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LEGISLATIVE TESTIMONY

"Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform"

Testimony before the Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
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Chairwoman Lee, Vice Chair Bush, Ranking Member Biggs, and distinguished Members of Congress:

Thank you for the opportunity to appear before you today to discuss some of the various criminal justice reform proposals that you are currently considering. My name is John Malcolm. I am the Vice President of the Institute for Constitutional Government and the Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.[1] I have also spent a good deal of my career involved in the criminal justice system—as an Assistant United States Attorney, an Associate Independent Counsel, a Deputy Assistant Attorney General in the Criminal Division at the U.S. Justice Department, and a criminal defense attorney.

A lot of my scholarship has focused on various aspects of our criminal justice system.[2] In 2013, I had the privilege of testifying before the House Judiciary Committee's Over-Criminalization Task Force,[3] and I was an outspoken supporter of the First Step Act[4] and other criminal justice reform proposals. Although I spent much of my career as a federal prosecutor and am a scholar at a prominent conservative think tank, I recognize that our criminal justice system is far from perfect and that, when it comes to creating new crimes or increasing sentences for new and old crimes, sometimes the pendulum can swing too far.

I am aware that you are currently considering a number of criminal justice reform proposals including the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act,[5] the Reforming Alternatives to Incarceration and Sentencing to Establish a Better Path for Youth (RAISE) Act,[6] the Community-Based Sentencing Alternatives for Caretakers Act,[7] the First Step Implementation Act,[8] and the Prohibiting Punishment of Acquitted Conduct Act,[9] among others. Even though I have concerns about some of these proposals, I applaud you for debating these issues. All of you care about public safety, although I recognize that there may be disagreements among you about whether some of these proposals will enhance or hurt public safety in the long run.

These are particularly difficult issues in relation to the "war on drugs," a phrase first used by President Richard Nixon in 1971 at a press conference where he identified drug abuse as "public enemy number one in the United States." There is no question that this effort has entailed a high social and economic cost.

A complicating factor in any discussion about drug offenses is that while many consider drug dealing to be a nonviolent offense, there are others, myself included, who are uncomfortable with this label "since drug dealing is often carried out by gangs, and almost invariably involves the actual or threatened use of violence and the inherent risk of overdose."[10] It seems clear, though, based on recent efforts in many states to decriminalize or legalize the possession of certain drugs that are still prohibited under federal law, that many members of the public believe that we need to recalibrate how we tackle the drug problems that continue to plague our country, as evidenced, for example, by the current opioid epidemic.[11] Many states have instituted drug courts[12] and other specialized courts. Sentencing reform at both the state and federal levels is, of course, part of that ongoing discussion.

The following are my thoughts on a couple of the proposals that you are considering.

The First Step Implementation Act

The First Step Act of 2018 modestly reduced the mandatory minimum penalties for certain repeat drug offenders[13] and eliminated the ability of prosecutors to "stack" mandatory minimum sentences under 18 U.S.C. § 924(c) for using a firearm during a crime of violence or drug crime.[14] The First Step Act made these changes applicable only to offenses committed after December 21, 2018, the effective date of the statute.[15]

Section 101 of the First Step Implementation Act would enable offenders who committed their crimes prior to that date to petition a court for a reduction in sentence based on the new sentencing structure brought about by the First Step Act. It would also expand eligibility from those who committed a "felony drug offense" to those who committed a "serious drug felony or serious violent felony."

Section 102 of the First Step Implementation Act would expand the current "safety valve"[16] to allow a court to impose a sentence below a mandatory minimum if the judge "specifies in writing the specific reasons why reliable information indicates that excluding the defendant pursuant to [the limitations set forth in the current safety valve] substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."

Section 201 provides potential relief to juvenile offenders—defined as those who "committed and completed" their crimes before turning 18 years of age—who were "convicted as an adult" by providing a "second look" after the offender has served a minimum of 20 years in prison, thereby enabling a judge to reduce that offender's sentence but only if the judge concludes that "the defendant is not a danger to the safety of the community and that the interests of justice warrant a sentence modification." The defendant would not be permitted to file more than three applications for relief, with a minimum of five years having elapsed between applications.

