women, Junk Science, and Zealous Defense*, THE CHAMPION (May 2010), http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/PregnantWomenJunkScienceZealousDefense.authcheckdam.pdf.

26. President Clinton's Violent Crime Control and Law Enforcement Act of 1994 (Crime Act), was signed into law on September 13, 1994. Pub. L. No. 103-322, 108 Stat. 1796 (1994). This "sweeping law addresses assault weapon possession, prison funding, community policing, police recruitment and training, 'justice grants,' violence against women and the elderly, sex crimes, terrorism, the federal death penalty (which it applied to numerous new offenses), drug control, youth violence, criminal street gangs, child pornography, victims' rights, and [hate crimes]." Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crime Legislation to Include the Homeless*, 45 No. 5 CRIM. LAW BULLETIN ART. 4 (Fall 2009).

27. See Crime Act, Pub. L. No. 103-322, 108 Stat. 1796.

28. Charles Doyle, CONG. RESEARCH SERV., RL 32040, FEDERAL MANDATORY MINIMUM SENTENCING STATUTES, i (2013).

29. See generally CAL. PENAL CODE §§ 667, 1170.12 (1999 & Supp. 2000); MISS. CODE ANN. § 41-29-147 (2015).

30. Hon. William H. Rehnquist, *Luncheon Address*, in U.S. SENTENCING COMM'N, DRUGS AND VIOLENCE IN AMERICA 283, 287 (1993). Lawmakers themselves have referred to themselves glowingly as "tough on crime." See Rachel E.

Furthering the trend of legislators getting “tough on crime,” in 1996 the Antiterrorism and Effective Death Penalty Act (“AEDPA”) severely limited access to federal courts for post-conviction relief.³¹ AEDPA created a one-year statute of limitations on first time petitioners in federal court, with no exception for claims of innocence.³²

While sentences grew longer and harsher, the industry for private prisons also grew.³³ The Sentencing Reform Act and federal legislation on mandatory minimum sentencing, passed in 1986, 1988, and 1990, led the federal inmate population to double between 1980 and 1989 and to double *again* by 1999.³⁴ As of the time of this Article, the federal prison population has increased 790% since 1980.³⁵ The number of private prisons³⁶ grew to meet the demand of both state and federal criminal systems. Prisons soon faced problems of inadequate health care for inmates,³⁷ sexual violence,³⁸ and overcrowding, to name but a few. In 1996, Congress enacted the Prison Litigation Reform Act (“PLRA”) limiting access to federal courts for inmates and their complaints.³⁹

Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873 n.14 (2009) (quoting federal lawmakers).

31. Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26 (2009).

32. *Id.* Thus, AEDPA has undermined and refused constitutional claims before they can be heard in federal court. *See id.*

33. *Historical Information: A Storied Past*, BUREAU OF PRISONS, <http://www.bop.gov/about/history/> (last visited June 29, 2015).

34. *Id.*

35. Nicole Flatow, *Federal Prison Population Spiked 790 Percent Since 1980*, THINKPROGRESS (Feb. 7, 2013), <http://thinkprogress.org/justice/2013/02/07/1552751/federal-prison-population-spiked-790-percent-since-1980/?mobile=nc>.

36. The primary concern of private prisons is profit; in 2011 Corrections Corporation of America recorded revenue of \$1.7 billion for 2011, and The Geo Group, Inc., recorded revenue of \$1.6 billion for 2011. Suevon Lee, *By the Numbers: The U.S.'s Growing For-Profit Detention Industry*, PROPUBLICA (June 20, 2012), <http://propublica.org/article/by-the-numbers-the-u.s.-growing-for-profit-detention-industry>.

37. *See* Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, HARPER'S MAG. (Aug. 2003), <http://harpers.org/archive/2003/08/sick-on-the-inside/>; Editorial, *Death Behind Bars*, N.Y. TIMES, Mar. 10, 2005, http://www.nytimes.com/2005/03/10/opinion/death-behind-bars.html?_r=0; Opinion, Brent Staples, *Treat the Epidemic Behind Bars Before it Hits the Streets*, N.Y. TIMES, June 22, 2004.

38. *See, e.g.*, WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS, 73–89 (1992); Adam Liptak, *Ex-Inmate's Suit Offers View Into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, <http://www.nytimes.com/2004/10/16/national/16rape.html>.

39. 42 U.S.C.A. § 1997e (West 2013).

The harms to inmates affect more than just the men and women incarcerated. Inmates' children and spouses are also stigmatized⁴⁰ and are often left without financial support. Family members are separated from their loved ones by distance to the prison, and time, until the end of the sentence – a sentence carried out not only by the inmate.⁴¹

Currently, 1.6 million people are incarcerated in the United States; the majority of these inmates were convicted of non-violent crimes.⁴² The cost of incarcerating one percent of the American adult population is \$68 billion annually at local, state, and federal corrections facilities.⁴³ This cost has contributed to state and federal budget deficits during our economic recession.⁴⁴

B. The Social Impact of the Government's Containment Approach to the Criminal Justice System

In 1960, Chief Justice Earl Warren observed that “[c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”⁴⁵ Fifty years later, his observation has only become more accurate.

State and federal legislatures have created collateral penalties to incarceration – penalties that diminish a person's full citizenship rights in society. Previously, courts determined the ultimate sentence for criminal offenses. Now, above and beyond mandatory minimum sentence requirements, legislatures create new administrative punishments, simultaneously restricting the flexibility of courts. The collateral civil penalties of a criminal conviction follow the individual long after the prison sentence has ended.⁴⁶ For instance,

40. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 PRISONS 121 (1999); JEREMY TRAVIS, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15–36 (2002).

41. *See, e.g.*, TERRY A. KUPERS, *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127 (2008); FAMM's History, *FAMILIES AGAINST MANDATORY MINIMUMS*, <http://famm.org/about/famms-history/> (last visited June 29, 2015).

42. E. Ann Carson & William J. Sabol, *Prisoners in 2011*, BUREAU OF JUSTICE STATISTICS (Dec. 17, 2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>. This number is for inmates in state and federal prisons; when including jails, the number rises to 2.3 million people. *Id.*

43. Rebecca Ruiz, *Eyes on the Prize*, THE AM. PROSPECT (Dec. 6, 2010), <http://prospect.org/article/eyes-prize>.

44. *See id.*

45. *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting).

46. Collateral consequences have been inventoried in a variety of states and at the federal level. The ABA has created the National Inventory of the Collateral Consequences of Conviction, which currently has information on all 50 states. *National Inventory of the Collateral Consequences of Conviction*, ABA, <http://www.abacollateralconsequences.org/> (last visited June 30, 2015). *See also* Community Re-Entry Program, Public Defender Service for the District of Columbia, *Collateral*

a minor drug conviction now makes an individual ineligible for welfare benefits, public housing, a driver's license, student loans, insurance, voting, government employment, and many jobs that require a professional license.⁴⁷ These civil punishments have a dramatic influence on the well-being of people with convictions and their families. A court does not control or dictate the implementation of these penalties. The National Employment Law Project estimates that 65 million Americans have a criminal record,⁴⁸ while the Department of Justice puts that estimate at 92 million Americans.⁴⁹

With these obstacles, many people leaving prison are unable to obtain employment. As a result, they may re-offend and return to prison.⁵⁰ Prison time is only part of the problem; the prison label is what supports the system of creating an "undercaste" of individuals in our society.⁵¹ Recognizing the multiple punishments that cannot be controlled by a court further emphasizes the importance of dismissal in the interest of justice and diverting cases before the punishment phase.

Consequences of Criminal Convictions in the District of Columbia: a Guide for Criminal Defense Lawyers, REENTRY NET (June 6, 2010), http://www.reentry.net/library/item.121665-Collateral_Consequences_of_Criminal_Convictions_in_the_District_of_Columbia;_Re-Entry_of_Ex-Offenders_Clinic,_University_of_Maryland_School_of_Law,_A_Report_on_Collateral_Consequences_of_Criminal_Convictions_in_Maryland, SENTENCING PROJECT (Spring 2007), http://www.sentencingproject.org/doc/publications/cc_report2007.pdf; Kelly Poff Salzman et al., ABA Commission on Effective Criminal Sanctions, *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations*, ABA (January 2009), <http://www.abanet.org/cecs/internalexile.pdf>; Molly Kovel, *The Consequences of Criminal Proceedings in New York State*, THE BRONX DEFENDERS (2015), <http://www.reentry.net/ny/search/item.76898>; Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project: Executive Summary*, 36 U. TOL. L. REV. 611 (2005).

47. Margaret Colgate Love, *The Collateral Consequences of Padilla v. Kentucky: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113, 116 (2011). The majority of people convicted of drug crimes are individuals living in poverty; however, this may simply be because drug use by upper and middle class citizens is not detected, recorded, or punished. See Sean Estaban McCabe et al., *Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students*, 60 J. OF ETHNICITY IN SUBSTANCE ABUSE 75–95 (2008).

