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FROM THE EDITOR-IN-CHIEF

Dear Readers,

Thank you for your continued support of the Criminal Law Practitioner. Being the only student-run publication dedicated exclusively to criminal law issues at American University Washington College of Law, we appreciate your interest in our work and we hope you find this edition to be a fascinating combination of pieces, focusing on various aspects of criminal law.

This edition was possible through the hard work of our Executive Board and staffers. I would like to thank our former board members and senior staffers who have graduated and passed an incredible legacy to me. I would specifically like to thank Dolores Sinistaj, Ramy Simpson, and Emily Osofsky who have been wonderful advisors in this process.

We are excited to be able to share these pieces with the rest of the criminal law community, and we hope you enjoy reading them.

Sincerely,

Lisa Sendrow

Lisa Sendrow
Editor-in-Chief

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Epitaph for Pardon Based on the Purpose of Punishment

Eva Carracedo Carrasco[1]

A. Introduction. Conceptual delineation of the individual pardon

The objective of this article is to analyze the purposes assigned to "the pardon" as an institution based on the different theories of justification of punishment. Its ultimate goal is to reflect on its justification in modern criminal law in the framework of democratic rule of law. To do this, it is necessary to start with the concept of the individual pardon.

In general terms, "pardon" could be defined as a discretionary act that, for a specific case, involves the mitigation or elimination of unfavorable legal consequences meted out in accordance with the law.[2]

In the face of the silence maintained by the Spanish Constitution and legislation, "individual pardon" can be defined as the discretionary act derived from the power nominally conferred to the Head of State.[3] The pardon power was materialized as an act of the Government, endorsed and proposed by the Minister of Justice and following the deliberation of the Council of Ministers.[4] In application, the sentence already imposed in a final judgment is not fully enforced, with it being partially or totally reduced or commuted to a less serious one.[5]

A pardon entails that, at the discretion of the Executive, a penalty is either partially or totally not enforced according to the extension established by the Royal Decree; or it is replaced with a lesser one.[6]

B. Purposes assigned to the institution of the pardon: introduction. Regulative and practical context of the pardon's Royal Decrees

Not only does the Spanish Constitution not define the *particular pardon*, but, as is often the case in comparative law, neither is there an indication of the reasons, requirements or requisites for it to be granted.[7]

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2 U.S. Const. art. II, § 2; C.E., B.O.E. n. 62(i), Dec. 29, 1978 (Spain).

3 César Aguado Renedo, *Problemas constitucionales de la potestad de gracia: en particular, su control* [Constitutional challenges of the power to pardon: particularly, its control], *in* La democracia constitucional: estudios en homenaje al profesor Francisco Rubio Llorente [Constitutional democracy: in homage to professor Francisco Rubio Llorente] 908 (Reyes et al. eds. 2002); Rosario García Mahamut, El indulto: Un análisis jurídico-constitucional [The Pardon: A Juridical-Constitutional Analysis] 127–48, 149 (2004).

4 Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto, arts. 21–23 (B.O.E. 1870, 175) (Spain). *See also* Rosario García Mahamut, Seis reflexiones sobre el indulto y una consideración acerca de la suspensión de la ejecución de la pena ante la solicitud de indulto [Six reflections on pardon and a consideration about the suspension of imprisonment when pardon is requested], *in* Constitución, estado de las autonomías y justicia constitucional [Constitution, State of Autonomies and constitutional justice] 612–13 (Luis Aguiar de Luque,Valencia, ed., 2005); Juan Luis Pérez Francesch & Fernando Domínguez García, *El indulto como acto del Gobierno: una perspectiva constitucional [Pardon as a Government act: a constitutional perspective]*, 53 Revista de Derecho Político [Political Law Review] 25, 30 (2002).

5 Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto, art. 4 (B.O.E. 1870, 175) (Spain).

6 Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto, arts. 4, 12, 30 (B.O.E. 1870, 175) (Spain).

7 *See generally* C.E., B.O.E., Dec. 29, 1978 (Spain).

The Law of June 18, 1870 (hereinafter "LI"),[8] when establishing rules for the exercise of a pardon—except for the general mention of achieving of justice, equity, or utility or public convenience in Articles 2.3, 11, and 16—does not determine the catalogue of reasons that justify its granting, nor does it reveal the conditions that the subject must meet to obtain it.[9]

In contrast to the silence guarded by the LI, the Spanish Criminal Code (hereinafter "CP") points to a function that the granting of a pardon should be directed towards, when the controversial CP Article 4.3 provides the option for the Judge or Court to address the Government to grant it, if the rigorous application of the provisions of the Act results in an action or omission being punished that, in its opinion, should not be, or if the penalty is noticeably excessive.[10]

Additionally, Article 206 the Prison Regulation Royal Decree ("RP")[11] refers to the specific conditions that the prisoner must meet so that he or she may be eligible to receive an individual pardon, as an extraordinary prison benefit.[12] Given its specific configuration as a prison benefit, its motives cannot be based on the totality of pardons granted in practice.[13] The guidelines referred to are exclusively focused on the post-conviction behavior of the offender, with respect to serving his sentence.[14]

On the other hand, resolutions granting pardon traditionally obey a stereotypical model in which reference to the concurrence of "*reasons of justice and equity*" is repeated.[15] They do not explain why a decision has been made, whether positive or a denial, because they are used for the most heterogeneous purposes.[16]

In accordance to what has been stated, it can be concluded that we are in an area that lacks regulation guidelines, except those in-

[8] Ley de 18 de junio de 1870, de Reglas para el ejercicio de la Gracia de indulto (B.O.E. 1870, 175) (Spain).

[9] Fernando Molina Fernández & Laura Pozuelo Pérez, Extinción de la responsabilidad penal y sus efectos [Extinction of the penal responsibility and its effects], *in* Memento Práctico Penal 717 § 6587 (2017) (Fernando Molina Fernández, ed., 2016); Francesc de Carreras, *El Indulto en Nuestro Estado de Derecho*, El País, Dec. 12, 2000, https://elpais.com/diario/2000/12/12/espana/976575627_850215.html; Jerónimo García San Martín, El Indulto: Tratamiento y Control Jurisdiccional: Con Formularios [The Pardon: Treatment & Jurisdictional Control: with Applications] 75–76 (2d ed. 2015).

[10] C.P. art. 4.3 (B.O.E. 1995, 281) (Spain).

[11] "The Assessment Board, on a proposal from the technical team, may request the Prison Supervision Court, the consideration of clemency, to the extent that circumstances may require, for inmates in which the following requirements on a long-term basis are met –for at least two years and in an extraordinary degree: a) Good behavior; b) Performance of a regular working activity (within the prison or outside, if it can be considered as useful to his/her future life in freedom; c) Participation in reeducation and social reintegration activities." Reglamento Penitenciario art. 206 (B.O.E. 1996, 40) (Spain).

[12] In order to access the possibility of obtaining that prison benefit, the convicted person must show, for more than two years and in an extraordinary way, good behavior, performance of a normal work activity that helps him prepare for life on the outside and participate in re-education and social reinsertion activities. *Beneficio Penitenciario de Indulto Particular*, Instrucción 17/2007 (Dec. 4, 2007) [hereinafter "instrucción 17/2007]. *See also* Maria del Puerto Solar Calvo, *El Indulto: Una Perspectiva Penitenciara,* legal today, July 31, 2014, http://www.legaltoday.com/practica-juridica/penal/penal/el-indulto-una-perspectiva-penitenciaria; Maria Jesus Espuny & Olga Paz Torres, 30 Años de la Ley de Amnistía (1977-2007) [30 years of the Amnesty Law (1977-2007)] 238, 243 (2009).