In order to give certain juvenile offenders the opportunity to start with a clean slate upon reaching adulthood, Section 202 would facilitate the sealing or expungement of juvenile delinquency adjudications and juvenile criminal records for certain eligible, nonviolent offenders.[17] It would also "prevent the unauthorized use or disclosure of [such records] and any potential employment, financial, psychological, or other harm that would result from such unauthorized use or disclosure," subjecting those who intentionally violate this provision to potential criminal penalties.[18] The section includes some sensible exceptions related to investigations conducted by, or potential employment with, certain federal agencies involved in law enforcement, national security, the military, and other designated "high-risk, public trust position[s]" within federal agencies. The section also includes an exception whenever a juvenile offender whose records have been sealed or expunged testifies "in a criminal or other proceeding if such disclosure is required by the Constitution of the United States, the constitution of a State, or a Federal or State statute or rule."

Section 203 would require the Attorney General to establish and enforce procedures to ensure the accuracy of criminal records that are sought for employment-related purposes. This is important because such records, which are often inaccurate or incomplete,[19] are routinely sought by would-be employers who are conducting background checks and can have a devastating effect on an individual's employment prospects. Accordingly, this section provides a process for people to challenge or correct records regarding their criminal history (or lack thereof).

I wholeheartedly endorse and applaud any effort to ensure that all parts of the First Step Act are fully and effectively implemented, and there are several provisions in this bill that I support. That having been said, there are parts of this bill that give me some pause. For example, regarding Section 101, I question whether expanding eligibility for sentencing reconsideration to those who have been convicted of a "serious violent felony" makes sense during a time in which we have experienced a dramatic spike in violent crime in this country,[20] although I do recognize that eligibility for sentencing reconsideration does not mean that such an offender will automatically, or even very often, get his sentence reduced.

I have similar concerns about Section 201 with respect to juvenile offenders who commit unspeakably violent crimes, but I recognize that such offenders would not be eligible for relief under this provision until they had spent over half of their lives behind bars[21] and can only assume and hope that if this bill is enacted in its present form, judges will take seriously the directive that such offenders should not be released early unless the judge determines that the defendant no longer poses "a danger to the safety of the community…."

Regarding Section 102, while I expressed the view that the safety valve was too stringent prior to passage of the First Step Act,[22] I am discomfited by the thought of expanding the safety valve to offenders who have more than four criminal history points—and have therefore made clear that they are recidivists—based on such subjective criteria as a judge's belief that this record "substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." I do recognize, though, that the judge must specify the reasons why he or she has reached this conclusion based on "reliable information" (another somewhat nebulous and subjective term) and take comfort in the fact that defendants who commit "a serious drug felony or a serious violent felony" as those terms are defined under federal law[23] would be ineligible unless, of course, the defendant provides "substantial assistance" to the government.[24]

The EQUAL Act

In 1986, Congress passed the Anti-Drug Abuse Act, which established many mandatory minimum penalties for drug offenses, including amending 21 U.S.C. § 841 to provide a 100-to-1 ratio in the quantities of powder cocaine and crack cocaine that would trigger a mandatory minimum penalty. For example, the law established a five-year mandatory minimum term of imprisonment for offenses involving 500 grams of powder cocaine or five grams of crack cocaine, and a 10-year mandatory minimum penalty for offenses involving five kilograms of powder cocaine or 50 grams of crack cocaine. In 2010, through the Fair Sentencing Act, Congress lowered the disparity to 18-to-1—an arbitrary number to be sure—so that the amount of crack cocaine was raised to 28 grams to trigger a five-year mandatory minimum penalty and

280 grams to trigger a 10-year mandatory minimum penalty while the amounts for powder cocaine remained unchanged. While the Fair Sentencing Act implemented this change on a prospective basis only, Section 404 of the First Step Act of 2018 made those changes retroactive, enabling many offenders who had been sentenced under the old 100-to-1 regime to petition a court for a reduction in sentence. While courts retain the discretion to grant or deny such relief, many offenders have in fact had their sentences reduced as a result of this change in the law.[25] The EQUAL Act would eliminate the disparity altogether and apply this change retroactively.

From a pharmacological perspective, there is really no difference between powder and crack cocaine.

