

FROM “OVERCRIMINALIZATION” TO “SMART ON CRIME”:
AMERICAN CRIMINAL JUSTICE REFORM—LEGACY AND
PROSPECTS

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INTRODUCTION

There is a long and rich history of criminal justice reform efforts in the United States, including the early twentieth century reformers advocating for the improvement and normalization of criminal procedural and substantive law, the large-scale criminal law study and reform efforts undertaken in the late 1960s, and the more recent “overcriminalization” movement.

All of these reform movements have sought to make criminal justice more effective, rational, efficient, and fair, although the extent to which they have succeeded is a matter for debate. With Americans feeling less safe (even in the face of dropping crime rates),¹ strained law enforcement budgets,² staggering rates of incarceration and recidivism,³ and real and perceived inequities in the administration of criminal justice,⁴ it is beyond peradventure that criminal justice is long overdue for an overhaul.

In recent years, a new approach to criminal justice reform—“smart on crime”—has gained traction in policy circles. The smart on crime philosophy emphasizes fairness and accuracy in the administration of criminal justice; alternatives to incarceration and traditional sanctions; effective preemptive mechanisms for preventing criminal behavior, the transition of

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¹ See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 75-110 (2007).

² See, e.g., Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. L. FORUM 265 (2010).

³ See, e.g., PAUL BUTLER, LET'S GET FREE: A HIP HOP THEORY OF JUSTICE (2010); VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS, 3-6 (2009); Todd R. Clear, *The Great Penal Experiment: Lessons for Social Justice*, in AFTER THE WAR ON CRIME: RACE DEMOCRACY, AND A NEW RECONSTRUCTION, 61-62 (Mary Louise Frampton et al. eds., 2008).

⁴ See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

formerly incarcerated individuals to law-abiding and productive lives; and evidence-based assessments of costliness, efficiency, and effectiveness of criminal justice policies. Such approaches, which represent a refreshing break from the existing unproductive “soft on crime” and “tough on crime” binary, appeal to policymakers because a number of the initiatives associated with the smart on crime movement have produced demonstrably successful outcomes.

The overcriminalization movement’s aims—including the proper allocation of sovereign enforcement authority and priorities, fidelity to traditional requisites of criminal culpability, and the streamlining of criminal codes—are not incompatible with those of the smart on crime movement. Indeed, this latest effort at American criminal justice reform presents a tremendous opportunity to address the issue of overcriminalization.

Part I of this article traces the evolution of American criminal justice reform from the Progressive criminal justice reform agenda in the early twentieth century to the work of private law reform coalitions and government-sponsored crime commissions of the interwar period. Part II explores the emergence of the overcriminalization movement and its relationship to the major criminal law reform efforts of the last third of the twentieth century, including the Commission on Law Enforcement and the Administration of Justice (the Johnson Crime Commission) and the Brown Commission. Finally, Part III suggests how critics of overcriminalization might situate their goals and proposals within the emerging smart on crime agenda and highlights some smart on crime initiatives that dovetail particularly well with the philosophy of the overcriminalization movement.

I. THE ARC OF AMERICAN CRIMINAL JUSTICE REFORM

In the early twentieth century, reformers took on the project of improving the administration of criminal justice in the United States. As the author has observed elsewhere:

Much like today, many commentators in the early twentieth century considered the American criminal justice system to be broken. With regard to all of its phases—substance, sentencing, and procedure—the criminal justice system was thought to be inefficient and ineffective, and it failed to inspire the confidence of the bench, bar, or public.⁵

At the same time, legal realists and allied reformers sought “the recognition of the importance of social realities” in the administration of the

⁵ Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 433 (2009).

criminal law.⁶ In response, policymakers, academics, practitioners, and judges began to examine avenues for reform.⁷

A. *The Cleveland Study*

Although the early twentieth century criminal justice reform project boasted the participation of many prominent individuals (such as Lester Orfield, Hebert Hadley, and John Henry Wigmore),⁸ it is fair to say that Roscoe Pound was the leading figure.⁹ One of the classic products of Pound’s reform efforts was an examination of criminal justice administration in Cleveland, Ohio.¹⁰ Pound’s comprehensive empirical study, which Felix Frankfurter co-directed, examined a wide variety of issues within Cleveland’s criminal justice system, including those related to police administration, prosecution, criminal courts, corrections, medicine and mental health, legal education, the media, and urbanization.¹¹ In the words of Frankfurter, the in-depth study “proved what was already suspected by many and known to a few. The point is that the survey proved it. Instead of speculation, we have demonstration.”¹² The Cleveland study, with its thoughtful design and effective methodology,¹³ represented the blueprint for those who later would seek to advance evidence-based proposals for criminal justice reform in jurisdictions across the country.¹⁴

⁶ Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 425 (2006).

⁷ Fairfax, *supra* note 5, at 433 (noting that “judges, lawyers, and law professors often gathered to discuss various topics in criminal law. These discussions and collaborations ultimately produced concrete reform proposals, many of which would go on to be implemented in law and practice”).

⁸ See, e.g., *id.* at 437-40.

⁹ *Id.* at 441 (describing Pound as “the father of the larger early twentieth-century criminal procedure reform project”); see also SHELDON GLUECK, *ROSCOE POUND AND CRIMINAL JUSTICE* (1965); ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (1930). Indeed, it was Pound’s 1906 speech to the American Bar Association, entitled “The Causes of Popular Dissatisfaction with the Administration of Justice,” which served as an indictment of sorts of the American justice system. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. ANN. MEETING REP. 395, 405 (1906). Pound’s address, which has been described as “the most influential paper ever written by an American legal scholar,” set the tone for twentieth century reformers interested in improving both civil and criminal justice in the United States. Rex E. Lee, *The Profession Looks at Itself—The Pound Conference of 1976*, 3 B.Y.U. L. REV. 737, 738 (1981).

¹⁰ See THE CLEVELAND FOUND., *CRIMINAL JUSTICE IN CLEVELAND* (Roscoe Pound & Felix Frankfurter eds., 1922).

¹¹ See *id.*

¹² *Id.* at v.

¹³ See *id.* at vii-ix (noting that the study benefited from a number of attributes, including “impersonal aims,” “scientific and professional direction,” local advisory cooperation,” “indifference to quick results,” and “checks against inaccuracy”).