[13] Puerto Solar Calvo, *supra* note 12; Jesus Espuny, *supra* note 12, at 238, 243.

[14] Instruccíon 17/2007, *supra* note 12.

[15] *See, e.g.,* Real Decreto 52/2019, de 8 de febrero, por el que se indulta a don Luis Alberto González Sanz (B.O.E. 2019, 36) (Spain); Real Decreto 35/2019, de 25 de enero, por el que se indulta a don Antonio José Vizcaíno Peralbo (B.O.E. 2019, 24) (Spain).

[16] Ana del Pino Carazo, Problemas Constitucionales del Ejercicio de la Potestad de Cesar Aguado Renedo 37 (2001); Enrique Linde Paniagua, *El indulto como acto de administración de justicia y su judicialización. Problemas, limites y consecuencias [Pardon as an act of administration of justice and its judicialization: Problems, limits, and consequences]*, 5 Teoria y Realidad Constitucional [Constitutional Theory and Reality] 161, 163 (2000).

cluded in the Spanish Criminal Code Article 4.3 and Article 206 of the RP. It is the academic opinion which has tried to fill this gap, inquiring about the reasons that lead to a pardon being granted[17] without prejudice to those judicial resolutions that tangentially address the issue.

C. Purposes assigned to the institution of the pardon in relation to the theories of punishment: starting points

Before we begin analyzing the purposes assigned to the institution of the pardon by the different theories of punishment, we must stop to clarify a premise that is assumed to avoid contaminating the examination of the different scenarios. From now on, we will try to distinguish between normal scenarios and those of an urgent nature – likened to Kantian[18] states of necessity – installed in the processes of transitional justice.[19]

Once such distinction is that the basis for the granting of a pardon does not have to be related to the purpose of the sentence. In some types of cases, the granting of pardon ends up being separated from the purposes assigned to the penalty and their fulfilment; it responds to

[17] *See* Pedro Armengol y Cornet, *Estudios penitenciarios.–La gracia de indulto y su ejercicio [Penitentiary studies: The grace of pardon and its exercise]*, *in* La Defensa de la Sociedad [The Defense of Society] 87 (Nabu Press rev. ed. 2012) (1875); *see generally* Hansgeorg Birkoff & Michael Lemke, Gnadenrecht [Clemency] 80–82 (2012); Kathrin Blaich, System und Rechtsstaatliche Ausgestaltung des Gnadenrechts [System of Constitutional Design for the Right of Pardons] 185–202 (2012); Don Emilio Bravo, La Gracia de Indulto [The Grace of Pardon] 197, 198 (Madrid, 1889); Fernando Cadalso, La libertad condicionál, el indulto y la amnistía [Conditional Freedom, Pardon and Amnesty] 206–07 (1921); Dimitri Dimoulis, Die Begnadigung in vergleichender Perspektive: Rechtsphilosophische, verfassungs- und strafrechtliche Probleme (Strafrechtliche Abhandlungen) [Competition in Comparative Perspectives: Legal Philosophics, Constitutional and Criminal Problems (Criminal Acts)] 341–45 (1996); Rosario García Mahamut, El Indulto: un Analysis Juridico- Constitucional [The Pardon: A Juridical-Constitutional Analysis] 120–21 (2004); Ireneo Herrero Bernabé, *El derecho de gracia: indultos*, 133–47 (2012) (unpublished doctoral thesis, Universidad Nacional De Educación A Distancia), http://e-spacio.uned.es/fez/eserv/tesisuned:Derecho-Iherrero/Documento.pdf; Hans-Heinrich Jescheck & Thomas Weigend, Lehrbuch des Strafrechts: Allgemeiner Teil [Textbook of of Criminal Law: General Part] 923–24 (5th ed. 1996); Daniel T. Kobil, *Should Clemency Decisions be Subject to a Reasons Requirement?*, 13 Fed. Sent'g Rep. 150, 150 (2001); José Llorca Ortega, La Ley de Indulto: Comentarios, Jurisprudencia, Formularios y Notas Para Su Reforma [The Law of Pardons: Commentary, Jurisprudence, Forms and Notes for its Reform] 75–114 (3rd ed. 2003); Antonio Madrid Pérez, *El indulto como excepción. Análisis de los indultos concedidos por el Gobierno español durante 2012* [*Pardon as Exception: Analysis of Clemencies Granted by the Spanish Government in 2012*], 6 Revista Crítica Penal y Poder [Criminal Review Penal and Power] 110, 110, 113, 115–16 (2014); Heinz Zipf et al., Strafrecht Allgemeiner Teil. Teilband 2: Erscheinungsformen des Verbrechens und Rechtsfolgen der Tat [Section on General Criminal Law. Sub-Chapter 2: Forms of Crimes and Legal Consequences] 1001–03 (8th ed. 2014); Axel Maurer, Das Begnadigungsrecht im modernen Verfassungs- und Kriminalrecht [The Pardon in Modern Constitutional and Criminal Law] 47–48 (1979); Samuel von Pufendorf, Über die Pflicht des Menschen und des Bürgers Nach Dem Gesetz der Natur [About the Duty of Man and the Citizen According to the Law of Nature] 193–94 (Klaus Luig ed. & trans., 1994); Stefan Ulrich Pieper, *Das Gnadenrecht des Bundespräsidenten – eine Bestandsaufnahme [The Pardon Power of the Federalist President]*, *in* Gnade Vor Recht–Gnade Durch Recht? [Pardon Before Law – Pardon Through Law?] 101–05, 109 (Christian Waldhoff ed., 2014); Hinrich Rüping, *Die Gnade im Rechstsstaat [Grace in the Law]*, *in* Festschrift für Friedrich Schaffstein [Commemmorative for Friedrich Schaffstein] 36–41 (Gerald Grünwald et al. eds., 1975); Johann-Georg Schätzler, *Gnade vor Recht [Grace Before Right]*, 28 Neue Juristische Wochenschrift 1249, 1250–52 (1975); Leslie Sebba, *Clemency in Perspective, in* criminology in perspective: Essays in Honor of Israel Drapkin 228–33 (Simha F. Landau & Leslie Sebba eds.,1977); Luis Silvela, El Derecho Penal Estudiado en Principios y en la Legislación Vigente en España [Criminal Law Studied in Principles and in the Current Legislation in Spain] 434–35 (1879); José Enrique Sobremonte Martínez & Manuel Cobo del Rosal, Indultos y Amnistia [Pardons and Amnesties] 25, 268 (1980).

[18] Immanuel Kant, Die Metaphysik der Sitten, in zwey Theilen [The Metaphysics of Morals, in Two Parts] 231–32 (2d ed.1803).

[19] *See* Alicia Gil Gil et al., Colombia Como Nuevo Modelo para la Justicia de Transición [Colombia as a New Model for Transitional Justice] 28–30 (2017).

other *exogenous* reasons.[20] For example, the pardon granted to solve a situation of economically unsustainable prison overcrowding or to celebrate commemorative events.[21] The proposed analysis concentrates on the first group, the normal scenarios, and examines the different purposes assigned to pardon to justify its use based on the different theories of punishment.