48. See Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment*, THE NATIONAL EMPLOYMENT LAW PROJECT 1, 13–18 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

49. According to the U.S. Department of Justice, more than 92 million individuals were in the files of the state criminal history repositories on December 31, 2008 (though an individual may have records in more than one state). Bureau of Justice Statistics, *Survey of State Criminal History Systems*, U.S. DEP'T JUST. 2, 12, tbl. 1 (2009), <http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf>.

50. See ZIMMING & HAWKINS, *supra* note 7.

51. "Undercaste" is a term used in MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 94 (2012).

II. JUDICIAL CLEMENCY: DISMISSING CASES IN THE INTEREST OF JUSTICE

Public officials are cautiously moving away from retributive punishments because harsh sentences have not made communities safer, and the retributive system costs taxpayers billions of dollars each year.⁵² The political ramifications of a more merciful approach may not be as detrimental as the hyperbole.

Yet this move has been years in the making. On January 15, 2001, shortly before leaving office, President Clinton delivered this message to Congress, despite his historically “hard on crime” presidency: “We must re-examine our national sentencing policies, focusing particularly on mandatory minimum sentences for non-violent offenders.”⁵³ Since the 1990s, federal judges have expressed their discontent with mandatory minimum sentences⁵⁴ and have called for a change to the sentencing structure.⁵⁵ Justice Anthony Kennedy referred to mandatory minimum sentencing as “misguided” in that it “gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. . . . Most of the sentencing discretion should be with the judge, not the prosecutors.”⁵⁶

Today, it is vital but no longer sufficient for judges to follow the appropriate procedures for applying these laws and punishments. The Supreme Court once held, “Process is not an end in itself. Its constitutional purpose is

52. Suevon Lee, *By the Numbers: The U.S.'s Growing For-Profit Detention Industry*, PROPUBLICA (June 20, 2012), <http://www.propublica.org/article/by-the-numbers-the-u.s.s-growing-for-profit-detention-industry>.

53. President William J. Clinton, Message to Congress: The Unfinished Work of Building One America (Jan. 15, 2001). President Clinton went on to advocate for a 10-to-1 ratio between crack and powder cocaine sentencing policies, rather than a 100-to-1 ratio. *See id.* In signing the bill in 1995, President Clinton rejected the Sentencing Commission’s recommendations for reform and instead maintained the 100-to-1 ratio. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074 (proposed May 10, 1995), rejected by Congress in Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334 (1995), and signed into law by President Clinton.

54. *See* Hon. James G. Carr, *Sentencing Reform and Pretrial Release*, 5 FED. SENT. R. 220, 221 (1993) (calling on the Clinton Administration to reduce mandatory minimum sentences and noting, “The prosecutor’s choice of charges has always influenced ultimate punishment. But before the guidelines, the authority to select charges was offset by the district judge’s unrestrained power to impose a sentence he or she thought most suitable. That counterweight to prosecutorial discretion has been dramatically reduced as a result of federal sentencing reforms.”).

55. The most outspoken federal judge has been federal district court judge Paul Cassell of Utah. *See* Tony Mauro, *Federal Judge Speaks Out Against Mandatory Minimum Sentencing*, NAT’L L. J. (June 27, 2007).

56. Hon. Anthony M. Kennedy, Speech at the ABA Annual Meeting (Aug. 9, 2003), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

to protect a substantive interest to which the individual has a legitimate claim of entitlement.”⁵⁷ Dismissal by a court in the interest of justice is created to address precisely these trappings of empty process.

A. Dismissal in the Interest of Justice and the Courts’ Burgeoning Capacity

Dismissal in the interest of justice allows a court to dismiss a procedurally proper, yet unjust, cause of action.⁵⁸ At common law, courts could dismiss a criminal proceeding only for a legal or procedural defect.⁵⁹ The power to dismiss a case, instead, rested with the prosecutor by virtue of *nolle prosequi*⁶⁰ “to prevent oppression.”⁶¹ Indeed, both *nolle prosequi* and dismissal in the interest of justice were used in response to the AIDS epidemic in the 1990s, where courts dismissed cases against terminally ill defendants.⁶² Some scholars and courts have found dismissal in the interest of justice to be an extension or evolution of the common law *nolle prosequi*.⁶³ Other states emphasize the inherent power of courts to govern their own courtrooms, including the capacity and duty to rule on cases to promote justice.⁶⁴

In 1881, the New York state legislature became the first legislative body to give state courts the power to dismiss criminal proceedings on their own motions.⁶⁵ Since that time, twelve states and Puerto Rico have provided this same capacity to judges: to dismiss cases in the interest of justice.⁶⁶ As the

57. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

58. See John Wirenius, *A Model of Discretion: New York’s ‘Interest of Justice’ Dismissal Statute*, 58 ALB. L. REV. 175, 178–79 (1994).

59. See *id.*

60. *State v. Echols*, 793 P.2d 1066, 1071 (Alaska Ct. App. 1990).

61. The literal meaning of *nolle prosequi* is “I am unwilling to prosecute.” See *Korematsu v. United States*, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984). See Alec Samuels, *Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals*, 1986 CRIM. L. REV. 33, 41 (giving an example of *nolle prosequi*, which is also referred to as “*nol pros*,” when the accused is terminally ill).

62. See Wirenius, *supra* note 58 at 218.

63. See *id.* at 177.

64. See LA. CODE CRIM. PROC. art. 17; see also *State v. Odom*, 993 So.2d 663, 675 (La. 2008) (“Additionally, the trial court had the inherent authority to fashion a remedy to promote justice.”); *State v. Mims*, 329 So.2d, 686, 688 (La. 1976) (“Where the law is silent, it is within the inherent authority of the court to fashion a remedy which will promote the orderly and expeditious administration of justice.”).

65. See Wirenius, *supra* note 58 at 178.

66. CAL. PENAL CODE § 1385 (2015); IDAHO CODE ANN. § 19-3504 (2015); MINN. STAT. § 631.21 (2015); MONT. CODE ANN. § 46-13-401 (2015); OKLA. STAT. tit. 22, § 815 (2015); OR. REV. STAT. § 135.755 (2015); ALASKA R. CRIM. P. 43(c); IOWA R. CIV. P. 2.33(1); N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2015); P.R. R. CRIM. P. 247(b); UTAH R. CRIM. P. 25; VT. R. CRIM. P. 48(b)(2); WASH. R. CRIM. P. 8.3. See also *Manning v. Engelkes*, 281 N.W.2d 7, 10–11 (Iowa 1979) (collecting authority); *People v. Panibianci*, 510 N.Y.S.2d 801, 802 (Sup. Ct. Monroe Cnty.

Court of Appeals of New York eloquently stated, “Throughout this history, and no less today, its thrust, even to the disregard of legal or factual merit, has been ‘to allow the letter of the law gracefully and charitably to succumb to the spirit of justice.’”⁶⁷

This judicial power has only been loosely defined, if at all.⁶⁸ In Montana, for instance, the state supreme court went so far as to say, “The legislature has not attempted to define the phrase ‘in furtherance of justice’ . . . , hence it is left for judicial discretion exercised in view of the constitutional rights of the defendant and the interests of society to determine what particular grounds warrant the dismissal of a pending criminal action.”⁶⁹ This intentional action by the legislature to grant the capacity to dismiss, and leave it open to definition by the judiciary through its own case law or rules of criminal procedure, provides an opportunity for courts to respond to the criminal justice crisis. In New York, a court may dismiss an action “even though there may be no basis for dismissal as a matter of law.”⁷⁰ Courts may make these determinations and consider the interests of society in an individual prosecution. If embraced, this action may check overzealous prosecutions, lessen prison overcrowding, and right the injustice made most apparent in our system by wrongful convictions.

B. Dismissal in the Interest of Justice: Greater Transparency and Equitable Discretion

This pivot away from prosecutors and toward courts through dismissal in the interest of justice brings greater transparency to our court system. In contrast to a prosecutorial *nolle prosequi* of a case, court dismissal in the interest of justice must usually include reasoning on the record and consideration of the equities of a case.⁷¹ This further instills transparency, as well as legitimacy and equity. Courts may respond to not only penal ramifications of a sentence, but also the loss of civil privileges through state codes or immi-

1986); *State v. Sonneland*, 494 P.2d 469, 475 (Wash. 1972) (en banc) (Hale, J., dissenting).

67. *People v. Rickert*, 446 N.E.2d 419, 420 (1983).

68. *See State v. Suave*, 666 A.2d 1164, 1167 (Vt. 1995) (stating courts may dismiss “in rare and unusual cases when compelling circumstances require such a result to assure fundamental fairness in the administration of justice”).

69. *State v. Cummins*, 850 P.2d 952, 953 (Mont. 1993) (alteration in original) (quoting *State ex rel. Anderson v. Gile*, 172 P.2d 583, 586 (Mont. 1946)).