¹⁴ See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND SOCIAL SCIENCE* 82 (1995) (noting that study of Cleveland’s criminal justice system was “the best of many such surveys”); see also

B. *The National Crime Commission*

In addition, private law reform groups worked on criminal justice reform in a number of areas, including procedural and substantive law. Leading groups included the American Bar Association, American Law Institute, American Institute for Criminal Law & Criminology, and the Joint Committee on the Improvement of Criminal Justice.¹⁵ In the 1920s, the National Crime Commission studied and proposed a number of criminal justice reforms in response to growing public concern over the perceived increase of crime in the United States.¹⁶ The Commission, which was first organized in New York City in 1925¹⁷ and enjoyed the support of President Calvin Coolidge,¹⁸ counted among its membership “statesmen, great financiers, college presidents, deans of great law schools, former governors of states and a former justice of the Supreme Court.”¹⁹ Included among this distinguished group were the likes of Franklin D. Roosevelt,²⁰ John Henry Wigmore,²¹ Charles Evans Hughes,²² George Wickersham,²³ and Roscoe Pound.

The National Crime Commission was led by an executive committee which oversaw the work of several subcommittees charged with studying subjects such as criminal procedure, firearms regulation, education, and the relationship of crime to medicine and education.²⁴ The Commission,

MO. ASS'N FOR CRIMINAL JUSTICE, MISSOURI CRIME SURVEY (1926); ILL. ASS'N FOR CRIMINAL JUSTICE, THE ILLINOIS CRIME SURVEY (1929).

¹⁵ See, e.g., Fairfax, *supra* note 5, at 445, 448 & n.23. The Joint Committee on the Improvement of Criminal Justice “featured the combined efforts of the American Bar Association, American Law Institute, and the Association of American Law Schools.” *Id.* at 438 (citing WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 221 (1977)).

¹⁶ See, e.g., M.O. Prentiss, *War on the Growing Menace of Crime*, 23 CURRENT HISTORY 1, 1-8 (1925); JESSE O. STUTSMAN, CURING THE CRIMINAL 387-92 (1926); G.W. Kirchwey, *Breasting the Crime Wave*, THE SURV. MIDMONTHLY, Apr. 15, 1927, at 69, 70; Esther Conner, *Crime Commissions and Criminal Procedure in the United States Since 1920—A Bibliography*, 21 AM. INST. CRIM. L. & CRIMINOLOGY 129, 129 (1930) (“The high rate of crime in the United States has resulted in a country wide movement against crime.”); Fairfax, *supra* note 5, at 438-39.

¹⁷ *Will Enlist Nation in Fight on Crime*, N.Y. TIMES, Apr. 29, 1926, at 25.

¹⁸ See John Henry Wigmore, *National Crime Commission: What Will it Achieve?*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 312, 312 (1926).

¹⁹ Kirchwey, *supra* note 16, at 71.

²⁰ Franklin D. Roosevelt was a former Assistant Secretary of the Navy and the future Governor of New York and President of the United States.

²¹ John Henry Wigmore was the Dean of Northwestern University Law School and the first leader of the American Institute for Criminal Law and Criminology.

²² Charles Evans Hughes was a former Associate Justice of the Supreme Court of the United States. Wigmore, *supra* note 18, at 312.

²³ George Wickersham was a former United States Attorney General and the future chairman of the National Commission on Law Observance and Enforcement.

²⁴ See Kirchwey, *supra* note 16, at 122.

though criticized for having no real authority and being "a merely recommendatory, consultative national body,"²⁵ achieved its goals of creating and supporting local criminal justice reform organizations, studying and collecting data on the workings of the criminal justice system, and advancing legislative proposals.²⁶ The National Crime Commission's lasting legacy can be found in the large number of state and local criminal justice reform organizations formed or strengthened during the late 1920s, some of which are still in existence today.²⁷

C. *The Wickersham Commission*

The National Commission on Law Observance and Enforcement (often referred to as the Wickersham Commission) represented the single-most comprehensive criminal justice reform activity under government auspices. Starting in 1929, following on the heels of Pound's study and the National Crime Commission, the Wickersham Commission undertook a comprehensive review of American criminal justice and set forth many recommendations for reform.²⁸ The Commission, chaired by George W. Wickersham (former United States Attorney General and name partner of Cadwalader, Wickersham, and Taft), included "a who's who of mid-twentieth-century criminologists, lawyers, and social and behavioral scientists" among its membership and staff,²⁹ including Ada L. Comstock,³⁰ William S. Kenyon,³¹ and, of course, Roscoe Pound.³²

President Hoover, commenting just prior to the release of the Wickersham Commission Reports, bemoaned the "increasing enactment of Federal criminal laws over the past 20 years" which placed "a burden upon the Fed-

²⁵ Wigmore, *supra* note 18, at 314.

²⁶ See George W. Wickersham, *The Work of the National Crime Commission*, 51 A.B.A. REP. 233, 234 (1926).

²⁷ See Conner, *supra* note 16, at 134-44 (listing states influenced by the National Crime Foundation and respective sources detailing changes in state and local law enforcement in the 1920s).

²⁸ See 1 NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REP. NO. 1-14 (1931). Although the Commission looked broadly at the American criminal justice system, the study was prompted by the effect of Prohibition on American criminal justice. See 1 NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REP. NO. 1, PRELIMINARY REPORT ON PROHIBITION 1 (1931); David Booth, *Review: On Crime Commission Reports*, 2 POLITY 92 (1969).

²⁹ JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY* 77, 81 (1993).

³⁰ 1 NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REP. NO. 1, PRELIMINARY REPORT ON PROHIBITION (1931). Ada L. Comstock was the president of Radcliffe College.

³¹ *Id.* William S. Kenyon was a Circuit Judge on the United States Court of Appeals for the Eighth Circuit and a former United States Senator from Iowa.

³² *Id.* The seven other members of the Wickersham Commission were Henry W. Anderson, Newton D. Baker, William I. Grubb, Monte M. Lemann, Frank J. Loesch, Kenneth Mackintosh, and Paul J. McCormick. *Id.*

eral courts of a character for which they are ill-designed, and in many cases entirely beyond their capacity.”³³ The Reports covered a wide variety of topics, including the enforcement of prohibition laws, criminal statistics, prosecution, deportation enforcement, juvenile offenders, federal courts, criminal procedure, penal institutions, probation and parole, crime and the “foreign born,” lawlessness in law enforcement, the costs and causes of crime, and the police.³⁴ However, the Wickersham Commission’s many proposals for reform failed to command much influence.³⁵ Indeed, in 1935, the president of the American Bar Association noted that the Wickersham Commission Reports were merely “gather[ing] dust on the shelves of college libraries.”³⁶

D. *Federal Rules of Criminal Procedure*

One triumph of these early twentieth century reform efforts came just after World War II in the form of the Federal Rules of Criminal Procedure (FCRP), which sought to promote fairness, efficiency, finality, and public confidence in the administration of justice.³⁷ The FCRP transformed federal criminal practice and influenced state adjudicatory criminal procedure as well.³⁸ However, up through the middle of the twentieth century, most criminal reform successes (outside of the juvenile justice arena) had been achieved in the procedural, rather than substantive criminal law, realm.³⁹

³³ HERBERT HOOVER, PROPOSALS TO IMPROVE ENFORCEMENT OF CRIMINAL LAWS OF THE UNITED STATES, H.R. DOC. NO. 71-252, at 1 (2d Sess. 1930), *reprinted in* 1 NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REP. NO. 1, PRELIMINARY REPORT ON PROHIBITION, at 1 (1931).