Finally, the following analysis may be transferred *mutatis mutandis* to mixed, unified, or unifying constructions of punishment, insofar as they are based on or are composed of the abstractions and premises that will be analyzed without deeming a specific study necessary. Such a study, in this regard, would not add anything to the constructions of punishment.

C.1. How the pardon fits into absolute theories

It might seem counterintuitive that theories based on retributive premises could make room for the pardon. The often-mentioned Kantian example of the inhabitants of the island quickly comes to mind.[22] Kant argued that, even when the risk of a civil society being dissolved exists, the last remaining murderer in prison would have to be executed first, so that each has done to him what his actions deserve.[23] If society does not demand the punishment, then society is responsible for the public violation of justice.[24]

However, Kant also contemplated an exception, structured as a state of necessity.[25] To construct his exception, it is illustrative that Kant resorted to the crime of rebellion, inspired by what took place in Scotland in 1745. Kant observes that, if the number of accomplices of such action was so great that the state almost reaches the point of having no subjects and did not want to be dissolved by returning to the state of nature, the sovereign would have power, in that extreme case (*casus necessitatis*), to judge and deliver a judgement imposing another penalty on criminals instead of the death penalty, in order to preserve the life of the people as a whole.[26]

At the heart of absolute theories, therefore, resorting to pardon is eventually defended. The question that continuously arises is: in which cases is its use advocated?

(**i**) In exceptional circumstances, like those Kant would assume, those theories allow a relaxation of his postulates and accept the possibility of employing pardon.[27]

(**ii**) In scenarios considered as normal:

(**a**) The arguments used to defend the pardon are not specific to the absolute theories nor do they sur-

[20] Eva Carracedo Carrasco, *Pena e indulto: una aproximación holística [Punishment and pardon: a holistic approach]* 296–333 (2018).

[21] *Id.* at 242–48, 280–89.

[22] Kant, *supra* note 18, at 231–32.

[23] *Id.*

[24] *Id.*; Norbert Campagna, Strafrecht und unbestrafte Straftaten: Philosophische Überlegungen zur strafenden Gerechtigkeit und ihren Grenzen [Criminal Law and Unstated Disputes: Philosophical Considerations on Criminal Justice and its Limits] 75–76 (2007); Dimoulis, Die Begnadigung, *supra* note 17, at 595.

[25] *See* Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 Buff. L. Rev. 101, 109–10 (2005) (noting that Kant believed that the state retains a right of necessity to grant clemency in extreme situations).

[26] *See* Kant, *supra* note 18, at 231–32, (explaining that the sovereign would not implement this decision by means of a public law, but through an act of authority, as an act of the law of majesty that, as a pardon, can only be exercised in isolated cases); von Pufendorf, *supra* note 17, at 194.

[27] Kathleen Dean Moore, Pardons: Justice, Mercy & the Public Interest 164, 201–02 (Oxford Univ. Press 1997) (1989).

pass the premises on which they are based[28] (making use of reasons such as offender rehabilitation or the achievement of heroic merits and services)[29] and, consequently, they will be analyzed later; or

(**b**) They defend the granting of forgiveness in favor of amnesty (like Hegel)[30] or the forgiveness of the victim,[31] not the pardon[32] and, therefore, outside the scope of our analysis; or

(**c**) They are justified: (**c. 1.**) when the expiatory purpose or moral reform of the convict has been completed earlier or (**c. 2.**) when based on moral or legal just deserts, the act of the pardon intends to replace deficiencies or correct dysfunctions that are observed when assuming the said premises.[33] In this regard, the constructions based on the idea of just desserts as a metaconcept stand out[34]: in the same way as the offender deserves the punishment, he may gain the benefit of pardon.[35]

In both scenarios of justified pardons (**c.1 and c.2**), the application of the pardon has now been surpassed by more precise institutions, through the adequate application of the legal theory of crime developed in our legal system and due to fundamental premises of our rule of law.[36]

When it is a matter of resolving the anticipated fulfilment of the expiatory purpose assigned to the punishment, there are already mechanisms designed to adapt the prison regime applicable to the subject who shows good behavior, who is already "reformed," as well as legal solutions that allow early release, an effective shortening of the time that he is deprived of his liberty.[37] Therefore, a pardon would be overcome by the current gradual prison regime (including parole)[38] and the prison benefit of granting parole in advance.[39]

[28] Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 New Eng. J. Crim. & Civ. Confinement 413, 450 (2007); Heidi M. Hurd, *The Morality of Mercy*, Ohio State J. of Crim. Law 389, 417 (2007); Morison, *supra* note 25, at 112.

[29] Moore, *supra* note 27, 197; Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 Chi. Kent L. Rev. 1501, 1523–31 (2000).

[30] Georg Wilhelm Friedrich Hegel, Grundlinien der Philosophie des Rechts: Naturrecht und Staatswissenschaft im Grundrisse [Basics of Philosophy of Rights: Natural Law and State Science in an Outline] 293–94 § 282 (1821).

[31] *See* Kant, *supra* note 18, at 236 (explaining his theory in relation to crimes of lese majesty).

[32] Heinz Zipf et al., Strafrecht Allgemeiner Teil. Teilband 2: Erscheinungsformen Des Verbrechens Und Rechtsfolgen Der Tat [Criminal Law General Part. Part 2: Appearance of the Criminal and Legal Actions of the Act] 135–36 (2014).

[33] Hugo Adam Bedau, *A Retributive Theory of the Pardoning Power*, 27, U. Rich. L. Rev. 185, 189 (1992); Jeffrie G. Murphy, *Mercy and Legal Justice*, 4, Soc. Phil. & Pol'y 1, 7, 9 (1986).

[34] *See, e.g.,* Hurd, *supra* note 28, at 392–93, 417.

[35] Moore, *supra* note 27, at 10; Claudia Card, *On Mercy*, 81 Phil. Rev. 182, 184–89, 204–06 (1972); Dorne, *supra* note 28, at 413, 421; Dan Markel, *Against Mercy*, 88 Minn. L. Rev. 1421, 1471–73 (2004); (defending the redirection to legislation and not to pardon); Tara Smith, *Tolerance & Forgiveness: Virtues or Vices?,* 14 J. Applied Phil. 31, 39–40 (1997).

[36] Markel, *supra* note 35, at 1425–78; Rapaport, *supra* note 29, at 1501–02.

[37] Karl David August Röder, Die herrschenden Grundlehren von Verbrechen und Strafe in ihren inneren Widersprüchen [The Initial Basics of Criminal and Penalty in their Inner Conflicts] 104–05, 127–28 (1867).

[38] Cadalso, *supra* note 17, at 206; Markel, *supra* note 35, at 1468–69.

[39] Reglamento Penitenciario arts. 202.2, 205 (B.O.E. 1996, 40) (Spain). Nothing could prevent the incorporation of the scenario of article 206 in the regime provided for in the preceding provision.

If the argument used at the heart of absolute theories is constructed based on the rule of behavior – that an act should no longer be subject to blame or criminal punishment – then the act no longer necessarily needs to be addressed as a statutory offence. Therefore, the use of pardon has been replaced by legislative reform and by the subsequent revision of the judgements.