> Cocaine is a hydrochloride salt in its powdered form, while crack cocaine is derived from powdered cocaine by combining it with water and another substance, usually baking soda (sodium bicarbonate). After cocaine and baking soda are combined, the mixture is boiled, and a solid forms. Once it's cooled and broken into smaller pieces, these pieces are sold as crack.[26]

According to pharmacologists, the major differences are how the drug is administered and its effects on the user. Although it can be injected, powder cocaine is usually snorted, while crack cocaine can only be smoked. When cocaine is injected or smoked, the drug takes effect more quickly, resulting in a more intense high of shorter duration.[27] For this reason, as well as the fact that crack cocaine is much cheaper than powder cocaine, many believe that crack cocaine users are more likely to become addicted than powder cocaine users are. Moreover, while some believe that crack users are more prone to violent reactions than powder cocaine users are, others dispute this.[28]

Additionally, regardless of the intent behind these laws, as has been pointed out many times, it is clear that the largest impact, both in terms of the devastation that drugs have wrought and in terms of the imposition of extremely long sentences on offenders, has been felt most keenly in communities of color.[29] I further note that the vast majority of states do not treat crack cocaine any differently from powder cocaine in terms of sentencing[30] and that this bill has attracted bipartisan support[31] as well as support from major prosecutorial and law enforcement organizations.[32] While I do not have a settled view on whether it makes sense to completely eliminate the differential when it comes to sentencing, the current disparity between how crack cocaine offenders are treated compared to powder cocaine offenders does strike me as being excessive.

Retroactivity

Let me say a few words about retroactivity. Both the First Step Implementation Act and the EQUAL Act have retroactivity provisions that might enable offenders who committed their offenses prior to passage of these Acts to take advantage of some of the changes that these laws, if enacted, would bring about, leaving it to the court's discretion whether to grant or deny a petition for relief.

There are many who object to the retroactive application of changes in sentencing laws. In addition to those who did not support the change in the first place, others object because it runs counter to the general principle of desiring finality in criminal cases,[33] which can be particularly unsettling to victims and their families. Some have mentioned the need to conserve judicial resources and the burden that would be placed on judges who would be tasked with reconsidering sentences that were imposed long ago at the expense of attending to other matters.[34] Others have noted that the original sentence that was imposed may have been the result of a plea bargain in which other, more serious charges were dismissed; enabling an offender to petition a court for a reduction in sentence could upset the "benefit of the bargain," at least from the prosecutor's perspective. One might also object that retroactivity is a one-way ratchet, in that an offender can petition a court for resentencing when a penalty is reduced by subsequent legislation, but a prosecutor cannot petition a court to resentence a defendant when a penalty is increased by subsequent legislation.[35]

While I recognize the legitimacy of all of these arguments, I come down on the side that if society has made a judgment, as reflected through legislation passed by its elected representatives, that certain punishments are simply too harsh and therefore unjust, then the current sentiment presumably is that they were too harsh and unjust when they were originally imposed, at least theoretically. Enabling a judge to reconsider a sentence, taking into account all factors including the nature of the crime that was committed, the views of the prosecutor and any victim, and the offender's record while incarcerated, as well as an assessment of the likelihood that the offender will recidivate upon release, is a smaller price to pay than allowing offenders to languish in prison for a period of time that society now deems to be excessive.

Conclusion

The work you do, most especially in the area of criminal justice, has a dramatic impact on the lives of real people—both the victims and perpetrators of crime and their families—and helps to shape how people view our criminal justice system in terms of its effectiveness and its fairness. Over the years, I have dealt with many people of goodwill from across the political and ideological spectrum who approach these issues from different perspectives. Some believe the system should be changed because of systemic racism; others believe that we incarcerate too many people—often referring to this as "mass incarceration"—and that the economic and noneconomic costs associated with this are too high relative to any resulting public safety benefits; still others believe that we do not place enough emphasis and focus on rehabilitation and that we underestimate the capacity of those who violate our criminal laws to redeem themselves.