70. N.Y. CRIM. PROC. LAW § 170.30 (2015) (allowing the dismissal of a complaint because the instrument is defective, the defendant has immunity, the prosecution is barred because of previous prosecution, the prosecution is untimely, the defendant has been denied a speedy trial, or the existence of some other jurisdictional or legal impediment).

71. *See Sheila Kles, Criminal Procedure II: How Much Further is the Furtherance of Justice*, 1989 ANN. SURV. AM. L. 413, 414 (1991).

gration status.⁷² Thus, dismissal in the interest of justice can increase awareness and reaction to the collateral consequences of a criminal sentence.

C. *Pivoting Away from Prosecutorial Misconduct and Prosecutorial Discretion*

Furthermore, this power may be seen as most helpful for restoring prosecutorial integrity and acknowledging misconduct. After the Supreme Court decided *Connick v. Thompson*,⁷³ grassroots efforts promoting prosecutorial oversight arose. One such effort, the Prosecutorial Oversight Tour, sponsored in part by the Innocence Project, was created for the purpose of exploring policy reforms and to create a national dialogue on the issue.⁷⁴ Another grassroots effort, the Veritas Initiative, tracks and publicizes court decisions on prosecutorial misconduct, analyzing how the court system identifies and addresses cases of prosecutorial misconduct.⁷⁵ The findings thus far confirm the widespread belief that prosecutors are rarely held accountable for their actions, even in the wake of convicting innocent people.⁷⁶

Prosecutorial discretion is a pivotal place for reforming the system. Because over 95% of federal defendants plead guilty and never go to trial,⁷⁷ prosecutors' choices in charges and recommendations for sentencing determine the fate of the majority of people in the criminal justice system.⁷⁸ Rachel Barkow has written extensively on prosecutorial discretion, as well as what she calls "prosecutorial administration": the role of prosecutors not only in individual cases, but also in corrections, forensics, and clemency policy

72. See *State v. Rodriguez*, No. 1722, 2008 WL 2627672, at *3 (Ohio Ct. App. July 3, 2008) (dismissing charges in part because conviction of an "aggravated felony" would have led to the defendant's deportation).

73. 131 S. Ct. 1350 (2011).

74. See *The Issue, Prosecutorial Oversight*, PROSECUTORIALOVERSIGHT, <http://www.prosecutorialoversight.org/about-the-issue> (last visited July 1, 2015).

75. See *About*, VERITAS INITIATIVE, veritasinitiative.scu.edu/?page_id=2 (last visited July 1, 2015).

76. Maurice Possley & Jessica Seargeant, *First Annual Report: Preventable Error - Prosecutorial Misconduct in California 2010*, N. CAL. INNOCENCE PROJECT (Mar. 2011), http://www.veritasinitiative.org/wp-content/uploads/2011/03/ProsecutorialMisconduct_FirstAnnual_Final8.pdf.

77. Glenn R. Schmitt, *Overview of Federal Criminal Cases: Fiscal Year 2009*, U.S. SENTENCING COMM'N 3 (Dec. 2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf ("In fiscal year 2009, more than 96 percent of all offenders [pleaded guilty], a rate that has been largely the same for ten years.").

78. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876-77 (2009).

and decision-making.⁷⁹ In many ways, prosecutors hold the power of ultimate determination in their hands.

By dismissing cases and charges that are not in the interest of justice, judges can hold prosecutors accountable for overcharging and for prosecuting without evidence. Courts can reinvigorate the standard that prosecutors must satisfy to affirmatively show that the defendant is guilty beyond a reasonable doubt.

III. SUPPORT FOR THE BENCH AND DISMISSAL IN THE INTEREST OF JUSTICE

As noted by Akhil Amar, infamous cases such as *Dred Scott v. Sandford*⁸⁰ and *Plessy v. Ferguson*,⁸¹ act as negative symbols that define our Constitution.⁸² Lincoln called *Dred Scott* “an astonisher in legal history,”⁸³ and acted in his capacity as President to directly undermine the Court’s decision on constitutional principles. The decision claimed that moral considerations were not relevant to considering constitutional issues.⁸⁴ Professor Amar argues that *Dred Scott*⁸⁵ plays a defining role in our Constitution, both in case law and in our culture. In his words:

Here is one way to connect the dots: In sharp contrast to America’s most disgraced cases, which protected haves at the expense of have-nots, and insiders at the expense of outsiders, most of our icons of positive national identity have championed equality and reflected abiding concern for those at the bottom of the status hierarchy. . . . *In this pattern resides a powerful lesson for how America’s unwritten Constitution is best interpreted and enforced – namely, to reinforce rather than to undercut the great themes of equality and inclusion in America’s written Constitution.*⁸⁶

These themes of equality and inclusion challenge our current criminal justice system – a system that arguably creates a second class of citizens, physically separated for sanctioned punishment and then civilly separated by shadowed collateral penalties. Striving for equality and inclusion, justice and liberty, our Constitution calls for a broader understanding of responsibility for

79. See generally Rachel Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013).

80. 60 U.S. 393 (1856).

81. 163 U.S. 537 (1896).

82. AHKIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 270 (2012).

83. Lincoln made this statement in a July 1858 speech in Chicago. *Id.* at 271.

84. *Id.* at 273.

85. Along with the cases of *Plessy v. Ferguson*, 163 U.S. 537, and *Lochner v. New York*, 198 U.S. 45 (1905).

86. AMAR, *supra* note 82, at 275.

justice as a constitutional beckoning among the three branches. As the Ninth Amendment clarified,⁸⁷ simply because a specific path or protection is not enumerated by the Constitution does not negate its existence under the broader spectrum of the Constitution's priorities and purposes.⁸⁸ Indeed, although there is no federal capacity to dismiss in the interest of justice, this may be the state constitutional reasoning behind the creation of this power.

This Article suggests that courts reclaim their capacity to dismiss cases and bring integrity to charges and cases in our justice system. As a possibility for courts without this capacity, this Article ponders the capacity of the state's highest court to pass a rule of criminal procedure that would recognize the often inherent power of trial courts to dismiss certain cases.

A. *Why Non-Procedural Dismissals Matter*

As Justice Benjamin N. Cardozo eloquently argued over a century ago, it is a judge's duty and obligation to adapt legal doctrine and precedent to our current modern justice system while also acting with fairness and impartiality.⁸⁹ It is this combination of adherence to legal precedent and incorporation of fairness and impartiality that lead to the proper adjudication of cases and the functioning of what is our system of justice.

Courts ensure that the federal and state constitutions are upheld, taking a vow and making a commitment to "establish Justice" under the Constitution's Preamble. A conviction in a criminal case may involve the loss of freedom as well as the stigma of a criminal record. These serious ramifications should be considered when a case is procedurally accurate, and yet is not just. In states where no other remedy is available, no motion may be made by the defense, and the prosecution continues unchecked – dismissal in the interest of justice upholds due process and acts with efficiency. The court's obligation is two-fold: cases of due process are not "strictly limited to those situations in which the defendant has suffered arguable prejudice . . . [but is also designed] to maintain public confidence in the administration of justice."⁹⁰

87. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people." U.S. CONST. amend. IX. "The Ninth Amendment tells to look beyond 'enumeration' when interpreting – 'construing' – the Constitution. It reminds us that not everything in the Constitution is textually itemized and specified." AMAR, *supra* note 82, at 100.

88. "Thus, even as the Ninth Amendment emphatically warns against certain *anti*-rights readings of the written Constitution based on mere negative implication, the amendment warmly invites certain *pro*-rights readings based on positive implications." AMAR, *supra* note 82, at 100.

89. See generally BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

90. United States v. Taylor, 648 F.2d 565, 571 (9th Cir. 1981) (referencing *coram nobis* writs).

For administrative determinations, the Supreme Court of Ohio states the issue succinctly:

Trial courts are on the front lines of administration of justice in our judicial system, dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the “inherent power to regulated the practice before it and protect the integrity of its proceedings.”⁹¹

Indeed, “Trial judges have the discretion to determine when the court has ceased to be useful in a given case.”⁹² Vermont also allows courts to consider efficiency and the “effective administration” of a court’s docket in dismissals.⁹³

B. Increased Support for Judicial Discretion and Alternative Resolutions to Cases

Growing support exists for judicial discretion, as well as alternative resolutions to cases in our criminal justice system. An increasingly popular judicial approach is diverting first time drug offenders to one of the nation’s 3400 drug courts for an alternative resolution.⁹⁴ Drug courts generally assess and then monitor the offender and provide treatment services as well as sanctions or incentives for completing the drug court program.⁹⁵ Drug courts reduce recidivism,⁹⁶ and some specifically assist juvenile offenders or offenders’ families.⁹⁷

Other specialized criminal courts are also growing: mental health courts, veterans’ courts, and reentry courts.⁹⁸ In general, this trend supports reaffirming the power of state trial courts to dismiss cases in the interest of justice, if they have such capacity, or to claim that power if they do not.