Another main use for those who defend resorting to pardon within these theories, is to solve proportionality deficiencies that would result in the application of excessive penalties. In this area, the use of that institution is intended to solve malfunctions of the rule in the abstract, and to correct the punitive excess that the application of the rule to a specific case may generate. If the deficiency refers to the rule in the abstract, then there is no solution other than legal reform and, once again, a revision of the judgements passed under the previous and more burdensome regulatory regime.[40]

If the point is to adjust the application of the general rule to the particularities of the specific case, which is assumed as the cornerstone of the issue, then there are currently sufficient mechanisms available to achieve the necessary individualization and adjustment without resorting to pardons. The Judges implement the individualization and determination of the penalty, in accordance with the guidelines (adaptable) set by the legislator. This task of individualization is not limited to the sentencing phase, but also, once the judgement is passed and a specific penalty is imposed, all the pre-established measures in the prison regulations are deployed to carry out said individualization in the gradual enforcement of the sentence which, could even be suspended.[41]

If the sentencing court noticed the impossibility of reaching a solution that was proportional to the specific case, then the deficiency would reside not in the individualization process, but in the rule to be applied and, therefore, a question of unconstitutionality[42] could be raised and, additionally, a request for the repeal or modification of criminal legal provisions.[43]

Curiously, the absolute theories would also try to solve, through the pardon, the disproportion of the imposed punishment when the prisoner's personal circumstances changed.[44] In those cases, the solution lies with, as already settled by our legislator, allowing that adjustment *ex ante*, incorporating legal provisions (suspension of imprisonment, access to parole or the progression through the prison system) that include those cases that are deemed relevant (qualified medical conditions or advanced aging).[45]

Finally, it is observed how the defenders of retribution theories would have structured the pardon as a mechanism to correct the deficiencies in the application of the deserved

[40] Daniel T. Kobil, *Quality of Mercy Strained: Wresting the Pardoning Power from the King,* 69 Tex. L. Rev. 569, 627–30 (1991).

[41] C.P. (B.O.E. 1995, 281) (Spain).

[42] The result of which could be the interpretation according to the Constitution of the challenged precept. Enrique Bacigalupo Zapater, *La Rigurosa Aplicacion de la Ley* [*The Strict Application of the Law*], 48 Anuario de Derecho Penal y Ciencias Penales [Y.B. of Crim. Law and Crim. Sci.] 862 (1995); Javier Sánchez-Vera Gómez-Trelles, *Una lectura crítica de la Ley de Indulto* [*A Critical Review of Pardon Law*], 2 InDret 1, 12–13, 17–18 (2008).

[43] Silvela, *supra* note 17, at 436–37 (noting that repeal or modification that could be implemented not only at the initiative of the sentencing court, but also in accordance with the specific mechanisms established in the Spanish Constitution).

[44] Markel, *supra* note 35, at 1470–71.

[45] C.P. art. 92(3) (B.O.E. 1995, 281) (Spain).

punishment. The catalogue of scenarios that are raised is broad.[46]

In fact, this body of reasons is so vast because, in practice, it is projected on all those cases that lend to the construction of the criminal theory (the validity of the rule of behavior and the rule of punishment being assumed). In the end, the reasons would allow the conclusion of the inexistence of a criminal act committed by a subject to whom criminal responsibility can be demanded. Not because the act is made to fictitiously disappear, but because, more than anything, it cannot be considered criminal[47] (or the act does not exist, it is not statutorily defined, it is not unlawful, it is not culpable, or it is not punishable).[48] The application of criminal theory to these cases makes it unnecessary and inadmissible to resort to the institution of the pardon to resolve an issue that the application of justice itself solves.

C.2. How the pardon fits into the general prevention theories

C.2.1. Pardon and negative general prevention theory

It seems that negative general prevention theories would not find space for pardons. The father of the psychological coercion theory, Feuerbach, assumed that the legal threat would not be sufficient, it being essential that the threatened evil be applied as soon as the offense was determined. For the threat contained in the law to be real, it must truly imply the real imposition of an evil.[49]

It seems to be confirmed then that, in general, at the heart of these constructions, there would be a shielded opposition to the use of pardons and forgiveness.[50] However, Feuerbach himself made exceptions to his general opposition, based on the indifference of the application of pardons for the purpose of deterrence in cases where judgments are considered unjust or perceived as such.

The reasons that justify resorting to pardons, in accordance with the arguments used by Feuerbach[51] and Mittermaier,[52] can be arranged into two categories: (i) the arguments used within normal contexts; and (ii) the reasons referring to extraordinary contexts, in which its use serves to maintain the legal state against pressing dangers (for example, conspiracies).[53]

In normal scenarios, the reasons can be divided, in turn, into three subgroups:

[**1**] The cases in which, although the sentence cannot be regarded as a judicial error subject to review, it provokes a public outcry. The scenarios in which

[46] *See* Ross Harrison, *The Equality of Mercy*, in Jurisprudence, Cambridge Essays 119 (Hyman Gross & Ross Harrison eds., 1992); Moore, *supra* note 27, *passim*; James Barnett, *The Grounds of Pardon,* J. Crim. L. & Criminology 490*,* 502–03, 511–12, 515–16 (1927); Kobil, *supra* note 40, at 630–32; Morison, *supra* note 25, at 25; Nigel Walker, *The Quiddity of Mercy*, 70 Phil. 27, 33–34 (1995).

[47] Markel, *supra* note 35, at 1455.

[48] Hugo A. Bedau, *A Retributive Theory of the Pardoning Power*, 27 U. Rich. L Rev. 185, 194 (1993) ("We cannot infer from the fact that a given offender does *not* 'deserve' a given sentence, that the offender *does* 'deserve' the mercy that a pardon brings. For it may be that the offender does not 'deserve' anything at all[.]") (emphases in original).

[49] Paul Johann Anselm von Feuerbach, Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts [Textbook of the Community in Germany Valid Permanent Rights] 38–40 (Giessen, Heyer, 1847); Paul Johann Anselm von Feuerbach , Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts [Revision of the Principles and Basic Concepts of Positive Public Law] 48–51 (Erfurt, Henning, 1799).

[50] Dimoulis, Die Begnadigung, *supra* note 17, at 596; Mark Freeman, Necessary Evils 21 (2009).

[51] Feuerbach, Lehrbuch, *supra* note 49, at 120–21; Feuerbach, Revision, *supra* note 49, at xxvii–xxviii.

[52] Feuerbach, Lehrbuch, *supra* note 49, at 122, notes II to IV.