³⁴ 1-6 NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REP. NOS. 1-14 (1931).

³⁵ *See* Robert B. Reich, *Solving Social Crises by Commissions*, 3 YALE REV. L. & SOC. ACTION 254, 258 (1972).

³⁶ *See id.* In December of 1934, Attorney General Homer Cummings held a “Conference on Crime,” which brought together luminaries from the policy, practice, media, and academic circles to discuss causes and solutions associated with the crime problem in the United States. *See generally* PROCEEDINGS OF THE ATTORNEY GENERAL’S CONFERENCE ON CRIME (1934). The four day conference, held in Washington, D.C., even attracted the participation of President Franklin D. Roosevelt, who noted in his address the importance of “recogniz[ing] clearly the increasing scope and complexity of the problem of criminal law administration.” *Id.* at 18.

³⁷ *See* Fairfax, *supra* note 5, at 455-56; *see also* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 68 FORDHAM L. REV. 2027, 2061-65 (2008).

³⁸ *See* Fairfax, *supra* note 5, at 455-56.

³⁹ Perhaps this should not be surprising, given that the Progressive criminal reform project was originally conceived with a primary focus on *procedural* reform. *See, e.g.*, Nathan William MacChesney, *A Progressive Program for Procedural Reform*, 3 J. CRIM. L. & CRIMINOLOGY 528, 528 (1913).

E. *Model Penal Code*

The American Law Institute’s drafting and adoption of the Model Penal Code (MPC) began an era of reform efforts focused on the *substantive* criminal law. Although the American Law Institute originally proposed the drafting of a model code in 1931, the project did not begin in earnest until the early 1950s.⁴⁰ Led by Herbert Wechsler of Columbia University and Louis Schwartz of the University of Pennsylvania, the model code drafting project would span more than a decade.⁴¹ With its comprehensive and streamlined codification of crimes and modern approach to *mens rea* and other criminal law doctrines, the MPC was—and still is—one of the most significant and influential products of twentieth century American criminal law reform.⁴² The MPC set the stage for the Johnson Crime Commission and Brown Commission of the late 1960s and early 1970s, respectively, which picked up where the Wickersham Commission had left off more than three decades prior and foreshadowed the emergence of the overcriminalization movement.

II. THE GREAT SOCIETY CRIME COMMISSIONS AND THE EMERGENCE OF THE OVERCRIMINALIZATION MOVEMENT

The modern overcriminalization movement can trace its lineage to the broad and ambitious efforts of President Lyndon Johnson’s commissions on crime and criminal code reform in the late 1960s. A number of the themes animating contemporary critiques of overcriminalization are apparent in the rhetoric, findings, and recommendations of those crime commissions.

A. *The Johnson Crime Commission*

President Lyndon Johnson established the Commission on Law Enforcement and Administration of Justice in 1965. The Commission was chaired by Nicholas deB. Katzenbach⁴³ and included the likes of Kingman

⁴⁰ See Paul Robinson & Markus Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 321 (2007); Ron Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 90-91 (1998).

⁴¹ See Gainer, *supra* note 40, at 92.

⁴² See Robinson & Dubber, *supra* note 40, at 333-35; Gainer, *supra* note 40, at 90-92.

⁴³ PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, TASK FORCE ON THE ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS iv (1967) [hereinafter TASK FORCE REPORT: THE COURTS]. Katzenbach was the United States Attorney General.

Brewster,⁴⁴ Leon Jaworski,⁴⁵ Lewis F. Powell, Jr.,⁴⁶ William P. Rogers,⁴⁷ Herbert Wechsler,⁴⁸ and Whitney M. Young, Jr.⁴⁹

The Johnson Commission had a broad mandate, including a comprehensive review of American criminal justice.⁵⁰ Johnson administration Attorney General Ramsey Clark observed in 1967 that “America [had] failed to accept the challenge” of the Wickersham Commission and that the effort had been “resurrected” by Johnson’s Commission.⁵¹ To be sure, both commissions, separated by some thirty-five years, had the same broad goals, including consideration of the economic and social costs of crime and criminalization. But whereas the Wickersham Commission operated against the backdrop of growing public dissatisfaction with the Prohibition’s impact on the administration of criminal justice,⁵² the Johnson Commission responded to rising crime rates in the 1960s (and concomitant increases in levels of fear and anxiety), as well as continued urbanization and increasing racial, societal, and political tensions.⁵³ In fact, suggestions were

⁴⁴ *Id.* Kingman Brewster was the president of Yale University and the future United States Ambassador to the United Kingdom.

⁴⁵ *Id.* Leon Jaworski was a future Watergate special prosecutor.

⁴⁶ Lewis F. Powell, Jr. was a future Associate Justice of the Supreme Court of the United States. *Lewis F. Powell, Jr. (1907-1998)*, WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW <http://law.wlu.edu/alumni/bios/powell.asp> (last visited Apr 13, 2011).

⁴⁷ William P. Rogers was a former United States Attorney General and a future United States Secretary of State. David Stout, *William P. Rogers, Who Served as Nixon’s Secretary of State, Is Dead at 87*, N.Y. TIMES, Jan. 4, 2001, <http://www.nytimes.com/2001/01/04/us/william-p-rogers-who-served-as-nixon-s-secretary-of-state-is-dead-at-87.html?src=pm>.

⁴⁸ Herbert Wechsler was a professor at Columbia Law School and the principal drafter of the Model Penal Code. *Herbert Wechsler 1909-2000*, THE AMERICAN LAW INSTITUTE, http://www.ali.org/ali_old/R2204_Wechsler.htm (last visited July 3, 2011).

⁴⁹ Whitney M. Young, Jr. was the Executive Director of the National Urban League. Rudy Williams, *Whitney M. Young, Jr.: Little Known Civil Rights Pioneer*, U.S. DEP’T OF DEF. (Feb. 1, 2002), <http://www.defense.gov/news/newsarticle.aspx?id=43988>; *see, e.g.*, TASK FORCE REPORT: THE COURTS, *supra* note 43. James Vorenberg (future Watergate special prosecutor and dean of Harvard Law School) served as Executive Director and led an all-star corps which included: deputy director Henry S. Ruth, Jr.; staffer Gerald M. Caplan; consultants Norman Abrams, Anthony Amsterdam, Gilbert Geis, Sanford Kadish, Patricia Wald, and Lloyd Weinreb; and advisers Sylvia Bacon, Gary Bellow, Geoffrey Hazard, Jr., Peter Low, Frank Miller, Herbert Packer, David Shapiro, and Jack Weinstein, among others. *See id.* at iv-vi.