IV. THREE STRIKES AND DISMISSAL IN THE INTEREST OF JUSTICE

Another use of dismissal in the interest of justice is dismissing prior convictions from consideration in current sentencing. The “three strikes” law in California is a well-known example of a penal law focused on incapacita-

91. *State v. Busch*, 669 N.E.2d 1125, 1128 (Ohio 1996).

92. *Id.*

93. VT. R. CRIM. PROC. 48(b)(1-2).

94. *Drug Courts*, NAT’L INS. OF JUSTICE, <http://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> (last visited July 1, 2015).

95. *Id.*

96. *Id.*

97. *Id.*

98. See generally Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).

tion, which has resulted in the growth of California's prisons.⁹⁹ California state courts' response to this law, however, provides a pathway for other states facing mandatory lengthy sentences. Dismissing allegations in the limited context of sentencing proactively responds to heightened sentencing for drug offenses.

Courts in California have been capable of dismissing cases in the "furtherance of justice" since the California state legislature's first meeting in 1850.¹⁰⁰ Under this codification, the court may, *sua sponte* or upon the prosecutor's motion, dismiss an action if dismissal is in the interest of the "furtherance of justice" and if the reasons for the dismissal are stated in the record.¹⁰¹ Case law in California interprets this statute to allow a court to strike an *allegation* of a prior conviction for a serious felony, a legal fiction that defeats sentencing enhancements.¹⁰² In other words, the trial court can circumvent the state's "three strikes rule" by dismissing from consideration the prosecutor's allegation of a prior conviction.¹⁰³

Dismissal of a prior conviction allegation under California Penal Code Section 1385 "is not the equivalent of a determination that defendant did not in fact suffer the conviction."¹⁰⁴ Instead, it is an action to reinforce judicial discretion solely in sentencing and the consideration of enhancements. Recent case law supports this particular power – the power of the courts to diminish the rigid impact of three strikes legislation.¹⁰⁵ In addition, a court may also strike a separate enhancement if it is in the "furtherance of justice."¹⁰⁶

The Supreme Court of California affirmed the independence of trial judges to dismiss enhancements when it stated,

99. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 395–96 (1997).

100. See *People v. Williams*, 637 P.2d 1029, 1032 (Cal. 1981).

101. CAL. PENAL CODE § 1385(a) (2013).

102. *Id.*

103. Indeed, in the 1993-1994 Regular Session of the California Legislature, the Senate Committee specifically considered the ability of courts to strike prior convictions to avoid a life sentence when amended Section 1385, when petitioned by the prosecutor. Cal. Senate Judiciary Comm., Bill Analysis-A.B. 971, at 9, Feb. 17, 1994 ("While it is clear that the initiative does not allow district attorneys or judges to strike the current felony allegation, sponsors argue that inequitable results may be avoided by allowing the district attorney, but not the judge, to strike prior convictions, so that the life terms may not be imposed.").

104. See *In re Varnell*, 70 P.3d 1037, 1041 (Cal. 2003).

105. See, e.g., *People v. Lara*, 281 P.3d 72 (Cal. 2012); *People v. Clancey*, 299 P.3d 131 (Cal. 2013).

106. *Clancey*, 299 P.3d at 141–42. In describing California Penal Code Section 1385, the state legislature has said, "Penal Code Section 1385 provides that a court can strike an action, or any part thereof, in the interest of justice, unless the Legislature clearly limits that power. Section 1385 includes the power to strike the punishment that may be imposed for a crime or an enhancement, as well as the power to completely dismiss an action, a count, or an enhancement." A.B. 1808, 1999-2000 Leg. Sess. (Cal. 2000).

The judicial power is compromised when a judge, who believes that a charge should be dismissed in the interests of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor. The judicial power must be independent, and a judge should never be required to pay for its exercise.¹⁰⁷

The reason for dismissal, however, must be “that which would motivate a reasonable judge.”¹⁰⁸ The court may dismiss the action in furtherance of justice at any time deemed appropriate: before, during, or after trial.¹⁰⁹

Twenty-seven states have a “three strikes” law;¹¹⁰ courts in six of those states, including California, can dismiss in the interest of justice. Courts in the other five states – Massachusetts, Montana, Utah, Vermont, and Washington¹¹¹ – could follow California’s example. By dismissing a prior conviction from consideration, these courts could regain control over sentencing.

V. APPLICATION OF DISMISSAL IN THE INTEREST OF JUSTICE: MISDEMEANORS

Dismissal in the interest of justice reinforces equitable discretion predominantly at a misdemeanor level. Misdemeanors are a realistic space where judicial clemency matters, impacting the “gateway” to cycling through the criminal justice system. As noted by Jenny Roberts,¹¹² the impact of misdemeanors that ensnare individuals in our prison system – often with little to no evidence and little to no representation – should not be casually underestimated.

107. *Clancey*, 299 P.3d at 142 (citing *People v. Tenorio*, 473 P.2d 993, 996 (Cal. 1970)).

108. *People v. Orin*, 533 P.2d 193, 199 (Cal. 1975) (en bank) (quoting *People v. Curtis*, 84 Cal. Rptr. 106, 126 (Cal. Ct. App. 1970)). It should be noted, however, that a trial court cannot dismiss sex offender registration under Section 1385. See *People v. Tuck*, 139 Cal.Rptr.3d 407, 412–13 (Cal. Ct. App. 2012).

109. See *People v. Uribe*, 132 Cal. Rptr. 3d 102, 141 (Cal. Ct. App. 2011).

110. Allen Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California’s Criminal Justice Realignment*, 54 SANTA CLARA L. REV. 527, 543 (2014).

111. Compare CAL. PENAL CODE § 667 (2015), with MASS. GEN. LAWS ANN. ch. 279, § 25 (2015), MONT. CODE ANN. § 46-18-502 (2014), UTAH CODE ANN. § 76-3-203.5 (2014), VT. STAT. ANN. tit. 13, § 11 (2015), and WASH. REV. CODE § 9.94A.570 (2015).

112. See generally Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

A. *Dismissal in the Interest of Justice and Misdemeanors*

An estimated 10 million misdemeanor cases are filed annually.¹¹³ Misdemeanors account for the vast majority of state criminal dockets¹¹⁴ and continue to grow in number.¹¹⁵ In major metropolitan areas, such as Chicago, Atlanta, and Miami, public defenders handle more than 2000 misdemeanor cases each year.¹¹⁶ Excessive caseloads for defenders make misdemeanants more likely to suffer from ineffective assistance of counsel.¹¹⁷ And yet, misdemeanants are not even necessarily entitled to counsel. In Texas, for example, counsel is appointed in fewer than 20% of jailable misdemeanor cases across three-fourths of its counties.¹¹⁸ This structurally casual response to misdemeanor charges statistically leads to innocent individuals being punished for crimes they did not commit.¹¹⁹ When defendants do not have the assistance of counsel, they often plead guilty, even when there is little or no evidence.¹²⁰ Yet the innocence of defendants charged with misdemeanors is rarely considered.

The civil consequences of a misdemeanor conviction can have harsh economic and social ramifications. A simple misdemeanor can make an individual ineligible for professional licenses, student loans, health care, child

113. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012).

114. Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads*, NAT'L CTR. FOR STATE COURTS 1, 47 (2010), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> (finding 79% of cases across eleven state courts were misdemeanors).

115. Roberts, *supra* note 112, at 282.

116. See Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS 1, 11 (2009), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808> (citing National Center for State Courts, 2007 Criminal Caseloads Report finding that in data gathered in 12 states in 2006, there was a “median misdemeanor rate of 3,544 per 100,000” people).

117. Many of these cases, however, are never appealed and thus never receive a court determination on effective assistance of counsel. See Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87, 90 (2010) (concluding that lack of personnel and resources across country prevents effective representation of indigent defendants); David Carroll, *Gideon Alert: DOJ Data Confirms Existence of Right to Counsel Workload Crisis in the United States*, NAT'L LEGAL AID & DEFENDER ASS'N (Sep. 17, 2010), <http://www.nlada.net/jscri/blog/gideon-alert-doj-data-confirms-existence-right-counsel-workload-crisis-united-states>.

118. Boruchowitz et al., *supra* note 116, at 10 (stating, “Three-quarters of Texas counties appoint counsel in fewer than 20 percent of jailable misdemeanor cases, with the majority of those counties appointing counsel in fewer than 10 percent of cases”).

119. *Id.*

120. *See id.*

custody, and public housing.¹²¹ A misdemeanor conviction can even lead to deportation.¹²² With quick Internet access to criminal records, employers and landlords can easily search and then refuse employment and housing.¹²³ Employment and family support are also disrupted when defendants serve time in jail, either because they were denied bail or as part of a sentence.¹²⁴ Indeed, pre-trial detention for individuals who cannot pay bail often incentivizes them to take an early plea with a sentence of time served or probation, whether or not they committed the crime.¹²⁵

Finally, misdemeanor convictions disproportionately impact poor communities and communities of color because “vulnerable, underrepresented defendants tend to plead guilty even in the absence of evidence.”¹²⁶ With arrests determining convictions, law enforcement determines who ultimately has a misdemeanor conviction on his record. Arrest policies, such as urban drug sweeps or zero tolerance policing, thus lead not only to arrests but also convictions.