[53] *Id.* at 121.

this aversion could arise, are identified as those cases in which material justice would not correspond to legal justice, at the time it was applied by the sentencing court:

(**a**) Due to a temporary lack of adaptation: Cases where society has evolved in some way that legal texts have not been capable of keeping up with.[54] For example, those cases in which a certain conduct should no longer be considered as criminal (or should not be so severely punished[55]), but the legal text has not yet been repealed or modified.[56]

(**b**) To cover an area that neither the judicial power, given its constrictions,[57] nor the legislative power reach.[58] There are the scenarios in which, considering the special circumstances of the case and given the express wording of the law, the adjudicating body must be subjected to an asymmetry between formal justice and material justice occurs again. This time not because the legal text is disproportionate in the abstract, but because of the idiosyncrasy of the case that is pending before the Court, which is limited by its duty to apply the law.[59] A pardon would serve to correct the severity of the law that has become cruel, allowing it to maintain the dissuasive authority of the law when faced with the risk of provoking moral repugnance or indifference.[60]

(**c**) Because the delivery of a judgement goes against the principle of equality, by breaking away from the normal repressive practice.[61]

[**2**] Cases in which the sentencing judgment does not cause an outcry, its enforcement can be disapproved of, and a pardon would be innocuous to the punishment's deterrence effect. Its granting is recognized as a reward for the offender's good behavior from perspectives similar to those of special prevention.[62]

[**3**] As a reward mechanism that encourages collaboration with justice, promising impunity to gang members or participants in collective actions who inform on fellow members.[63]

Once those cases are identified where resorting to pardon is justified, based on the negative general deterrence theory, the following is observed:

(**i**) In exceptional scenarios, the negative general prevention theories expressly allow for the use of a pardon, when, ordinary means for overcoming these exceptional circumstances are expected to fail.

[54] Antonio Beristain Ipiña, Un Derecho Fundamental de la Persona Todavia no Suficientemente Reconocido: El Derecho al Perdon [A Fundamental Right of the Person Still not Sufficiently Recognized: The Right to Pardon] 22 (1985-1986).

[55] Vittorio Emanuele Orlando, Principii di Diritto Costituzionale [Principles of Constituional Law] 220 § 287 (5th ed. 1920).

[56] Feuerbach, Revision, *supra* note 49, at xxviii.

[57] *Id.* at xxvii–xxix.

[58] Feuerbach, Lehrbuch, *supra* note 49, at 121.

[59] Feuerbach, Revision, *supra* note 49, at xxvii–xxix.

[60] Feuerbach, Lehrbuch, *supra* note 49, at 121 § 63.

[61] Dimoulis, Die Begnadigung, *supra* note 17, at 455–59.

[62] Feuerbach, Lehrbuch, *supra* note 49, at 122, note IV.

[63] *Id.* at 121 § 63.

(**ii**) However, as Feuerbach himself anticipated[64], the solutions regarding normal scenarios can be found in other ordinary mechanisms of the criminal system.

If the text of the law has become obsolete, nothing prevents its reform; both in terms of adapting social consideration with respect to the rule of behavior, and adjusting the *quantum* of the penalty that would be imposed on a specific crime by minimizing it.[65] This would allow judgements delivered under the previous and more burdensome regime to be reviewed.

If the point is to adjust the ideal of *material justice* to a specific case that presents particular circumstances, to solve a deficiency in terms of individualization when applying the rule, Feuerbach himself admits the possibility of defending an alternative in which it is accepted that the adjudicating body is able to resolve said mismatch through the interpretation and application of the rule.[66]

Although Mittermaier himself had already announced the controversy and difficulties of resorting to pardon regarding this specific justification,[67] if the intention was to acknowledge a reward for the convicts, as an incentive to leave prison early, other institutions have far exceeded its use. Mittermaier himself did not discard the possibility of making use of the institution of the indeterminate judgement as a mechanism to value not only the necessary reparations of the harm caused by the crime and the protection of society, but also reform of the offender.[68] Consequently, the use of pardons would be relieved by a gradual prison regime (including parole) and the prison benefit of granting parole in advance.

Finally, as Bacigalupo Zapater pointed out, resorting to pardons to incentivize the collaboration with justice would have been replaced by an express regulation to that effect, so that the institution of the pardon would have become, from this perspective as well, superfluous.[69]

C.2.2. Pardon and positive general prevention theory

Prima facie, it seems again that there is no room for pardon within the positive general prevention theories. However, Jakobs himself (who, let's recall, demands the affliction of criminal pain) or authors who advocate for idealistic foundations of punishment within those constructions, recognize the possibility of resorting to the said institution.[70] In this regard, it is noteworthy that Silva Sánchez has already pointed out that "*positive general prevention is surely the foundation of forgiveness in criminal law*."[71] So, the questions that arise are, in which cases and under what conditions?

Within the positive general prevention theory, I will highlight the constructions elaborated by Jakobs himself and by Dimoulis.

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[64] Feuerbach, Revision, *supra* note 49, at xxvii–xxix.

[65] Enrique Bacigalupo Zapater, Justicia Penal y Derechos Fundamentales [Criminal Justice and Fundamental Rights] 20–22 (2002); Enrique Linde Paniagua, Amnistía e indulto en España [Amnesty and Pardon in Spain] 43 (1976).

[66] Feuerbach, Revision, *supra* note 49, at xxvii–xxix.

[67] Feuerbach, *Lehrbuch*, *supra* note 49, at 122, note IV.

[68] *Notes on Current and Recent Events.*, 3 J. Am. Inst. Crim. L. & Criminology 266, 303–05 (1912).

[69] Enrique Bacigalupo Zapater, Derecho Penal y el Estado de Derecho [Criminal Law and the Rule of Law] 23 (2005).

[70] For the purpose of this study, theories considering forgiveness as a functional equivalent of punishment are excluded because, despite their suggestion, they do not determine in what specific assumptions that interchangeability would be acceptable, arguing for the unpredictability of the granting as a requirement for subrogation.

[71] Jesús-María Silva Sánchez, *De nuevo, el perdón [Again, a pardon]*, 4 InDret Penal 1, 1–2 (2011), www.indret.com/pdf/editorial.2_4.pdf.

In exceptional scenarios, Jakobs establishes the possibility of using the pardon as a practical remedy to such situations,[72] expressly following Köhler›s thesis.[73] Pardons could be used as a mechanism whereby the implementation of strict enforcement of the sentence is more flexible for state reconstruction, within the framework of achieving internal peace in critical environments.[74]

In normal scenarios, Jakobs himself also positively considers the possibility of using the pardon mechanism, assuming it as an obstacle to material punishment or as a complex mechanism.[75] Pardons could serve not only (procedurally) to avoid an inopportune process, but also (legally-materially) to correct an erroneous judicial decision – modifying the evidenced fact or object examined in the proceedings – or to make an adjustment to a legal assessment of the fact, which has been modified but not yet been reflected in the appropriate retroactive legislative change – the fact or object was correctly evidenced and remains intact, but a change in the assessment of that fact has occurred.[76]

Setting aside the first assumption related to the avoidance of an inopportune process, an objective that would not be possible within most legal systems,[77] the two possible uses that Jakobs points out would be reduced to these purposes: the correction of errors made by the judicial body and the adjustment to the new legal assessment that corresponds to the fact—which will remain unchanged—(the solution to the temporary lack of adaptation that was pointed out earlier and indicated by Feuerbach).

In turn, Dimoulis divides the potential use of pardons into two scenarios: the normal scenario and a scenario that he characterizes as exceptional, or as a state or situation of emergency linked to political changes that have occurred in a society.[78]

When analyzing the normal scenarios, Dimoulis observes that pardons can serve as a mechanism to achieve the aims of positive general prevention[79], although he announces, from the start of his theoretical constructions, that other resources or alternatives to replace it in terms of the said purpose can be found without any problems.[80]

These are cases in which pardon is recognized and used as a means to repair the errors of justice (which are still human, *ergo* fallible) in order to achieve *material justice*.[81] This mechanism, as an "safety valve", would be aimed at

[72] *See* Günther Jakobs, Strafrecht Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre [Criminal Law General Part: The Foundations and the Court] 5 (2nd ed. 1991).