⁵⁰ *See Gainer, supra* note 40, at 93.

⁵¹ *See* Henry S. Ruth, Jr., *To Dust Shall Ye Return?*, 43 NOTRE DAME L. REV. 811, 831 (1967) (quoting Ramsey Clark, *Report of the 97th Annual Congress of Correction*, 29 AM. J. OF CORR. 13, 17-18 (1967)); *see also generally* RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* (1970).

⁵² *See* NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, *ENFORCEMENT OF THE PROHIBITION LAWS*, S. DOC. NO. 73-307, at 13-14 (1931).

⁵³ *See* PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT 24* (1967) [hereinafter *THE CHALLENGE OF CRIME IN A FREE SOCIETY*]; Jeffrey Fagan, *Continuity and Change in American Crime: Lessons from Three Decades*, in Symposium, *THE CHALLENGE OF CRIME IN A FREE SOCIETY: LOOKING BACK*,

made that the Johnson Crime Commission was an attempt to appease a public clamoring for broad and hasty legislative responses to perceived spikes in crime.⁵⁴ As Todd Clear observed, "the [Johnson] Commission might well be seen as the first foray of politics into the crime policy arena."⁵⁵

The Johnson Crime Commission released its 1967 report, *The Challenge of Crime in a Free Society*, with a great deal of attention and fanfare.⁵⁶ The report spanned twelve substantive chapters covering a snapshot of crime in America, juvenile delinquency and youth crime, police, courts, corrections, organized crime, narcotics and drug abuse, drunkenness, control of firearms, science and technology, research, and a national strategy on crime.⁵⁷ Additionally, the report contained over two hundred recommendations to "cities, to States, to the Federal Government; to individual citizens and their organizations; to policemen, to prosecutors, to judges, to correctional authorities, and to the agencies for which these officials work[ed]."⁵⁸ Furthermore, the report concluded:

Taken together these recommendations and suggestions express the Commission's deep conviction that if America is to meet the challenge of crime it must do more, far more, than it is doing now. It must welcome new ideas and risk new actions. It must spend time and money. It must resist those who point to scapegoats, who use facile slogans about crime by habit or for selfish ends. It must recognize that the government of a free society is obliged to act not only effectively but fairly. It must seek knowledge and admit mistakes. . . . Controlling crime in America is an endeavor that will be slow and hard and costly. But America can control crime if it will.⁵⁹

Some of the Johnson Crime Commission's rhetoric may sound familiar to those currently engaged in efforts concerning the issues of overcriminalization, particularly the notion that some antisocial conduct would be better addressed through civil or other non-criminal sanctions.⁶⁰ Indeed, Chapter 8 ("Substantive Law Reform and the Limits of Effective Law En-

LOOKING FORWARD 16-17 (1998); Warren Lehman, *Crime, The Public, and the Crime Commission: A Critical Review of The Challenge of Crime in a Free Society*, 66 MICH. L. REV. 1487, 1492 (1967).

⁵⁴ *Hearings Before the Subcommittee on Administrative Practice and Procedure, Comm. on the Judiciary*, U.S. Senate, 92nd Cong., 1st Sess., (1971) (statement of Nicholas Katzenbach).

⁵⁵ Todd R. Clear, *Societal Responses to the President's Crime Commission: A Thirty-Year Retrospective*, in Symposium, *supra* note 53, at 134.

⁵⁶ See Ruth, *supra* note 51, at 830-31 (1967) (noting that over one hundred thousand copies of the report, which was the subject of a ninety minute special on NBC's *Meet the Press*, were distributed).

⁵⁷ See THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 53, at 17-291.

⁵⁸ See *id.* at 291, 293-301. Although the report did not make many specific and concrete legislative proposals, see Clear, *supra* note 55, at 137, the report's policy recommendations did help to shape the 1968 Omnibus Crime Control and Safe Streets Act and the Organized Crime Control Act of 1970. See Michael Tonry, *Building Better Policies on Better Knowledge*, in Symposium, *supra* note 53, at 94; Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 667 n.25 (1987).

⁵⁹ THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 53, at 291.

⁶⁰ See, e.g., *id.* at 126-27, 211-37; TASK FORCE REPORT: THE COURTS, *supra* note 43, at 97-107.

forcement”) of the Johnson Crime Commission’s task force report on the Courts (the Court Report) referred to “overreliance on the criminal law”⁶¹ and lamented “the sheer bulk of penal regulations”⁶² and the “remarkable range of human activities now subject to the threat of criminal sanctions.”⁶³ In addition, the Court Report recommended the “appropriate redefinition”⁶⁴ of certain crimes in order to achieve “a substantial contraction of the area of criminality.”⁶⁵ Interestingly, Sanford Kadish, one of the consultants for the Court Report, even explicitly used the term overcriminalization in a 1968 article amplifying his views of the Johnson Crime Commission’s work.⁶⁶

B. *The Brown Commission*

The work of the Johnson Crime Commission prompted calls for the substantial revision of federal criminal law.⁶⁷ The National Commission on Reform of Federal Criminal Laws (popularly known as the Brown Commission) sought to propose a comprehensive and integrated federal criminal code.⁶⁸ Established by Congress in 1966,⁶⁹ the Brown Commission originally had a broad statutory mandate, “including a review not only of substantive criminal law and the sentencing system, but also of procedure and all other aspects of ‘the federal system of criminal justice.’”⁷⁰ Ultimately, the Brown Commission decided to focus its three-year enterprise on reform of the substantive federal criminal law.⁷¹

The Brown Commission—like the Wickersham Commission and Johnson Crime Commission before it—boasted the participation of many leading lights of the bench, bar, and academy. For instance, its members included Edmund Brown, Sr.,⁷² Judge George C. Edwards,⁷³ Sam J. Ervin,

⁶¹ *Id.* at 98.

⁶² *Id.* at 99.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); see also Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 972 & n.8 (2009).

⁶⁷ See Gainer, *supra* note 40, at 94.

⁶⁸ See NATL. COMM’N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE) xi (1971).

⁶⁹ See Pub. L. No. 89-801, 80 Stat. 1516 (1966).

⁷⁰ See *supra* note 68.

⁷¹ *Id.* The legislation was later amended to expand the timeframe from three years to four years. See Public Law 91-39, 83 Stat. 44 (1969). The Commission’s final report was submitted in 1971. See FINAL REPORT, *supra* note 68; Paul Marcus, *The Proposed Federal Criminal Code: Conspiracy Provisions*, 1978 U. ILL. L. F. 379, 379.