Though I do not agree with all of these perspectives, I acknowledge that the people who espouse these divergent viewpoints believe them passionately and sincerely. In speaking to these thought leaders, I have often been struck by how much agreement there is on many of the measures that *ought* to be taken to improve our criminal justice system, even if there is broad disagreement about *why* those measures are warranted. Sadly, I have also often been struck by the fact that such measures fail to get enacted either because people get caught up in the latter and don't focus on the former or because they insist on an all-or-nothing approach with respect to the specific proposals they support. As you continue your deliberations on these important

issues, I would urge you to focus on your areas of agreement and not let the perfect be the enemy of the good.

I thank you for inviting me here to testify today and would be happy to answer any questions you might have.

Endnotes

[1] The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2017, it had hundreds of thousands of individuals, foundation, and corporate supporters representing every state in the U.S. Its 2017 income came from the following sources: Individuals 71%, Foundations 9%, Corporations 4%, Program revenue and other income 16%. The top five corporate givers provided The Heritage Foundation with 3.0% of its 2017 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

[2] John G. Malcolm, *Do We Have a Mass Incarceration Problem? Compared to What?*, CATO UNBOUND, July 16, 2020, available at https://www.cato-unbound.org/2020/07/16/john-malcolm/do-we-have-mass-incarceration-problem-compared-what; John G. Malcolm and Cully Stimson, *Reform of Policing: What Makes Sense—and What Doesn't*, DAILY SIGNAL, June 11, 2020, available at https://www.dailysignal.com/2020/06/11/reform-of-policing-what-makes-sense-and-what-doesnt/; John G. Malcolm and Brett Tolman, *A Bill to Give Former Inmates a Second Chance*, DAILY SIGNAL, Aug. 26, 2019, available at https://www.dailysignal.com/2019/08/26/a-bill-to-give-former-inmates-a-second-chance/; John G. Malcolm and Brett Tolman, *Why It's Not "Soft On Crime" to Support Criminal Justice Reform*, DAILY SIGNAL, Aug. 20, 2018, available at https://www.dailysignal.com/2018/08/20/why-its-not-soft-on-crime-to-support-criminal-justice-reform/; John G. Malcolm, *Criminal Justice Reform a Big Part of Orrin Hatch's Legacy*, DAILY SIGNAL, June 25, 2018, available at https://www.dailysignal.com/2018/06/25/criminal-justice-reform-a-big-part-of-orrin-hatchs-legacy/; John G. Malcolm and John-Michael Seibler, *House-Passed Prison Reforms Would Help Strengthen Families and Communities*, DAILY SIGNAL, May 23, 2018, available at https://www.dailysignal.com/2018/05/23/house-passed-prison-reforms-would-help-strengthen-families-and-communities/; John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, FEDERALIST SOC'Y REV., Jan. 29, 2018, available at https://fedsoc.org/commentary/publications/the-problem-with-the-proliferation-of-collateral-consequences; John G. Malcolm, *Morally Innocent, Legally Guilty: The Case for Mens Rea Reform*, FEDERALIST SOC'Y REV., Sept. 7, 2017, available at https://fedsoc.org/commentary/publications/morally-innocent-legally-guilty-the-case-for-mens-rea-reform; John G. Malcolm and Hon. Michael Mukasey, *Criminal Law and the Administrative State: How the Proliferation of Regulatory Offenses Undermines the Moral Authority of Our Criminal Laws*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 283 (Dean Reuter & John Yoo eds., Encounter Books 2016); John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. LAW & POL. 249 (2016), available at https://static1.squarespace.com/static/57cd857d3e00bed93bb34aea/t/57cd9d09725e25df3efd2203/1473092875109/FINAL-FORMAT-Malcolm_Website-1.pdf; John G. Malcolm and Hon. Michael Mukasey, *The Importance of Meaningful Mens Rea Reform*, HERITAGE FOUND., Feb. 17, 2016, available at https://www.heritage.org/crime-and-justice/commentary/the-importance-meaningful-mens-rea-reform; John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND., Sept. 1, 2015, available at https://www.heritage.org/crime-and-justice/report/the-pressing-need-mens-rea-reform; John G. Malcolm and Paul Larkin, *Obama Is Right That We Need to Reform the Criminal Justice System*, DAILY SIGNAL, Jan. 20, 2015, available at https://www.dailysignal.com/2015/01/20/obama-got-right-wrong-state-union/#headline4; John G. Malcolm, *Criminal Law and the Administrative State: The Problems with Criminal Regulations*, HERITAGE FOUND., Aug. 6, 2014, available at https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations; John G. Malcolm, *The Case for the Smarter Sentencing Act*, HERITAGE FOUND., July