[73] Michael Köhler, *Strafgesetz, Gnade und Politik nach Rechtsbegriffen [Penal law, Grace and Politics according to legal concepts]*, *in* Rechtsdogmatik und Rechtspolitik [Legal Dogmatics and Legal Policy] 68–74 (Karsten Schmidt ed., 1990).

[74] *See* Jakobs, *supra* note 72, at 345 n.41.

[75] *Id*. at 344.

[76] *Id*. at 345.

[77] Given that, within them, to grant an individual pardon, a final guilty judgement is demanded.

[78] *See* Dimoulis, Die Begnadigung, *supra* note 17, at 465–72.

[79] The said author, starts from the idea pointed out by Bernardo José Feijoo Sánchez, La pena como institución jurídica: retribución y prevención general [Penalty as a Legal Institution: General Compensation and Prevention] 311 (2014), that in certain cases in which pardon is granted, for example, because the penalty imposed is unjust, if instead of granting pardon the sentence was served, that unjust exigence of the punishment weakens the purpose of positive general prevention. It reduces it to the extent that it would contradict the commitment to present criminal proceedings as necessary and just and, at the same time, damages trust in institutions, denying the legitimacy of the criminal law system by demonstrating both its rigidity and its dysfunctionality.

[80] *See* Dimoulis, Die Begnadigung, *supra* note 17, at 450–51, 602–04.

[81] Dimitri Dimoulis, *Die Gnade als Symbol* [*Grace as a Symbol*], 81 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft [Critical Q. Letter for Legis. & Legal Sci.] 357, 357–59 (1998).

providing a quick and effective response to the criminal system's legitimacy crisis within the framework of sentencing, without it being necessary to resort to reforming the system.[82]

In these scenarios, pardons would not only have a direct function but a symbolic-liberating effect in which it publicly demonstrates that the criminal law system corrects its own deficiencies and has the necessary capacity to adapt in situations of crisis.[83] The key to granting pardons would not, therefore, be rooted in the error contained in a specific judgement, but on the lack of necessity in terms of positive general prevention.[84] Thus, pardons would become a positive instrument to legitimize the criminal system.[85]

However, once these conclusions are reached, Dimoulis himself recognizes that, if the institution were to be conceptually abolished by a rationalization of the criminal system, structural deficiencies would not appear.[86] There would be no insurmountable obstacles to its elimination. However, and despite reiterating that its abolition would not find insuperable impediments[87], he states that pardons will not disappear for three reasons: (**a**) because the executive branch would never want to lose its traditional power[88] – an irrelevant argument for our analysis; (**b**) for the symbolic function assigned to the institution; and (**c**) because, in crisis situations, exceptional scenarios, it is a unique mechanism.[89]

In relation to the symbolic function (b), the said author concludes that the fact that this task can be assigned to the institution of pardon, related to the guarantee of satisfying material justice which allows people to trust the system, does not imply that this institution has to be simply accepted and that it has to be acknowledged as eternal.[90] Insofar as it is represented as a last illusion (*letzte Täuschung*) of an imaginary guarantee of the justice of punishment (which materializes in a few cases), resorting to pardon can be overcome by creating other forms of conflict resolution in the system.[91] Pardons are surpassed once again; this time, from the perspective of positive general prevention.

C.2.3. Pardons and special prevention theories

Within the special prevention theories, pardons would have been accepted naturally,[92] between all of the institutions which made enforcing the punishment more flexible (suspending the sentence, replacing punishments,

82 *Id*. at 368.

83 *See* Dimoulis, Die Begnadigung, *supra* note 17, at 450–52.

84 *Id*. at 451.

85 Dimoulis, *Die Gnade*, *supra* note 81, 363–68 (1998).

86 *See* Dimoulis, Die Begnadigung, *supra* note 17, at 602. *But see*, Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. Rev. 802, 802, 807–808, 832–861, 869 (2015); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1, 2, 5, 17, 18, 26 (2015).

87 *See* Dimoulis, Die Begnadigung, *supra* note 17, at 603.

88 Manuel Fanega, *El Indulto: Análisis y Alternativas Bajo el Prisma Criminológico [The Pardon: Analysis and Alternatives Under the Criminological Prism]*, *in* Criminología y Justicia [Criminology & Justice] 114 (Guillermo González et al. eds., 3d ed. 2016); Linde Paniagua, Amnistía, *supra* note 65, at 70–71.

89 Dimoulis, Die Begnadigung, *supra* note 17, at 603.

90 Dimoulis, *Die Gnade*, *supra* note 81, at 365–366; Dimoulis, Die Begnadigung, *supra* note 17, at 604.

91 Dimoulis, Die Begnadigung, *supra* note 17, at 604.

92 The reasons why pardons would have fit so naturally are based on the centrality of the offender's personal circumstances in the construction of the special prevention theories; and in the fact that precisely in the phase of enforcement of the sentence, the only phase in which the *post-sententiam* pardon can appear is in that which the reasons of special prevention are projected or have to be taken into consideration, even if a monist theory on special prevention is not defended. Claus Roxin, *Sentido y límites de la pena estatal [Meaning and Limits of State Punishment]*, *in* Problemas básicos del Derecho penal [Basic Problems of Criminal Law] 31–32 (Diego-Manuel Luzón Peña trans., 1976).

the conditional sentence, parole, or the reduction or remission of the sentence).

In view of the above, it is not at all surprising that Von Liszt, who was considered the founder of these theories, came to defend the use of the pardon.[93] However, and this point is fundamental, among the functions that he assigns to pardons, no special prevention objectives are mentioned.[94] The said author states that a decision that does not give the convict any control in terms of obtaining his anticipated release, a measure over which he has no influence on and does not provide him with any certainties, is of no use for his resocialization. For this reason, he would defend, instead of pardon, an indeterminate sentence or, as he preferred to call it, a suspended sentence.[95]

a) Negative special prevention theories

From a negative perspective, focused on the protection of society against the offender, it would seem *a priori* that a pardon would not fit, as it entails releasing from prison those who still have to be neutralized and kept away from the community. However, as Freeman[96] states with regard to amnesty, the other form of state pardon, a pardon may be conditioned. Therefore, measures may be established that aim to achieve this incapacitation of the offender in the first place, to achieve the protection of society on a secondary level.

Although these constructions do not determine which criteria positively guide the granting of a pardon or its grounds, instead they are centered on protecting the innocuous purpose related to granting pardons, they cannot be marginalized, insofar as they suggest considering the conditioning of the pardon as a functional equivalent to applying the punishment. Note that this conditioning is an essential element of parole and therefore, the practical likeness of this institution for that purpose could be stated.[97]

b) Positive special prevention theories

From the perspective of positive special prevention constructions, however, there would be reasons to justify resorting to pardons to achieve the convict's reinsertion into society. These are based on two types of arguments.

[93] Von Liszt identifies three justifications for pardons: **(i)** as a self-correction of justice, as a safety valve, with which it is possible to reconcile the rigid generalization of the law with the demands of material justice; **(ii)** to improve judicial errors, whether true-confirmed or presumptive; and **(iii)** to help the triumph of state intelligence or politics, at the expense of the Law. Franz von Liszt, Lehrbuch des Deutschen Strafrechts [Textbook of German Criminal Law] 268–69 (10th ed. 1900); Franz von Liszt & Eberhard Schmidt, Lehrbuch des Deutschen Strafrechts [Textbook of German Criminal Law] 440 (26th ed. 1932).