⁷² Edmund Brown was a former governor of California.

⁷³ Judge George C. Edwards sat on the United States Court of Appeals for the Sixth Circuit.

Jr.,⁷⁴ Judge A. Leon Higginbotham,⁷⁵ and Abner Mikva.⁷⁶ The Advisory Committee included Justice Tom C. Clark,⁷⁷ Patricia Roberts Harris,⁷⁸ Robert M. Morgenthau,⁷⁹ Louis Pollak,⁸⁰ Elliot Richardson,⁸¹ and Professor James Vorenberg.⁸²

The Brown Commission completed the Herculean task of proposing a federal criminal code, consisting of a general part, a specific part, and a sentencing portion. The final report also noted statutes residing within and outside of Title 18 of the United States Code that would be impacted by the proposed laws. The completion of the Brown Commission's work, which spilled over into the Nixon Administration, coincided with the beginning of more than a decade's worth of efforts to pass a comprehensive criminal code in both houses of Congress. The 1984 Comprehensive Crime Control Act (which passed both houses of Congress and was supported by the Reagan Administration) did represent some progress, but largely paled in comparison to what the Brown Commission had originally proposed.⁸³ Nevertheless, the failed attempt to streamline and refine the federal criminal code would help to spawn what would become known as the overcriminalization movement.⁸⁴ Although there were at least a half-dozen other national

⁷⁴ Sam J. Ervin, Jr. was a United States Senator from North Carolina.

⁷⁵ Judge A. Leon Higginbotham, Jr. was a District Judge on the United States District Court for the Eastern District of Pennsylvania when he served on the Brown Commission and later became the Chief Judge of the United States Court of Appeals for the Third Circuit.

⁷⁶ Abner Mikva was a United States Representative from Illinois when he served on the Brown Commission and later became White House Counsel and the Chief Judge of United States Court of Appeals for the District of Columbia Circuit. *See supra* note 68, at 361-62.

⁷⁷ Justice Tom C. Clark was a recently retired Associate Justice of the Supreme Court of the United States and former United States Attorney General.

⁷⁸ Patricia Roberts Harris was a former United States Ambassador to Luxembourg and former Dean of Howard University School of Law.

⁷⁹ Robert M. Morgenthau is a former United States Attorney for the Southern District of New York and became a long-serving Manhattan District Attorney.

⁸⁰ Louis H. Pollak was the Dean of the Yale Law School and later became Dean of the University of Pennsylvania Law School and a District Judge on the United States District Court for the Eastern District of Pennsylvania.

⁸¹ Elliot Richardson was a former United States Attorney for the District of Massachusetts during his service on the Brown Commission and later became the United States Attorney General, United States Secretary of Commerce, United States Secretary of Defense, and United States Secretary of Health, Education, and Welfare.

⁸² Professor James Vorenberg was a prominent criminal law scholar and professor at Harvard Law School who later became Dean at Harvard. *See supra* note 68, at 363-64. As a point of personal privilege (and institutional pride), I would like to note that several of the key Brown Commission participants were then-current and former members of the George Washington University Law School faculty, including advisory committee member Patricia Roberts Harris, and consultants Robert G. Dixon, Jr., David Robinson, and James Starrs.

⁸³ *See Gainer, supra* note 40, at 136.

⁸⁴ However, as Professor Julie O'Sullivan has noted, "[a]lthough previous code reform efforts in the 1960s through the 1980s failed, they did yield something that made the deficiencies of the substan-

government or private commissions focused on criminal law reform in the 1960s and 1970s,⁸⁵ the Brown Commission and the Johnson Crime Commission deserve recognition for laying the foundation for today's overcriminalization movement.

C. *The Overcriminalization Movement*

Over the four decades since the work of the Johnson Crime Commission and the Brown Commission, a philosophical and advocacy movement has developed. Built on the foundation of the earlier criminal law reform commissions, the visibility and influence of the "overcriminalization" movement continues to grow. Notably, the movement has enjoyed broad-based participation across the ideological spectrum, support that is typically elusive on hot-button social issues such as crime. The roster of organizations active in the overcriminalization movement demonstrates the broad ideological coalition at its core. For example, diverse groups such as the Washington Legal Foundation, the Federalist Society, the Cato Institute, the Heritage Foundation, Families Against Mandatory Minimums, the American Civil Liberties Union, and the National Association of Criminal Defense Lawyers have come together in recent years to support the movement.⁸⁶

Not surprisingly for a group marked by such ideological diversity, the characterization of the movement's central aim may differ depending upon who is asked. During the "Overcriminalization: The Politics of Crime" symposium held in 2004, scholars, practitioners, and policy analysts had the opportunity to ponder the meaning of overcriminalization.⁸⁷ Although overcriminalization may mean many different things to different people,⁸⁸ one or more of five core critiques likely come to mind for people outside of the movement when the term is invoked. The first is what has come to be

tive code more tolerable: the U.S. Sentencing Guidelines." Julie O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 645 (2006).

⁸⁵ See FINAL REPORT, *supra* note 68, at xi; Michael Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 L. & SOC. INQUIRY 171, 173 (2009); AM. BAR ASS'N, REPORT OF THE CRIMINAL JUSTICE SECTION TASK FORCE ON CRIME (1981); ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM; A COMMISSION REPORT (1971).

⁸⁶ See, e.g., Press Release, National Association of Criminal Defense Attorneys, *Diverse Coalition Urges Congress to Rein in Overcriminalization* (Sept. 29, 2010), <http://www.nacd.org/public.nsf/NewsReleases/2010mn32?OpenDocument>.

⁸⁷ See Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

⁸⁸ See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748-49 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712-19 (2005).

known as “overfederalization,”⁸⁹ which is a critique of the improper allocation of sovereign enforcement authority and priorities between the federal government and the states.⁹⁰ A second meaning of overcriminalization is a critique of the improper criminalization of “relatively trivial conduct”⁹¹ or conduct better made “a matter of individual morality.”⁹² The third meaning is a critique of the lack of fidelity to traditional requisites of criminal culpability.⁹³ A fourth meaning is a critique of the failure to streamline expansive and often redundant criminal codes.⁹⁴ Finally, overcriminalization also has been used to describe harsh sanctions of “excessive punishment attached to uncontroversial (or at least plausible) criminal statutes.”⁹⁵ All of these critiques fairly fall under the umbrella of the overcriminalization movement.⁹⁶

III. FROM OVERCRIMINALIZATION TO ‘SMART ON CRIME’

A. *The Emergence of the ‘Smart on Crime’ Agenda*

The well-documented financial struggles of federal, state, and local governments in the United States have hit criminal justice administration

⁸⁹ Beale, *supra* note 88, at 748-49 & n.4.