28, 2014, available at https://www.heritage.org/crime-and-justice/commentary/the-case-the-smarter-sentencing-act; John G. Malcolm, *Over-Criminalization Undermines Respect for Legal System*, HERITAGE FOUND., Dec. 11, 2013, available at https://www.heritage.org/crime-and-justice/commentary/over-criminalization-undermines-respect-legal-system.

[3] *Defining the Problem and Scope of Over-Criminalization and Over-Federalization—Testimony before the Committee on the Judiciary Over-criminalization Task Force, U.S. House of Representatives on June 14, 2013*, HERITAGE FOUND., available at https://www.heritage.org/testimony/defining-the-problem-and-scope-over-criminalization-and-over-federalization.

[4] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, untitled (congress.gov).

[5] EQUAL Act, H.R. 1693, 117th Cong. (2021), BILLS-117hr1693ih.pdf (congress.gov). A companion bill, S. 79, has been introduced in the Senate.

[6] RAISE Act of 2021, H.R. 128, 117th Cong. (2021), BILLS-117hr128ih.pdf (congress.gov).

[7] Community-Based Sentencing Alternatives for Caretakers Act of 2021, H.R. 2277, 117th Cong. (2021), BILLS-117hr2277ih.pdf (congress.gov).

[8] First Step Implementation Act of 2021, S. 1014, 117th Cong. (2021), BILLS-117s1014is.pdf (congress.gov).

[9] Prohibiting Punishment of Acquitted Conduct Act of 2021, H.R. 1621 & S. 601 (as amended by the Senate Judiciary Committee), 117th Cong. (2021), BILLS-117s601is.pdf (congress.gov).

[10] John G. Malcolm and Jason Snead, *As Justice Department Ramps Up Fight Against Violent and Drug Crime, Property Owners Put at Risk*, DAILY SIGNAL, July 21, 2017, available at https://www.heritage.org/crime-and-justice/commentary/justice-department-ramps-fight-against-violent-and-drug-crime-property.

[11] According to the National Institute on Drug Abuse (internal footnotes omitted): "In 2019, nearly 50,000 people in the United States died from opioid-involved overdoses. The misuse of and addiction to opioids—including prescription pain relievers, heroin, and synthetic opioids such as fentanyl—is a serious national crisis that affects public health as well as social and economic welfare. The Centers for Disease Control and Prevention estimates that the total 'economic burden' of prescription opioid misuse alone in the United States is $78.5 billion a year, including the costs of healthcare, lost productivity, addiction treatment, and criminal justice involvement." *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis (last visited June 14, 2021).

[12] *See*, *e.g.*, *What Are Drug Courts?*, NAT'L. DRUG CT. RES. CTR., available at https://ndcrc.org/what-are-drug-courts/ (last visited June 14, 2021).

[13] For example, the mandatory minimum penalty for a second drug offense was reduced from 20 years to 15 years, and the mandatory minimum penalty for a third drug offense was reduced from life imprisonment to 25 years.

[14] The Act clarified that an offender cannot receive the 25-year mandatory sentence for a repeat 924(c) offense unless he had previously been convicted and served a sentence for such an offense.

[15] This is in stark contrast to another provision of the First Step Act, Section 404, which enabled certain crack cocaine offenders sentenced prior to the effective date of the Fair Sentencing Act of 2010 to petition for a reduction in sentence based on the changes in the law that were brought about by that Act.

[16] *See* 18 U.S.C. § 3553(f) (listing the current list of criteria that must be met for a person to qualify for the safety valve).

[17] Many states have already enacted laws providing for the sealing or expungement of certain criminal convictions, including for juvenile offenders. See *50-State Comparison: Expungement, Sealing & Other Record Relief*

RESTORATION OF RTS. PROJECT, available at https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ (last visited June 14, 2021).