[94] Franz von Liszt, *Bedingte Verurteilung und bedingte Begnadigung [Conditional Condemnation and Conditional Pardon]*, *in* 3 Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechsreform, Allgemeiner Teil [Comparative Presentation of German and Foreign Criminal Law: Preparations for the German Criminal Renewal, General Part] 58–59 (Karl Birkmeyer et al. eds., 1908); Franz von Liszt, *Welche Maßregeln können dem Gesetzgeber zur Einschränkung der kurzzeitigen Freiheitsstrafe empfohlen werden? [What measures can be recommended to the legislature to limit short-term imprisonment?]*, 1 Mitteilungen der Internationalen Kriminalistischen Vereinigung [Comm. of the Int'l Crim. Ass'n] 51 (1889); Franz von Liszt, *Kriminalpolitische Aufgaben [I] [Criminal Policy Tasks [I]]*, 9 Zeitschrift für die gesamte Strafrechtswissenschaft [J. of All Crim. Sci.] 452, 495 (1889); Franz von Liszt, *Kriminalpolitische Aufgaben [II] [Criminal Policy Tasks [II]]*, 9 Zeitschrift für die gesamte Strafrechtswissenschaft [J. of All Crim. Sci.] 737, 781–82 (1889).

[95] von Liszt, *Welche Maßsregeln*, *supra* note 94, at 44; von Liszt, *Kriminalpolitische Aufgaben II, supra* note 94, at 755–76.

[96] Freeman, *supra* note 50, at 22.

[97] Gimeno Gómez, *La gracia de indulto [The grace of pardon]*, 4 Revista de Derecho procesal iberoamericana [Mag. Procedural L. Iberoamericana] 899, 925 (1972); Amadeo Pineda, *Derecho de gracia o indulto [Right of Grace or Pardon]*, *in* 11 Iuris: actualidad y práctica del Derecho [IuriS: Actuality & Practice of Law] 34, 36–38 (1997).

(**A**) The first subgroup includes those grounds that defend the use of the institution of pardon when the resocialization that the penalty intended to achieve has already been realized and the remaining sentence to be served becomes superfluous and even harmful[98]; or when the re-education of the offender no longer needs to be verified in prison.[99]

(**B**) Additionally, a second positive use for pardons can be found, as an autonomous mechanism incentivizing the convicted person and giving him hope, by rewarding him if he succeeds in achieving the penalty's objective: his resocialization.[100] Pardons are configured as a supreme reward in response to the offender's excellent behavior, which signifies that the purpose has been achieved.[101]

An analysis of the arguments used by the defenders of positive special prevention theories in relation to the limits of the pardon's use, shows the following:

(**i**) In exceptional cases, those identified as transitional contexts, the defenders of these theories expressly and unanimously accept resorting to pardons (either by using the *state intelligence* idea employed by Von Liszt[102] or by using Merkel[103] or Bacigalupo Zapater's[104] idea on the *predominant general political interests* or limiting their use to certain crimes –political– as suggested by Ferri[105]).

(**ii**) Regarding normal scenarios, functions assigned to the pardon that have been assumed or could be assumed by other ordinary mechanisms of the criminal system have been identified. The transfer of functions to other institutions and the overcoming of pardons are both recognized and assumed by the defenders of preventive-special postulates.

In normal scenarios, the justifications given to pardons can be divided into two subgroups: those related to the accomplishment of the punishment's purpose – the resocialization of the convicted person – and those not specifically related to the achievement of that purpose (such as serving as a correction mechanism when faced with a dysfunctional application of a general law to a particular case, as a temporary adjustment mechanism between social reality and a new legislation, and as a mechanism to amend judicial errors).

98 Dimoulis, Die Begnadigung, *supra* note 17, at 343–45; Linde Paniagua, Amnistía, *supra* note 65, at 73.

99 Enrico Ferri, Principii di Diritto Criminale [Principles of Criminal Law] 179–80 (1928) (basing argument on positivist ideas). However, Ferri himself, who showed his reluctance regarding the employment of the institution, admitted that pardons would have been surpassed by the conditional sentence and parole (which would serve to undertake a periodic review of judgements and take into account the convicted person's meritorious behavior, having a jurisdictional guarantee that the pardon didn't have).

100 Miguel Ruiz Muñoz, *A propósito de la política de clemencia en Derecho de la Competencia [About the clemency policy in Competition Law]*, Almacén de Derecho [Law Mag.], Sept. 6, 2016, https://almacendederecho.org/perdon-unos-panales/ (basing this analysis on competitive law).

101 Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 Fed. Sent'g Rep., 125 (2000-2001); David A. Shaw, *Clemency: A Useful Rehabilitation Tool*, Army Law., Aug. 1975, at 32.

102 von Liszt, Lehrbuch des Deutschen Strafrechts, *supra* note 93, at 268.

103 Adolf Merkel, Lehrbuch des Deutschen Strafrechts [Textbook of German Criminal Law] 251–53 (Stuttgart, 1889).

104 Bacigalupo Zapater, Justicia Penal *supra* note 65, at 25.

105 Ferri, *supra* note 99, at 178–79 (following François Guizot, *De la peine de mort en matière politique [Death penalty in political matters]* 172–73, 177 (Paris, 2d ed. 1822)).

If the aim of the pardon is to adjust the application of the general rule to the particularities of a specific case, it has already been pointed out when dealing with absolute theories, that there are sufficient mechanisms to achieve the necessary individualization without the need to use the pardon.

If, as Ferri observed,[106] the criminal punishment provokes a public outcry as a result of a temporary imbalance (insofar as the current legislation is more beneficial for the convicted person, having been adopted after the judgement was delivered and which the convict is now serving), nothing prevents, in accordance with the current regulation, the review of the judgements delivered under the previous and more burdensome regime.

If the aim is to defend the pardon as a mechanism for repairing judicial errors, as Von Liszt[107] defended, in relation to the fundamental rights and freedoms involved, this mistake must be corrected through the appeals system set up for that purpose and, as a last procedural remedy, resort to judicial review (*recurso de revisión*). If the established system is thought to be insufficient, the solution will consist in the reform of the existing review mechanisms.[108]

In relation to the reasoning in support of pardons based on arguments aimed at the reinsertion of the individual, I anticipated its division to distinguish between: those reasons that are based on the early achievement of resocialization, before the end (temporal) of the punishment was reached; and those that focus on the pardon as a reward or incentive for the convict.

In the first subgroup, the constructions have to be distinguished according to the temporal stage in which the offender's resocialization was achieved in relation to the enforcement of the sentence. In a scenario where resocialization has been completed before the sentence has been enforced, due to the excessive lapse of time between the acts (not prescribed) and the sentence, there would no longer be a need for the subject to verify his re-education in prison. In these cases, the judgement may or may not have been delivered. When delivering the judgement, the sentencing court has: (**i**) the mitigating circumstance of undue delay at his disposal (CP Article 21.6); (**ii**) the closing clause set forth in CP Article 21.7; (**iii**) the general rules that allow for its adjustment depending on the offender's personal circumstances (CP Article 66); or (**iv**), if the requirements are met, the suspended sentence (CP Articles 80 *et seq*.).