While these arrests and misdemeanor convictions may appear harmless – brushed off as only a night in prison – they not only carry collateral civil consequences, but they also begin a cycle of racial discrepancy in the prison system. These convictions label a person as a criminal without the general evidentiary requirements that would stop an arrest from becoming a criminal complaint, and a complaint from becoming a conviction. As Bernard Harcourt has pointed out, if our sentencing system is increasingly based on criminal history as its key factor, then any contacts with the criminal system, including arrests and misdemeanor convictions, negatively impact a defend-

121. See Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 770 (2011) (describing expanded scope and severity of collateral penalties in federal and state law in past two decades). See also 20 U.S.C.A. §1091(r)(1) (West 2014) (listing varying ineligibility periods for federal student loans, based on number of drug-related convictions); 21 U.S.C.A. §862a(a) (West 2014) (discussing bars to public benefits for individuals convicted of a misdemeanor); 42 U.S.C. §13661(b) (2012) (discussing bars to public housing for individuals convicted of a drug crime).

122. See Anthony Lewis, *Abroad at Home: ‘This Has Got Me in Some Kind of Whirlwind,’* N.Y. TIMES, Jan. 8, 2000, <http://www.nytimes.com/2000/01/08/opinion/abroad-at-home-this-has-got-me-in-some-kind-of-whirlwind.html> (describing deportation order against Mary Anne Gehris, who was adopted and brought to United States as an infant, based on misdemeanor conviction from her young adulthood). Because of the Supreme Court’s decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that defense counsel must advise clients of collateral consequences to convictions, such as deportation, a few misdemeanor cases are being examined on appeal for ineffective assistance of counsel for not informing their clients. See Roberts, *supra* note 112, at 320.

123. See Roberts, *supra* note 112, at 299.

124. See *id.*

125. *Id.* at 308.

126. Natapoff, *supra* note 113, at 1315.

ant's sentencing score and lead to a higher sentence for people of color.¹²⁷ The label that begins with a misdemeanor transforms that person into a criminal for years to come.

With the high number of individuals charged with misdemeanors every year, a court's capacity to dismiss in the interest of justice both brings equity to these cases and is a practical resolution in managing a court's docket. While the flooding of misdemeanor cases has generally created pressure on a defendant to plead guilty, a court could instead encourage the system to function as it should, both procedurally and equitably. Dismissal acknowledges the lack of acceptable representation on the part of the defense, as well as charging with little actual evidence on the part of the prosecution. By enforcing the standards applicable for other criminal charges in the courtroom, the court can avoid wrongful convictions while also pragmatically resolving their own overwhelmed dockets.

B. Conceptual Comparisons to *De Minimis* Infractions

The Model Penal Code makes provisions for the dismissal of "*de minimis* infractions" – cases where the harm of the offense was "only to an extent too trivial to warrant the condemnation of conviction."¹²⁸ Four states have adopted a *de minimis* exception: Hawaii, Maine, New Jersey, and Pennsylvania.¹²⁹ The full name of *de minimis non curat lex* has been interpreted as "the law does not concern itself with trifling matters."¹³⁰

127. Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT. R. 237, 238 (2015).

128. MODEL PENAL CODE § 2.12 (2013).

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

- (1) was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
- (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
- (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons).

Id.

129. Each of these states has a version of Section 2.12. See HAW. REV. STAT. § 702-236 (2015); ME. REV. STAT. tit. 17-A, § 12 (2015); N.J. REV. STAT. § 2C:2-11 (2015); 18 PA. CONS. STAT. § 312 (2015). Guam also includes a *de minimis* provision. See 8 GUAM CODE ANN. § 130.50 (2015).

130. Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 538 (1947).

De minimis dismissals may conceptually assist in determining dismissals “in the interest of justice,” particularly for minor drug offenses.¹³¹ The *de minimis* exception “does not exculpate a defendant because of a justifying or excusing condition, but rather serves to refine the offense definition . . . [the defendant] is ‘outside the harm or evil sought to be prevented and punished by the offense.’”¹³² Other conceptualizations focus on justification: logic and support for the prohibited action that does not cancel out the allegation, but instead rationalizes the action or even neutralizes its harm.¹³³ Perhaps for petty offenses, equitable considerations of the case should prevail over the blameworthiness of the defendant.¹³⁴ This is precisely the province of the court in deciding dismissals in the interest of justice.

VI. STATE LAWS AND RULES OF CRIMINAL PROCEDURE

As previous Parts have noted, judicial clemency and in particular, dismissal in the interest of justice, may be a route for courts to influence overzealous prosecutors, lessen the war on drugs, and decrease mass incarceration. Similar to executive clemency, the numeric impact of these actions is necessarily smaller and more individualized than legislation reducing the disparity between crack cocaine and powder cocaine sentences, for example. Its impact, however, is important nonetheless. Wrongful convictions revealed through DNA evidence are a small fraction of cases in our criminal justice system, and their weight is important to the culture of our system as well as to the individual. The same can be true of state judicial dismissals.¹³⁵

131. See, e.g., *State v. Vance*, 602 P.2d 933, 944 (Haw. 1979) (affirming conviction, but finding, “The possession of a microscopic trace of a dangerous drug in combination with other factors indicating an inability to use or sell the narcotic, may constitute a *de minimis* infraction within the meaning of HRS s 702-236 and therefore warrant dismissal of the charge otherwise sustainable under HRS s 712-1243”).

132. See Douglas Husak, *The De Minimis “Defense” to Criminal Liability*, UNIV. OF CAL. BERKELEY SCH. OF LAW 1, 20 (Nov. 20, 2009), http://www.law.berkeley.edu/files/De_Minimis2_DHusak.pdf (quoting PAUL ROBINSON, *CRIMINAL LAW DEFENSES* 324 (1984)). If courts look more to justification for dismissal in furtherance of justice, then it may be presumed that such justifications would be circumstances where the defendant violated the law to avoid a greater social harm, or to gain a greater societal benefit. See *id.* at 12. In the words of Akhil Amar, “normative innocence” is where the defendant “did it, but . . . did not thereby offend the public’s moral code.” AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 90 (1997).

133. See Husak, *supra* note 132, at 21.

134. See generally Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010) (describing “easy cases” where there is sufficient proof of guilt, yet insufficient consideration of whether the prosecution serves the ultimate ends of justice).

135. See *Death Penalty*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/related-issues> (last visited July 11, 2015).

A. States and Dismissal in the Interest of Justice

Twelve states recognize the judicial capacity to dismiss cases in the interest of justice.¹³⁶ Of these twelve states, seven – California,¹³⁷ Idaho,¹³⁸ Minnesota,¹³⁹ Montana,¹⁴⁰ New York,¹⁴¹ Oklahoma,¹⁴² and Oregon¹⁴³ – have

136. See sources cited *supra* note 66.

137. See CAL. PENAL CODE § 1385(a) (2015) (“The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.”).

138. See IDAHO CODE ANN. § 19-3504 (2015) (“The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.”).

139. See MINN. STAT. § 631.21 (2015) (“The court may order a criminal action, whether prosecuted upon indictment or complaint, to be dismissed. The court may order dismissal of an action either on its own motion or upon motion of the prosecuting attorney and in furtherance of justice. If the court dismisses an action, the reasons for the dismissal must be set forth in the order and entered upon the minutes. The recommendations of the prosecuting officer in reference to dismissal, with reasons for dismissal, must be stated in writing and filed as a public record with the official files of the case.”).

140. See MONT. CODE ANN. § 46-13-401(1) (2015) (“The court may, either on its own motion or upon the application of the prosecuting attorney and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, or a count contained in a complaint, information, or indictment, charging a felony, unless good cause for dismissal is shown and the reasons for the dismissal are set forth in an order entered upon the minutes.”).

141. The Superior Court rule is N.Y. CRIM. PROC. LAW § 210.40.1 (“An indictment or any count thereof may be dismissed in furtherance of justice, as provided in paragraph (i) of subdivision one of Section 210.20, when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (h) of said subdivision one of Section 210.20, such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice.”). The Local Criminal Court rule is N.Y. CRIM. PROC. LAW § 170.40.1 (“An information, a simplified traffic information, a prosecutor’s information or a misdemeanor complaint, or any count thereof, may be dismissed in the interest of justice, as provided in paragraph (g) of subdivision one of Section 170.30 when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (f) of said subdivision one of Section 170.30, such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration

codified the right of state court judges to dismiss either information or indictments¹⁴⁴ *sua sponte*¹⁴⁵ if such dismissal is in the “furtherance of justice.” Five states – Alaska,¹⁴⁶ Iowa,¹⁴⁷ Utah,¹⁴⁸ Vermont,¹⁴⁹ and Washington¹⁵⁰ –

or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice.”)