⁹⁰ See, e.g., Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1573 & n.25 (2010); Beale, *supra* note 88, at 748-49 & n.4; see also generally Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002); James A. Strazzella, *The Federalization of Criminal Law: Task Force on the Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. L. REP.; Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995). *But see* Susan R. Klein, *Debunking Claims of Over-Federalization of Criminal Law* (draft manuscript on file with author).

⁹¹ Beale, *supra* note 88, 748. *But see* Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 461 (2009).

⁹² Beale, *supra* note 88, at 748.

⁹³ See, e.g., Podgor, *supra* note 90, at 1573; Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, NACDL & THE HERITAGE FOUNDATION (2010), <http://www.heritage.org/Research/Reports/2010/05/Without-Intent>.

⁹⁴ See, e.g., Brown, *supra* note 91, at 463; O’Sullivan, *supra* note 84, at 645; John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 548-54 (2005).

⁹⁵ Brown, *supra* note 91, at 462; see also Lisa H. Nicholson, *Sarbanes-Oxley’s Purported Over-Criminalization of Corporate Offenders*, 2 J. BUS. & TECH. L. 43, 45-46 (2007).

⁹⁶ For an in-depth treatment of the topic of overcriminalization, see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); see also IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” (Timothy Lynch ed., 2009); GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004); Brown, *supra* note 91.

particularly hard. All across the nation, governments must do more with less and make difficult decisions regarding the reduction of enforcement or punishment capacity.⁹⁷ The tremendous economic challenges facing governments have prompted the desire for new approaches to the delivery of cost-effective services. Although governments have always focused on how to punish and rehabilitate offenders to keep the community safe, they now seek to do so economically and efficiently.⁹⁸

Certainly, all of the aforementioned historical reform efforts sought to make criminal justice more effective, rational, efficient, and fair, although the extent to which they have succeeded is a matter for debate. However, with strained law enforcement budgets, staggering rates of incarceration and recidivism,⁹⁹ and real and perceived inequities in the administration of criminal justice,¹⁰⁰ it is beyond debate that an overhaul of American criminal justice is long overdue.

In recent years, a newly packaged approach to criminal justice reform—smart on crime—has gained traction in policy circles. The smart on crime philosophy emphasizes: (1) fairness and accuracy in the administration of criminal justice; (2) recidivism-reducing alternatives to incarceration and traditional sanctions; (3) effective pre-emptive mechanisms for preventing criminal behavior; (4) the transition of formerly incarcerated individuals to law-abiding and productive lives; and (5) evidence-based assessments of the costliness, efficiency, and effectiveness of criminal justice policies.¹⁰¹

Although the term had been in use for some time,¹⁰² the smart on crime approach and proposals recently have been championed by current office-

⁹⁷ See, e.g., Fairfax, *supra* note 2, at 275-76; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 418-19 (2009).

⁹⁸ A recent story highlighted on Professor Doug Berman's blog tells of the Ohio Department of Rehabilitation and Correction's cost-cutting decisions, *inter alia*, to charge inmates \$1 per day for electricity in their cells and to limit the inmates' lunch and dinner beverage options to water. See Doug Berman, *Do the Crime, Pay More than Time*, SENTENCING LAW AND POLICY, http://sentencing.typepad.com/sentencing_law_and_policy/2011/03/do-the-crime-pay-more-than-time.html (quoting Alan Johnson, *Do the Crime, Pay More than Time*, COLUMBUS DISPATCH, Mar. 18, 2011) (last visited March 18, 2011).

⁹⁹ See, e.g., BUTLER, *supra* note 3; Mary D. Fan, *Beyond Budget Cut Criminal Justice*, 90 N.C. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1804539>.

¹⁰⁰ See, e.g., ALEXANDER, *supra* note 4.

¹⁰¹ See, e.g., THE SMART ON CRIME COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE ADMINISTRATION AND CONGRESS, iv-v (2011). Perhaps seeds of the current smart on crime approach, particularly in the area of sentencing, can be found in the American Bar Association's Justice Kennedy Commission Report, issued in August 2004. See AM. BAR ASS'N, JUSTICE KENNEDY COMMISSION: REPORTS WITH RECOMMENDATIONS (Aug. 2004).

¹⁰² See, e.g., Mary Price, *Sentencing Reform: Eliminating Mandatory Minimums, Easing Harsh Sentencing Structures and Building "Smart-on-Crime" Solutions—One State at a Time*, CHAMPION MAGAZINE, June 2004, at 18; Press Release, Am. Bar Ass'n, ABA Commission Cites Over-Reliance on Incarceration, Calls for New "Smart on Crime" Approach (June 23, 2004),

holders on the federal, state, and local levels.¹⁰³ Perhaps most notably, smart on crime rhetoric has begun to seep into political campaigns, including those run by individuals seeking elected prosecutorial office.¹⁰⁴ However, the smart on crime rhetoric received the greatest amount of attention—and, perhaps, legitimacy—when Attorney General Eric Holder endorsed the philosophy during his address to the American Bar Association Convention in August of 2009:

There is no doubt that we must be “tough on crime. But we must also commit ourselves to being “smart on crime.” . . . Getting smart on crime requires talking openly which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy. And getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government’s ability to enhance public safety before the crime is committed and after the former offender is returned to society.¹⁰⁵

Such approaches, which represent a refreshing break from the all-too-common and unproductive soft on crime and tough on crime binary, appeal to voters and policymakers because a number of the initiatives associated with the smart on crime movement have produced demonstrably successful outcomes. Just as the overcriminalization movement has enjoyed broad-based support, the smart on crime mantle has been picked up by those across the ideological spectrum. For example, the “Smart on Crime Coalition,” which has developed a comprehensive set of specific smart on crime proposals, includes a diverse set of over forty institutions interested in criminal justice reform.¹⁰⁶ In addition, various groups have taken up the cause of smart on crime reform.¹⁰⁷

<http://www.abanow.org/2004/06/aba-commission-cites-over-reliance-on-incarceration-calls-for-new-smart-on-crime-approach/>.

¹⁰³ See, e.g., KAMALA HARRIS, SMART ON CRIME: A CAREER PROSECUTOR’S PLAN TO MAKE US SAFER (2009); Kamala D. Harris, *Smart on Crime*, in AFTER THE WAR ON CRIME: RACE DEMOCRACY, AND A NEW RECONSTRUCTION (Mary Louise Frampton et al. eds., 2008).