[18] I note that there are other currently existing federal statutes that would most likely apply to such conduct, including 18 U.S.C. § 402 (contempts constituting crimes). If Congress wishes to ensure that uses and disclosures of the type envisioned in this section are treated solely as misdemeanors, it might want to consider adding language that would preclude a federal prosecutor from charging such uses and disclosures as felonies. Additionally, while I acknowledge that the section provides a mens rea standard that is reasonably strong, I would encourage Congress to consider utilizing the more robust "willfulness" standard here.

[19] *See* Nicole Weissman and Marina Duane, *Five problems with Criminal Background Checks*, URB. INST., March 13, 2017, available at https://www.urban.org/urban-wire/five-problems-criminal-background-checks; *Faulty FBI Background Checks for Employment: Correcting FBI Records Is Key to Criminal Justice Reform*, NAT'L EMP. LAW PROJECT, December 2015, available at https://s27147.pcdn.co/wp-content/uploads/NELP-Policy-Brief-Faulty-FBI-Background-Checks-for-Employment.pdf.

[20] *See, e.g.*, Emma Tucker and Peter Nickeas, *The US Saw Significant Crime Rise Across Major Cities in 2020. And It's Not Letting Up*, CNN, April 3, 2021, available at https://www.cnn.com/2021/04/03/us/us-crime-rate-rise-2020/index.html; Neil MacFarquhar, *With Homicides Rising, Cities Brace for a Violent Summer*, N.Y. TIMES, June 1, 2021, available at https://www.nytimes.com/2021/06/01/us/shootings-in-us.html; Leonard A. Sipes, Jr., *Violent and Property Crime Rates in the U.S.*, CRIME IN AMERICA, April 2021, available at https://www.crimeinamerica.net/crime-rates-united-states/; Rafael A. Mangual, *Cities Got Deadlier in 2020: What's Behind the Spike in Homicides?*, THE HILL, April 5, 2021, available at https://thehill.com/opinion/criminal-justice/546445-cities-got-deadlier-in-2020-whats-behind-the-spike-in-homicides.

[21] I am also aware of a significant body of research concluding that adolescent brain development is such that juveniles are likely to act more impulsively and be less risk averse than adults. *See, e.g.*, Dustin Albert, Jason Chein & Laurence Steinberg, *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 CURRENT DIRECTIONS IN PSYCH. SCI. 114, 114–15 (2013) (describing heightened susceptibility to peer influence and resulting increased risky behavior in adolescents); Leah H. Somerville, *The Teenage Brain: Sensitivity to Social Evaluation*, 22 CURRENT DIRECTIONS IN PSYCH. SCI. 121, 125 (2013) (noting the disproportionate effect of peer reaction on juvenile decision-making compared to adults); Beatriz Luna et al., *The Teenage Brain: Cognitive Control and Motivation*, 22 CURRENT DIRECTIONS IN PSYCH. SCI. 94, 98–99 (2013) (noting that even when adolescents are capable of exercising control akin to adults, they show less consistency and less integration of brain processes in decision-making); Nico U. F. Dosenbach, Steven E. Peterson & Bradley L. Schlaggar, *The Teenage Brain: Functional Connectivity*, 22 CURRENT DIRECTIONS IN PSYCH. SCI. 101, 104 (2013); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 253–54 (1996); JOHN H. FLAVELL, PATRICIA H. MILLER & SCOTT A. MILLER, COGNITIVE DEVELOPMENT (3d ed. 1993) (discussing the advances in deductive reasoning that occur as children mature into adulthood including the ability to think hypothetically, abstractly, and multi-directionally as well as the development of metacognition).

[22] John G. Malcolm, *The Case for the Smarter Sentencing Act*, HERITAGE FOUND., July 28, 2014, available at https://www.heritage.org/crime-and-justice/commentary/the-case-the-smarter-sentencing-act.

[23] *See* 21 U.S.C. §§ 802(57), (58).

[24] *See* 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

[25] *See* U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION, August 2020 ("Since authorized by the First Step Act, 2,387 offenders received a reduction in sentence as a result of retroactive application of the Fair Sentencing Act of 2010."), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

[26] *What Is Crack? Differences Between Crack and Cocaine?,* AM. ADDICTION CTRS., available at https://americanaddictioncenters.org/cocaine-treatment/differences-with-crack (last visited June 14, 2021).