142. See OKLA. STAT. tit. 22, § 815 (2015) (“The court may either of its own motion or upon the application of the district attorney, and the furtherance of justice, order an action or indictment to be dismissed; but in that case the reasons of the dismissal must be set forth in the order, which must be entered upon the minutes.”).

143. See OR. REV. STAT. § 135.755 (2015) (“The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order the proceedings to be dismissed. The reasons for the dismissal shall be set forth in the order, which shall be entered in the register.”).

144. An information is generally for a misdemeanor complaint, while an indictment is for a felony complaint.

145. These states also retain the common law standing by which the prosecution may make such a motion; only two states, Utah and New York, allow the defendant to make a motion asking the Court to dismiss the case “in the interest of justice.” See N.Y. CRIM. PROC. LAW § 210.40(3); UTAH R. CRIM. PROC. 25(a).

146. ALASKA R. CRIM. PROC. 43(c) (“The court may, either on its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action, after indictment or waiver of indictment, to be dismissed. The reasons for the dismissal shall be set forth in the order.”).

147. IOWA R. CIV. PROC. 2.33(1) (“The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.”).

148. See UTAH R. CRIM. PROC. 25(a) (“In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.”).

149. See VT. R. CRIM. PROC. 48(b)(2) (“The court may dismiss the indictment or information . . . If the court concludes that such dismissal will serve the ends of justice and the effective administration of the court’s business. Unless the court directs that the dismissal is with prejudice, the dismissal shall be without prejudice.”).

150. See WASH. SUPER. CT. CRIM. R. 8.3 (“The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial. The court shall set forth its reasons in a written order.”); WASH. CT. OF LTD. JURISDICTION CRIM. R. 8.3 (“The court, in the furtherance of justice after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial. The court shall set forth its reasons in a written order.”). For dismissal of civil cases, Rule 60(b) applies:

have state rules of criminal procedure that grant judges the authority to dismiss indictments or information “in the furtherance of justice.” Puerto Rico also has a local rule of criminal procedure for courts to “order the supersession of a charge or complaint” for the “furtherance of justice.”¹⁵¹

In these twelve states, judges have the power to dismiss the information or indictment *sua sponte*. These states also retain the common law standing by which the prosecution may make such a motion;¹⁵² only two states, Utah and New York, allow the defendant to make a motion to dismiss the case “in

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (5) The judgment is void;
- (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;
- (8) Death of one of the parties before the judgment in the action;
- (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
- (10) Error in judgment shown by a minor, within 12 months after arriving at full age; or
- (11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

WASH. CT. OF LTD. JURISDICTION CRIM. R. 60(b).

151. P.R. R. CRIM. PROC. 247(b) (“When it is deemed convenient for the furtherance of justice and upon holding a hearing in which the prosecuting attorney shall participate, the court may order the supersession of a charge or complaint. The causes for the supersession shall be set forth in an order issued to such effects, which shall be attached to the record of the proceeding.”).

152. See sources cited *supra* note 66.

the interest of justice.”¹⁵³ All the noted states, except Vermont, require the court to state its reasons on the record for dismissal.¹⁵⁴ In Vermont, the court must only do so if the prosecution objects to the dismissal.¹⁵⁵ The states vary as to whether the dismissal will be with or without prejudice, thus potentially barring the State from bringing the same charges again.¹⁵⁶

1. State Specific Statutes

Looking at some examples of court-instigated dismissals help to elucidate the varied considerations of all states and state courts in making these determinations. In Montana, the court must show good cause for the dismissal,¹⁵⁷ while in New York, ten factors must be considered, as well as “a compelling factor, consideration, or circumstance demonstrating that the conviction would constitute injustice.”¹⁵⁸ Utah requires not only that the dismissal be in the “furtherance of justice,” but also that a “substantial cause” exist for dismissal.¹⁵⁹ In Ohio, a court may dismiss an indictment, information, or complaint over the objection of the State, provided that the court declares on the record the findings of fact and reasons for dismissal.¹⁶⁰ New York and

153. See N.Y. CRIM. PROC. LAW § 210.40(3) (McKinney 2015); UTAH R. CRIM. PROC. 25(a). The prosecutor may also motion for dismissal in all twelve states. See sources cited *supra* note 66.

154. CAL. PENAL CODE § 1385 (2015); IDAHO CODE ANN. § 19-3504 (2015); MINN. STAT. § 631.21 (2015); MONT. CODE ANN. § 46-13-401 (2015); OKLA. STAT. tit. 22, § 815 (2015); OR. REV. STAT. § 135.755 (2015); ALASKA R. CRIM. P. 43(c); IOWA R. CIV. P. 2.33(1); N.Y. CRIM. PROC. LAW § 210.40; P.R. R. CRIM. P. 247(b); UTAH R. CRIM. P. 25; WASH. R. CRIM. P. 8.3.

155. See VT. R. CRIM. PROC. 48(c).

156. Of the twelve laws, only four states have any mention of what the effect dismissal will have on future prosecution: Montana, Vermont, Utah, and Iowa. Montana’s law states that the prosecution after the entry of a plea on a misdemeanor charge will be dismissed, unless good cause is shown, with prejudice if the defendant is not brought to trial within six months. MONT. CODE ANN. § 46-13-401(2) (2015). Vermont directs every dismissal to be without prejudice unless the court states otherwise. VT. R. CRIM. PROC. 48(b). Utah and Iowa’s laws, on the other hand, are somewhat similar because a potential bar on prosecution ultimately depends on what the original crime dismissed was. Iowa states that if the charge dismissed was a simple or serious misdemeanor than future prosecution for the same offense is thereby barred; however, if the charge was a felony or aggravated misdemeanor than future prosecution is not barred. See IOWA R. CRIM. PROC. 2.33(1); UTAH R. CRIM. PROC. 25.

157. MONT. CODE ANN. § 46-13-401(1) (2015).

158. N.Y. CRIM. PROC. LAW § 210.40(1).

159. UTAH R. CRIM. PROC. 25(a).

160. OHIO CRIM. R. 48 (“If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.”). In *State v. Busch*, the Ohio Supreme Court stated that “[Rule 48(b)] does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim. R. 48(B) if a

California represent two notable ends of the spectrum for dismissals in the interest of justice.

a. New York

In New York, Criminal Procedure Law Section 170.40 provides that an information or misdemeanor complaint may be dismissed in the interest of justice when it “is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance[.]” which demonstrates that prosecuting the defendant “would constitute or result in injustice.”¹⁶¹ Such dismissal may occur “even though there may be no basis for dismissal as a matter of law.”¹⁶² Said dismissal may be initiated by the court, the prosecution, or by the defendant.¹⁶³

In dismissing the information, the court must state its reasons for doing so on the record and must examine or consider multiple factors.¹⁶⁴ The stat-

dismissal serves the interest of justice.” 699 N.E.2d 1125, 1127–28 (Ohio 1996). Ohio courts have interpreted Criminal Rule of Procedure 48(b) as “creating a substantive right for a court to sua sponte dismiss a criminal case over the objection of the prosecution where the complaining witness does not wish the case to proceed, or in the interest of justice.” *State v. Rodriguez*, No. 1722, 2008 WL 2627672, at *2, (Ohio Ct. App. July 3, 2008) (citing *Busch*, 669 N.E.2d 1125). In Ohio, the Court is required to state on the record its findings of fact and reasons for dismissal. *Id.*

161. N.Y. CRIM. PROC. LAW § 170.40.1. The Superior Court rule is N.Y. CRIM. PROC. LAW § 210.40.1 and the Local Criminal Court rule is N.Y. CRIM. PROC. LAW § 170.40.1 (“An information, a simplified traffic information, a prosecutor’s information or a misdemeanor complaint, or any count thereof, may be dismissed in the interest of justice, as provided in paragraph (g) of subdivision one of Section 170.30 when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (f) of said subdivision one of Section 170.30, such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice.”).

162. *Id.* § 170.30–40 (allowing the dismissal of a complaint because the instrument is defective, the defendant has immunity, the prosecution is barred because of previous prosecution, the prosecution is untimely, the defendant has been denied a speedy trial, or the existence of some other jurisdictional or legal impediment).

163. *Id.* § 170.40(2).