¹⁰⁴ On the website for Ms. Harris’ successful 2010 campaign for California Attorney General, her philosophy was made clear:

Since her election in 2003, Kamala Harris has proven herself to be a District Attorney who not only stands her ground, but breaks new ground in the fight to fix our failing criminal justice system. . . . Her pledge is to move beyond the false choice of being either ‘tough’ or ‘weak’ on crime. Kamala Harris is Smart on Crime, and it’s working.

Smart on Crime, KAMALA HARRIS FOR CALIFORNIA ATTORNEY GENERAL 2010, (Apr. 16, 2011), <http://www.kalaharris.org/smartoncrime>.

¹⁰⁵ Hon. Eric Holder, U.S. Attorney Gen., Address at the 2009 American Bar Association Convention (Aug. 3, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>; see also Charles M. Blow, Op-Ed., *Getting Smart on Crime*, N.Y. TIMES, Aug. 14, 2009, at A19.

¹⁰⁶ See SMART ON CRIME, *supra* note 101, at vi. The report was an update of an earlier report, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS, issued by the

This sort of diverse and influential advocacy has the potential to gain political traction if the timing is right. Such a window opened in 2009, when Senator Jim Webb, a Democrat from Virginia, spearheaded a legislative campaign to form a National Criminal Justice Commission.¹⁰⁸ As originally conceived, Senator Webb's Commission would be made up of eleven members, including a chair appointed by the President, and ten others appointed by majority and minority leaders in the Senate and House, as well as the chairs of the Republican and Democratic Governors Associations.¹⁰⁹ The members were to be experts in a number of areas, including law enforcement, criminal justice, national security, prison administration, prisoner reentry, public health (including drug addiction and mental health), victims' rights, and social services.¹¹⁰ The proposed Commission would be the first major government-sponsored reform effort since the Johnson and Brown Commissions and would have a broad mandate to "review the [criminal justice] system from top to bottom"¹¹¹:

"2009 Criminal Justice Transition Coalition" on November 5, 2008. As the front matter of the more recent report states, "[t]he efforts of the Smart on Crime Coalition are coordinated by the Constitution Project . . . [which] brings together unlikely allies—experts and practitioners from across the political spectrum—in order to promote and safeguard America's founding charter." *Id.*; see also Tony Mauro, *Reforming the Criminal Justice System*, THE BLOG OF LEGAL TIMES (Feb. 10, 2011), <http://legaltimes.typepad.com/blt/2011/02/refroming-the-criminal-justice-system.html> (reporting on the release of the Smart on Crime Coalition report, noting "[t]he last time the federal criminal justice system under went major reform was more than 40 years ago" and that "[a] broad coalition of organizations, ranging from the American Civil Liberties Union to the Heritage Foundation, today agreed that the time has come for another overhaul"). But see Michelle Alexander, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 14, 2011, at WK9.

¹⁰⁷ See, e.g., *The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers*, RIGHT ON CRIME, <http://www.rightoncrime.com> (last visited July 9, 2011). The American Bar Association recently identified a set of priorities for criminal justice reform, many of which overlap with typical smart on crime solutions. See Bruce Green, *Criminal Justice—What's Ahead? Roadblocks and New Directions*, 25 CRIMINAL JUSTICE 4 (2011); *State Policy Implementation Project—Save States Money While Improving the Criminal Justice System*, AM. BAR ASS'N., <http://www2.americanbar.org/sections/criminaljustice/CR203800/Pages/statepolicyproject.aspx> (last visited July 22, 2011); see also AM. BAR ASS'N., *THE STATE OF CRIMINAL JUSTICE* (2009).

¹⁰⁸ National Criminal Justice Commission Act of 2009, S. 714, 111th Cong. (as reported by the S. Comm. on the Judiciary, Mar. 26, 2009). It should be noted that there previously was a "National Criminal Justice Commission," which was a project of the National Center on Institutions and Alternatives, a private criminal justice research and practice organization. Commissioners included the likes of Professor Derrick Bell, Elaine Jones, Professor Charles Ogletree, and Professor James Vorenberg. Among the many distinguished advisors and consultants were Marc Mauer, Professor Tracey Meares, Professor Jamin Raskin, Professor Randolph Stone, and Professor Franklin Zimring. See *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION xi-xxvi* (Steven R. Donziger ed., 1996). The Commission proposed its "Pathway to a Safer Society: 2020 Vision," which was a set of eleven recommendations for improving the administration of criminal justice in the United States. *Id.* at 195-219.

¹⁰⁹ S. 714, at 12.

¹¹⁰ *Id.* at 13.

¹¹¹ Editorial, *Reviewing Criminal Justice*, N.Y. TIMES, Mar. 30, 2009, at A0.

The Commission shall undertake a comprehensive review of the criminal justice system, make findings related to Federal and State criminal justice policies and practices, and make reform recommendations for the President, Congress, and State governments to improve public safety, cost-effectiveness, overall prison administration, and fairness in the implementation of the Nation’s criminal justice system.¹¹²

Although Senator Webb’s thorough and energetic campaign to garner early broad support buoyed the legislation, the Commission ran into legislative stumbling blocks. A revised version of the legislation introduced in the summer of 2010 expanded the membership to fourteen Commissioners, including two co-chairmen appointed by the President in consultation with the leadership of the House and Senate, and two local representatives appointed by the President in agreement with the Senate Majority Leader and Speaker of the House.¹¹³ The stated mandate of the Commission was changed in the revised legislation, providing that “[t]he Commission shall undertake a comprehensive review of the criminal justice system, encompassing current Federal, State, local, and tribal criminal justice policies and practices, and make reform recommendations for the President, Congress, State, local, and tribal governments.”¹¹⁴ The National Criminal Justice Commission legislation was approved by the House of Representatives in July of 2010 but failed to clear the Senate.¹¹⁵ Senator Webb reintroduced the legislation in February of 2011,¹¹⁶ reiterating his earlier smart on crime sentiment: “We can be smarter about whom we incarcerate, improve public safety outcomes, make better use of taxpayer dollars, and bring greater fairness to our justice system.”¹¹⁷ If the legislation ultimately passes,¹¹⁸ the National Criminal Justice Commission would represent a tremendous opportunity for the proposal and implementation of smart on crime reforms.

¹¹² S. 714, at 6.

¹¹³ National Criminal Justice Commission Act of 2010, S. 714, 111th Cong. (as reported by the S. Comm. on the Judiciary, May 6, 2010), at 23-24.

¹¹⁴ *Id.* at 19-20.

¹¹⁵ See National Criminal Justice Commission Act of 2010, H.R. 5143, 111th Cong., 2d Sess.; Press Release, Senator Webb Reintroduces National Criminal Justice Commission Act (Feb. 8, 2011), <http://www.webb.senate.gov/newsroom/pressreleases/02-08-2011-02.cfm>.