[27] *Id*. ("The intensity and duration of the high largely relate to how the drug is taken, per the National Institute on Drug Abuse. Generally, when cocaine is injected or smoked, the drug takes effect more quickly, resulting in a more intense but shorter high. When cocaine is snorted, it takes longer to feel its effects but the resulting high lasts longer. According to a clinical pharmacist, cocaine and crack produce very different effects in the body, largely related to how they are usually administered. When cocaine is snorted, its effects occur in about 1–5 minutes; they peak within 20–30 minutes; and they dissipate within 1–2 hours. The effects of crack take hold in under a minute, peak in 3–5 minutes, and last 30–60 minutes. If cocaine is injected, however, the effects begin, peak, and for about as long as crack. While injection is not the most common method of cocaine consumption, it is used by some people.").

[28] *See*, *e.g*., Michael G. Vaughn, Qiang Fu, Brian E. Perron, Amy S. B. Bohnert, Matthew O. Howard, *Is Crack Cocaine Use Associated with Greater Violence than Powdered Cocaine Use? Results from a National Sample*, AM. J. OF DRUG AND ALCOHOL ABUSE, 36: 181–186 (2010).

[29] *See, e.g*., USSC, *Quick Facts: Crack Cocaine Trafficking Offenses*, The United States Sentencing Commission (June 2020), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY19.pdf (reporting that in FY2019, 80.9 percent of defendants convicted of federal crack cocaine distribution charges were black).

[30] FAMM, CRACK COCAINE DISPARITY IN THE STATES, available at https://famm.org/wp-content/uploads/Crack-Disparity-in-the-States.pdf (last visited June 14, 2021).

[31] In addition to the fact that the EQUAL Act was introduced by a bipartisan group of Congressmen—Reps. Hakeem Jeffries (D-NY), Bobby Scott (D-VA), Kelly Armstrong (R-ND), and Don Bacon (R-NE)—and has a bipartisan list of co-sponsors, *see* https://www.govtrack.us/congress/bills/117/hr1693/details, Arkansas Governor Asa Hutchison, a Republican and former director of the Drug Enforcement Administration under President George W. Bush, recently voiced his support for the bill. Gov. Asa Hutchison, *It's Time to Fix an Old Wrong and End the Disparity Between Crack and Cocaine Offenses*, FOX NEWS, June 8, 2021, available at https://www.foxnews.com/opinion/end-crack-cocaine-offenses-gov-asa-hutchinson.

[32] *See*, *e.g.,* Letter of support from the Major Cities Chiefs Association to Sen. Booker and Rep. Jeffries (April 26, 2021), available at https://majorcitieschiefs.com/wp-content/uploads/2021/05/2021.04.26-S.-79_H.R.-1693-EQUAL-Act-Endorsement.pdf; Press Release, National District Attorneys Association, Nation's Largest Prosecutor Organization Endorses Ending the Disparity in Sentencing Between Crack and Powder Cocaine (Feb. 24, 2021), available at https://ndaa.org/wp-content/uploads/NDAA-Press-Release-on-EQUAL-Act.pdf.

[33] *See* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."); Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting) ("Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. Rev. 441, 452 (1963) (stating that a lack of finality can undermine the functions of criminal law).

[34] *See*, *e.g.*, Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment) (cited by the Teague plurality in support of claim that retroactivity overburdens judicial resources); Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) (arguing that finality conserves judicial resources).

[35] U.S. CONST. art. I, § 9, cl. 3 provides: "No…ex post facto Law shall be passed." The phrase "ex post facto," Latin for "after the fact," refers to laws that apply retroactively. Ever since Calder v. Bull, 3 U.S. 386 (1798), in which Justice Samuel Chase stated that the Ex Post Facto Clause applies to any law that renders criminal an action that was legal when it was taken, aggravates the severity of a crime, increases the resulting punishment, or alters the applicable rules of evidence after the crime was committed, courts have applied the Clause to penal laws. *See*, *e.g*.,

Lindsey v. Washington, 301 U.S. 397 (1937); Weaver v. Graham, 450 U.S. 24 (1981); Lynce v. Mathis, 519 U.S. 433 (1997).