164. In determining whether a “compelling factor, consideration, or circumstance” exists, the court must examine and consider ten factors:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

ute specifying the current ten factors expresses the legislative intent “to permit consideration of a broad range of factors basically unrelated to guilt or innocence.”¹⁶⁵ The trial court’s capacity to dismiss a case *sua sponte* was first derived through case law in *People v. Clayton*, which was later codified.¹⁶⁶ The parallel power for dismissing felonies rests in Criminal Proce-

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- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
 - (g) the impact of a dismissal on the safety or welfare of the community;
 - (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
 - (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
 - (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

Id. § 170.40(1)(a)-(j). These factors must be considered both individually and collectively. N.Y. CRIM. PROC. LAW § 170.40(1). The ten factors listed in § 179.40 were added as clarification to the existing rule, and became effective on January 1, 1980. *People v. Prunty*, 420 N.Y.S.2d 703, 706 (N.Y. Crim. Ct. 1979). Prior to this clarification, *People v. Clayton* provided guidance for courts trying to determine the meaning of a “compelling factor.” 41 A.D.2d 204, 206–08 (N.Y. App. Div. 1973). *Clayton* listed the following seven factors that a court may consider in determining whether an accusatory instrument should be dismissed in the interests of justice:

- (a) the nature of the crime, (b) the available evidence of guilt, (c) the prior record of the defendant, (d) the punishment already suffered by the defendant, (e) the purpose and effect of further punishment, (f) any prejudice resulting to the defendant by the passage of time and (g) the impact on the public interest of a dismissal of the indictment.

Id. at 207–08. The Court of Appeals of New York, in *People v. Belge*, condoned the use of the *Clayton* factors, calling the judiciary’s efforts to clarify the statute “commendable,” and urged that the “predicament” was “more appropriate for legislative resolution.” 359 N.E.2d 377, 378 (N.Y. 1976) (per curiam). Three years later, the New York Legislature added ten factors to the statute that courts must consider in granting a motion to dismiss in the interest of justice. *Compare Clayton*, 41 A.D.2d at 207–08, with N.Y. CRIM. PROC. LAW § 170.40.1(a)-(j) (*Clayton* is no longer binding precedent, but many of the factors contained in its opinion have been added to the language of Section 170.40).

165. Peter Preiser, *Practice Commentaries*, WESTLAW (reviewing N.Y. CRIM. PROC. LAW § 170.40).

166. *Clayton*, 41 A.D. 2d at 207–08.

cedure Law Section 210.40.¹⁶⁷ If a case is dismissed “in the furtherance of justice,” court approval is required for re-indictment.¹⁶⁸

Despite being the first state to authorize courts to dismiss cases on their own initiative, New York case law restricts its usage.¹⁶⁹ Indeed, New York case law in recent years has found that a dismissal in the “interest of justice” does not include a defendant’s age and likelihood of death if incarcerated,¹⁷⁰ military and public service,¹⁷¹ misconduct on the part of the prosecutor,¹⁷² or a serious medical condition suffered by the defendant.¹⁷³ The New York Supreme Court of Appeals has held, “Dismissal of an indictment in the interest of justice must be exercised sparingly . . . that is, only in those rare cases where there is a compelling factor which clearly demonstrates that prosecution of the indictment would be an injustice.”¹⁷⁴

b. California

The capacity for California courts to dismiss in the “furtherance of justice” was bestowed by the state legislature in 1850, the same year California became a state.¹⁷⁵ In California, the court may *sua sponte* dismiss an action, or may do so upon a prosecutor’s motion, as long as the reasons for the dismissal are stated in the record and it is in the furtherance of justice.¹⁷⁶ No specific factors exist to support dismissal in the interest of justice, the opposite of the detailed specifications for dismissal in New York. As noted earlier, the statute is most frequently used to dismiss an allegation of a prior conviction at sentencing, in order to avoid “three strikes” laws.

2. Recommendations

Although states vary in their implementation of this right of courts, this Article recommends the consideration of factors similar to the standard ap-

167. See Wirenius, *supra* note 58, at 181 (“When the Code of Criminal Procedure was superseded by the Criminal Procedure Law, Section 671 was renumbered Section 210.40, and the defendant was permitted to move for dismissal in the interest of justice, not just the district attorney or the court.”) (citing *People v. Graydon*, 330 N.Y.S.2d 259, 262 (Nassau Cnty. Ct. 1972); *People v. Shanis*, 374 N.Y.S.2d 912, 917 (Sup. Ct. Queens Cnty. 1975)).

168. N.Y. CRIM. PROC. LAW § 210.20(4).

169. See *People v. Miller*, 963 N.Y.S.2d 552, 553 (N.Y. Cnty. Ct. 2013) (citing *People v. Littles*, 591 N.Y.S.2d 2 (1st Dept., 1992)).

170. *People v. Marshall*, 961 N.Y.S.2d 447, 453–54 (N.Y. App. Div. 2013).

171. See *id.*

172. *People v. Schellenbach*, 888 N.Y.S.2d 153 (N.Y. App. Div. 2009) (finding prosecutor’s conduct did not rise to the level of “exceptionally serious misconduct”).

173. *People v. Sherman*, 35 A.D.3d 768, 769 (N.Y. App. Div. 2006).

174. *People v. May*, 100 A.D.3d 1411, 1413 (N.Y. 2012).

175. See *People v. Williams*, 637 P.2d 1029, 1032 (Cal. 1981).

176. CAL. PENAL CODE § 1385(a) (2013).

plied in New York. The New York standard allows the court freedom to dismiss a case “even though there may be no basis for dismissal as a matter of law.”¹⁷⁷ The New York standard also requires reasoning of specific, enumerated factors on the record.¹⁷⁸ If our current judicial system suffers from a lack of transparency as to why an individual is prosecuted, New York’s standard brings sunlight into the courtroom. Requiring stated reasons on the record encourages, or maintains, transparency.

New York courts may dismiss when “some compelling factor, consideration or circumstance” demonstrates that prosecution of the defendant “would constitute or result in injustice.”¹⁷⁹ The ten factors that the court is expected to examine or consider include information about the offense, the defendant, the prosecution and the state investigation, as well as the purpose and effect of the sentence, the welfare of the community, and public confidence in the criminal justice system.¹⁸⁰ These latter factors – community welfare, public confidence, the purpose and effect of a sentence – are of great importance to the continued effectiveness and efficiency of our court system. Yet courts are infrequently granted the ability to consider these factors. The New York statute specifically expresses the legislative intent “to permit consideration of a broad range of factors basically unrelated to guilt or innocence.”¹⁸¹

As noted previously, at the height of the AIDS epidemic, courts were asked to dismiss in the interest of justice against terminally ill defendants.¹⁸² Likewise, in our current state of mass incarceration and harsh penalties for drug crimes, considerations could include the impact of drug convictions on communities, the diminishing confidence in our system when drug sentences are disproportionately served by poor people and people of color, and the effect of a conviction on an individual’s capacity to even be employed. These are the vast, overarching questions that are being raised about our system, without answers. Dismissal in the interest of justice allows courts to respond to those greater questions instead of being compelled by prosecutorial control to simply dispense sentences. Furthermore, the court, the prosecutor, or the defendant should have the capacity to request that a case be dismissed in the interest of justice,¹⁸³ contrary to our nation’s current status: only two states allow for defendants to request dismissal in the interest of justice.¹⁸⁴

177. N.Y. CRIM. PROC. LAW § 170.30–40 (allowing the dismissal of a complaint because the instrument is defective, the defendant has immunity, the prosecution is barred because of previous prosecution, the prosecution is untimely, the defendant has been denied a speedy trial, or the existence of some other jurisdictional or legal impediment).

178. *Id.* § 170.40(2).

179. *Id.* § 170.40.

180. *See supra* note 164.

181. Preiser, *supra* note 165.

182. *See Wirenius, supra* note 58, at 218–20.

183. N.Y. CRIM. PROC. LAW § 170.40(2).

184. *See supra* note 145.

This Article also encourages adopting the California model of dismissing prior convictions from consideration when sentencing an offender under “three strikes” laws. This action reinforces judicial discretion in sentencing, an area where federal judges have expressed their discontent with the mandatory minimum sentences that originated in the 1990s.¹⁸⁵ Federal judges are calling for changes to the mandatory minimum sentencing structure.¹⁸⁶ The ability to dismiss prior sentences from consideration and to strike additional enhancements if it is in the “furtherance of justice”¹⁸⁷ provides discretion to courts that are applying “three strikes” legislation.¹⁸⁸

B. State Rules of Criminal Procedure

For the states that currently do not grant courts the authority to dismiss cases in the furtherance of justice, this Article proposes creating new state rules of criminal procedure. The judiciary itself, notably by the state supreme court, often creates rules with approval by the legislature; five of the states that allow courts to dismiss cases do so through state rules of criminal procedure.¹⁸⁹

As far back as the late 1800s, the Supreme Court of the United States recognized the inherent power of courts to prescribe rules, regulate their proceedings, and facilitate the administration of justice.¹⁹⁰ Indeed, in 1792, the Chief Justice of the Supreme Court stated that the Court “considers the practice of the courts of King’s Bench and Chancery of England as affording outlines for the practice of this court, and that they will, from time to time, make such alterations therein as circumstances may render necessary.”¹⁹¹ Notwithstanding the inherent rule-making power of courts, in many jurisdictions,

185. See Carr, *supra* note 54.

186. See Mauro, *supra* note 55.

187. *Id.*

188. See *People v. Lara*, 281 P.3d 72, 72–75 (Cal. 2012); *People v. Clancey*, 299 P.3d 131, 141 (Cal. 2013).

189. A rule, however, should neither extend nor abridge the court’s jurisdiction. *United States v. Sherwood*, 312 U.S. 584 (1941).