¹¹⁶ See National Criminal Justice Commission Act of 2011, S. 306, 112th Cong.; Press Release, *supra* note 115.

¹¹⁷ Press Release, *supra* note 115.

¹¹⁸ The recent announcement of Senator Webb’s planned retirement from the U.S. Senate in 2012 has left the initiative in some limbo. See Mauro, *supra* note 106. However, such a commission presumably also could be created through an executive order or under the auspices of a governmental agency.

B. *The Compatibility of Overcriminalization with the ‘Smart on Crime’ Agenda*

This latest effort at American criminal justice reform presents an opening to address the issue of overcriminalization. The aims of the overcriminalization movement—including the proper allocation of sovereign enforcement authority and priorities, fidelity to traditional requisites of criminal culpability, and the streamlining of criminal codes—are not incompatible with those of the smart on crime movement. Indeed, the Smart on Crime Coalition’s report, “Smart on Crime: Recommendations for the Administration and Congress,” devotes its very first chapter to proposals addressing overcriminalization.¹¹⁹ However, other core smart on crime proposals also dovetail well with the overcriminalization philosophy. In particular, certain innovative criminal justice policies identified with the smart on crime movement may serve the overcriminalization movement’s interest in avoiding criminal sanctions such as incarceration where other controls on antisocial conduct may be more desirable.

One example might be found in the use of restorative justice and alternative dispute resolution (ADR) in the criminal process.¹²⁰ For instance, victim-offender mediation is a voluntary process by which the victim of a crime and the alleged offender are joined by a neutral mediator in a face-to-face meeting.¹²¹ With the help of the mediator, the parties reveal and discuss the root causes of the conduct at issue.¹²² Experience has proven that most such mediations “result in an agreement resolving the issues and conflict underlying the criminal conduct, and a plan for prospective avoidance of repeat incidents.”¹²³ An apology and, where appropriate, financial restitution are also components of the agreement.¹²⁴ Overcriminalization advocates should be impressed by the fact that successful mediations mean that the criminal process is not invoked (or prolonged), criminal sanctions are not imposed unnecessarily, and victims are made whole.¹²⁵

¹¹⁹ See THE SMART ON CRIME COALITION, *supra* note 101, at 1-17.

¹²⁰ See, e.g., Kimberlee K. Kovach, *Expanding the Use of Mediation and ADR*, in AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE 2009 203-208 (2009).

¹²¹ See Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS J. 339, 362 (2010). Other methods of integrating alternative dispute resolution into the criminal process include sentencing circles and peacemaking circles. See, e.g., *id.*; Carol L. Izumi, *The Use of ADR in Criminal and Juvenile Delinquency Cases*, in ADR HANDBOOK FOR JUDGES 196 (Donna Steinstra & Susan M. Yates eds., 2004); Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Restoring Public Norms*, 34 VT. L. REV. 563 (2010).

¹²² See Izumi, *supra* note 121.

¹²³ Fairfax, *supra* note 121, at 362-63; Izumi, *supra* note 121, at 196-97.

¹²⁴ See Fairfax, *supra* note 121, at 364.

¹²⁵ See Fairfax, *supra* note 121, at 363 (noting that victim-offender mediation “has proven to be very successful and well-received by victims and offenders alike”) (citing Izumi, *supra* note 121, at 196-

Likewise, drug courts are another criminal justice innovation that may hold appeal for the overcriminalization movement. One of a variety of “problem-solving courts,”¹²⁶ which address a wide range of social ills giving rise to criminal conduct,¹²⁷ drug courts attempt to prevent and address the root causes of, antisocial conduct related to narcotics use. Using a system of sanctions to incentivize completion of drug treatment and other rehabilitation, drug courts give drug-addicted offenders the chance to avoid serious criminal charges, incarceration, and collateral consequences.¹²⁸ Although there are some concerns regarding how drug courts operate in practice and impact vulnerable offenders,¹²⁹ they have been celebrated as a successful criminal justice innovation.¹³⁰ For overcriminalization advocates, such opportunities to prevent recidivism by low-level, non-violent offenders without imposing harsh criminal sanctions should be attractive.

Criminal ADR and problem-solving courts are but two smart on crime initiatives that advance the multi-faceted aims of the overcriminalization movement. Certainly, many other smart on crime proposals—such as those related to improving the grand jury’s screening function, protecting innocence, enhancing indigent defense, and reforming sentencing laws—would all seem to fit within the overcriminalization philosophy. The overcriminalization movement and the smart on crime movement have much more in common than might be appreciated at first glance. In addition to the fact that certain specific policy proposals advance the goals of both movements, broad and ideologically diverse coalitions undergird the two movements—both of which are focused on the improvement of criminal justice in the United States. Furthermore, one can trace the DNA of both movements back to the historical criminal law reform efforts of the twentieth century. As such, the overcriminalization movement and the smart on crime movement may be natural partners as both continue to evolve.

97). However, victim-offender mediation certainly is not without criticism on procedural and substantive grounds, particularly because it can be employed in serious felony cases as well as misdemeanors. See, e.g., Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1262, 1291-1301 (1994).

¹²⁶ See, e.g., Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 420-24 (2009); Michael O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 463-65 (2009); Michael C. Dorf & Jeffrey A. Fagan, *Problem Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003); Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Treatment Movement*, 76 WASH. U. L.Q. 1205 (1998).

¹²⁷ Dorf & Fagan, *supra* note 126, at 1507 (citing specialized courts directed at “mentally ill offenders, drunk drivers, parole or probation violators, gun carriers, [and] domestic violence offenders”); see also Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006).

¹²⁸ See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 784 (2008).

¹²⁹ See, e.g., *id.*; Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2001).

¹³⁰ See, e.g., Aruna Jain, *For Drug Offenders, A Second Chance*, WASH. POST, Dec. 14, 2006.

CONCLUSION

The American historical experience with criminal justice reform presents a valuable lesson for today's reformers. Efforts to tackle the significant shortcomings of the criminal justice system throughout the twentieth century were largely episodic and failed to achieve their goals. Such disappointments have not been due to the lack of human or other resources. Indeed, twentieth century criminal reform efforts were able to attract the intellect, vision, and energy of some of the leading figures in society and the relevant fields, and enjoyed the support of the political establishment. Nevertheless, more than four decades after the last major effort to overhaul our criminal justice system, we seem to have progressed very little. To be sure, our strained politics and sometimes-misplaced priorities have not facilitated innovation in the criminal justice arena. However, recent developments seem to represent a rare opportunity for the real exchange of ideas across the political and ideological spectrum. To the extent that the overcriminalization and smart on crime movements may be emblematic of the next phase of criminal justice reform approach, the outcome this time around very well may be different.