190. See, e.g., *Smoot v. Rittenhouse*, 27 Wash. L. Rep. 741 (U.S. Jan. 10, 1876) (Supreme Court of the United States decision noting the power inherent in every court to establish rules for the transaction of its business); *In re Hien*, 166 U.S. 432, 436–37 (1897) (stating courts of justice possess the power to make and frame reasonable rules not conflicting with an express statute); *McDonald v. Pless*, 238 U.S. 264, 266–67 (1915) (finding that courts of each jurisdiction must be in a position to adopt and enforce their own self-preserving rules). See also *People v. Tock Chew*, 6 Cal. 636 (1856) (affirming the discretion of the trial court in instituting specific and differing time limits on oral argument).

191. *Case of Hayburn*, 2 U.S. 408, 410 (1792).

this power is expressly conferred or recognized by state constitutions or statutes.¹⁹²

In Iowa,¹⁹³ for example, the state's highest court prescribes all rules "of pleading, practice, evidence and procedure," including rules of criminal procedure.¹⁹⁴ The Supreme Court of Iowa submits the rule to the legislative council and also reports the rule to the chairpersons and ranking members of the senate and house judiciary committees.¹⁹⁵ While the legislative services agency makes recommendations to the Supreme Court of Iowa, a rule submitted will take effect sixty days after it is submitted to the legislative council, unless the legislative council votes to delay the effective date.¹⁹⁶ The legisla-

192. *See, e.g.*, *Cropley v. Vogeler*, 2 App.D.C. 28, 34 (D.C. Cir. 1893) (stating the statute affirmed the court's inherent right); *De Lorme v. Pease*, 19 Ga. 220, 227–28 (1856) (stating the rule-making power of the superior courts extends to and was intended to embrace all ground not covered by the statute or common law); *Owens v. Ranstead*, 22 Ill. 161, 196 (1859) (by statute the judge of the Circuit Court may establish rules of proceeding in chancery, in cases not provided for by law); *Siesseger v. Puth*, 234 N.W. 540, 451 (1931) (noting the court possesses both constitutional and statutory power to make rules prescribing the form and nature of court procedure).

193. Iowa's relevant Rule of Criminal Procedure is Rule 2.33(1):

The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

IOWA R. CIV. PROC. 2.33(1).

194. IOWA CODE § 602.4201 (2015) ("The supreme court may prescribe all rules of pleading, practice, evidence, and procedure, and the forms of process, writs, and notices, for all proceedings in all courts of this state, for the purposes of simplifying the proceedings and promoting the speedy determination of litigation upon its merits.").

195. *Id.* § 602.4202 ("The supreme court shall submit a rule or form prescribed by the supreme court under Section 602.4201, subsection 3, or pursuant to any other rulemaking authority specifically made subject to this section to the legislative council and shall at the same time report the rule or form to the chairpersons and ranking members of the senate and house committees on judiciary. The legislative services agency shall make recommendations to the supreme court on the proper style and format of rules and forms required to be submitted to the legislative council under this subsection.").

196. *Id.* ("A rule or form submitted as required under subsection 1 takes effect sixty days after submission to the legislative council, or at a later date specified by the supreme court, unless the legislative council, within sixty days after submission and by a majority vote of its members, delays the effective date of the rule or form to a date as provided in subsection 3.").

tive council cannot vote against the rule itself.¹⁹⁷ This is similar to the process for revising the Federal Rules of Civil Procedure.¹⁹⁸

In a state like Iowa, the state's highest court usually has broad power to promulgate rules, not only through judicial decisions, but also through rules that govern procedural matters in all state courts.¹⁹⁹ In West Virginia, the highest court has the ultimate discretion to create rules governing civil and criminal procedure "which shall have the force and effect of law."²⁰⁰ In practice, the Supreme Court of Appeals of West Virginia, the only appellate court in West Virginia, creates a committee that analyzes the rules and suggests revisions; the court accepts or changes the suggested revisions and opens the new rules to public comment. After the public comment period, the court issues the rules.²⁰¹ Going through such a process, courts may create rules that infuse courts with the same common law power as prosecutors: to dismiss a case in the interest of justice.

Another potential solution is to simply adopt Federal Rule of Criminal Procedure 48(a) into court rules and to modify Rule 48(a) to include the capacity of courts to act *sua sponte*.²⁰² Rule 48(a) has been interpreted to allow a dismissal "in the interest of justice."²⁰³

Notwithstanding the inherent rule-making power of courts in many jurisdictions, this power is expressly conferred or recognized by state constitutions or statutes.²⁰⁴ Although this may appear self-serving, the state supreme

197. *See id.*

198. Conversation with Professor Charles DiSalvo, Chair of Committee for Reforming the West Virginia Rules of Civil Procedure (Sept. 30, 2013).

199. *See, e.g.,* Schoenvogel *ex rel. Schoenvogel v. Venator Group Retail, Inc.*, 895 So. 2d 225, 234 (Ala. 2004); *Borer v. Lewis*, 91 P.3d 375, 380 (Colo. 2004); *United Services Auto. Ass'n v. Goodman*, 826 So. 2d 914, 915 (Fla. 2002); *Fabre v. Walton*, 781 N.E.2d 780, 784 (2002); *USF & G Ins. Co. of Miss. v. Walls*, 911 So.2d 463, 468 (Miss. 2005); *Berdella v. Pender*, 821 S.W.2d 846, 849–50 (Mo. 1991); *State v. Davis*, 141 S.W.3d 600, 628 (Tenn. 2004); *State v. Arbaugh*, 595 S.E.2d 289, 290 (Va. 2004); *Terex Corp. v. Hough*, 50 P.3d 317, 322 (Wyo. 2002).

200. W. VA. CONST. art. VIII, § 3.

201. Conversation with Professor Charles DiSalvo, Chair of Comm. for Revising the West Virginia Rules of Civil Procedure (Sept. 30, 2013).

202. FED. R. CRIM. P. 48 ("(a) By the Government. The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. (b) By the Court. The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial.")

203. *See* Sheila Kles, *Criminal Procedure II: How Much Further is the Furtherance of Justice?* 1989 ANN. SURV. AM. L. 413, 415–16 (1991) (citing support for interpretation of Federal Rule of Criminal Procedure 48(a) with "in the interest of justice" as a basis for dismissal).

204. *See, e.g.,* *Cropley v. Vogeler*, 2 App.D.C. 28, 34 (D.C. Cir. 1893) (stating the statute affirmed the court's inherent right); *De Lorme v. Pease*, 19 Ga. 220, 227–28 (1856) (stating the rule-making power of the superior courts extends to and was in-

court has the prerogative to consider and promulgate such rules and standards. By virtue of this process, courts may create rules that instill themselves with the same common law power as prosecutors: to dismiss a case in the interest of justice.

CONCLUSION

The exile imposed on citizens with a felony conviction in our time in history, first in prison and then on the outskirts of society, may eventually be seen like the cases of *Johnson v. McIntosh*, *Dred Scott*, and *Korematsu*. This exile may define what the Constitution – and what our country – is *not*.

Our current system arguably creates a second class of citizens, physically separated for sanctioned punishment and then civilly separated in silent shadowed punishment. Judicial capacity to dismiss cases provides an opportunity for change: for pivoting accountability and responsibility from prosecutors to the judiciary. This Article proposes that courts reclaim the capacity to dismiss cases in the interest of justice. For those state courts without this capacity, this Article suggests creating state rules of criminal procedure that allow trial courts to make such a decision. Courts can, as Abraham Lincoln described it, fulfill “[t]he legitimate object of government [] to do for a community of people, whatever they need to have done, but can not [sic] do, *at all*, or can not [sic], *so well do*, for themselves—in their separate, and individual capacities.”²⁰⁵

One of the final actions President Lincoln took on the day of his assassination was to pardon a deserter soldier named Patrick Murphy.²⁰⁶ Taking responsibility and responding to the justice of the situation provides an opening for society to heal. After thirty years of the War on Drugs, judicial action and responsiveness may be that next step to reform and change our system.

tended to embrace all ground not covered by the statute or common law); *Owens v. Ranstead*, 22 Ill. 161, 196 (1859) (by statute the judge of the Circuit Court may establish rules of proceeding in chancery, in cases not provided for by law); *Siesseger v. Puth*, 234 N.W. 540, 451 (1931) (noting the court possesses both constitutional and statutory power to make rules prescribing the form and nature of court procedure).

205. LINCOLN, *supra* note 4.

206. JOSHUA WOLF SHENK, *LINCOLN’S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS* 210 (2005).