If social reinsertion had been achieved after the judgement declaring an imprisonment sentence was delivered, two scenarios should be distinguished: one in which the enforcement of the sentence has not yet begun and the one in which said reintegration materializes during the sentence.

In the first of the scenarios described, Bacigalupo Zapater advocates for the use of pardons in cases where the convicted person has completed his or her social reintegration in the time between the commission of the criminal act and the enforcement of the sentence imposed.[109] However, I believe that nothing would prevent the reform of Article 80 CP in this sense, if it can be deemed necessary to ex-

[106] Ferri, *supra* note 99, at 178–79.

[107] von Liszt, Lehrbuch des Deutschen Strafrechts, *supra* note 93, at 268.

[108] *See, e.g.*, L.E. Crim. (B.O.E. 1882, 260) (Spain). This was also the case with Royal Decree 41/2015, of October 6, on the modification of the Procedure Criminal Law for the acceleration of criminal justice and the strengthening of procedural guarantees. (B.O.E. 2015, 239).

[109] Bacigalupo Zapater, Derecho Penal, *supra* note 69, at 25.

tend and expand those cases where imprisonment may be suspended.

On the other hand, if the offender's resocialization takes place during his imprisonment, once the offender is inside the penal institution and before the end of the sentence being served, it is not necessary to resort to pardons. Merkel[110], a defender of this particular argument, pointed out that institutions such as parole would have displaced it. Additionally, the Spanish prison system, based on the individualization of treatment and the various security categories that allow the regime to be adjusted to the preventive-special needs of the subject (including the advancement of parole as a prison benefit), would perfectly satisfy the function assigned to pardons.

Finally, if the purpose is to use pardons as an incentive or reward to achieve the offender's resocialization with the aim of establishing it as a maximum prison benefit, it should be specified that according to Article 25 of the Spanish Constitution, the said purpose should not be understood as an exception but should be applied to all the punishments to be served.

In the second of the scenarios described, the existing prison regulation positively values the offender's good behavior, allowing for the individualized enforcement of punishments in which the possibility of advancing parole is provided as a prison benefit, whose regime could be legally extended, if deemed necessary. Therefore, also in this area, pardons have been surpassed by institutions subject to predetermined requirements, endowed with greater guarantees and which are, in practice, less disturbing for the convicted subject[111] and society itself.

In short, those who have approached the study of the pardon assuming the starting hypotheses of special prevention have realized that, actually, this institution has lost its importance in favor of other mechanisms.[112] These instruments would impact not only at the time of determining the penalty to be applied to the subject but, also the terms in which the punishment that is finally imposed must be achieved. I refer to the introduction of mitigating circumstances *ex lege*, to the incorporation of ranges in relation to the penological limits associated with the definition of crimes,[113] to the suspended sentence,[114] its replacement by alternative penalties, conditional reduction, parole,[115] or the system of individualization of the enforcement of the punishment.[116]

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[110] Merkel, *supra* note 103, at 251.

[111] Concepción Arenal de García Carrasco, El derecho de gracia: ante la justicia; y el reo, el pueblo y el verdugo [The Right of Grace: Before Justice: The Inmate, the People and the Executioner] 55–56, 117–118 (Madrid, 1893); Carmen Navarro Villanueva, *Notas acerca del indulto [Notes on pardon]*, *in* 30 Años de la Ley de Amnistia (1977-2007) [30 Years of Amnesty Law (1977-2007)] 235–36 (Maria Jesus Espuny I Tomas et al. eds., 2009).

[112] Jerónimo García San Martín, La suspensión de la ejecución y sustitución de las penas [The suspension of the execution and substitution of penalties] 66–67 (2012).

[113] von Liszt, *Kriminalpolitische Aufgaben [I]*, *supra* note 94, at 497; Franz von Liszt, *Kriminalpolitische Aufgaben [III] [Criminal Policy Tasks [III]]*, 10 Zeitschrift für die gesamte Strafrechtswissenschaft [J. of All Crim. Sci.] 51, 53 (1890).

[114] Diego-Manuel Luzón Peña, Medición de la pena y sustitutivos penales (Colección de criminología y derecho penal) [Measurement of Penalty and Criminal Substitutions (Collection of Criminology and Criminal Law)] 93–95 (1979).

[115] Bacigalupo Zapater, Derecho Penal *supra* note 69, at 25; Dimoulis, Die Begnadigung, *supra* note 17, at 421–26, 600; Linde Paniagua, Amnistía, *supra* note 65, at 45; Luzón Peña, *supra* note 114, at 95–97; Santiago Mir Puig & Francisco Muñoz Conde, *Propuesta alternativa de la parte general del código penal del grupo parlamentario comunista [Alternative proposal of the general part of the penal code of the communist parliamentary group]*, *in* 18 Cuadernos de política criminal [Crim. Pol'y Books] 609, 614 (1982); S.T.C., Nov. 2, 2015 (B.O.E., No. 296) (Spain).

[116] Ley Orgánica General Penitenciaria art. 72 (B.O.E. 1979, 239); Reglamento Penitenciario arts. 100–109 (B.O.E. 1996, 40); Maria del Puerto Solar Calvo, *El principio de flexibilidad en el medio penitenciario [The principle of flexibility in the penitentiary environment]*, 8912 Diario La Ley [Law Newspaper] 1, 1–4 (2017).

In this regard, in relation to parole (similar, in its nature, to a prisoners subjective right),[117] its indissolubility regarding the enforcement of the sentence has been pointed out, given that it would soften the potentially inflexible rigidity, improving legal guidelines and allowing "to put an end to suffering, which when it is not necessary, is unjust."[118] This also makes the pardon obsolete and outdated from this perspective.[119]

D. Conclusions

According to the distinction assumed at the beginning of this article between the normal scenarios and transitional contexts, the study of the arguments aiming to support the use of pardon by the diverse theories of justification of punishment reveals a dichotomous solution.

In the transitional contexts, there is consensus among academic opinion that pardons can be seen as an irreplaceable tool to make the enforcement of punishment flexible in order to achieve social peace and harmony within the so-called toolbox of transitional justice.[120]

However, in normal scenarios, pardons have been surpassed by other institutions that have absorbed the functions that were historically assigned to it. That means that the uses that in practice had been granted to pardons are met through the opportune corrections and reforms of the system whose deficiencies were intended to be corrected through that institution: a more correct statutory definition of punishable acts and their legal consequences; an adequate application of the law by the judges and the provision of a more complete appeals system (including a potential improvement of the judicial review regime –*recurso de revisión*–); or specific institutions provided for in the law (parole). Perhaps this effect on the inexorable overcoming of pardons would precisely explain the sharp decrease in the number of pardons granted in Spain in the last ten years.[121]

[117] Maria del Puerto Solar Calvo, *La libertad condicional antipenitenciaria [The anti-prison probation]*, 8873 Diario La Ley [Law Newspaper] 1, 1–2 (2016).

[118] Cadalso, *supra* note 17, at 42.

[119] Dimoulis, *Die Gnade*, *supra* note 81, at 354.

[120] Javier Chinchón Álvarez, Derecho internacional y transiciones a la democracia y la paz [International Law and Transitions to Democracy and Peace] 458–65, 522 (2007). A different question, which goes beyond the limits of this analysis, is the material scope that such a pardon must have and the body that must grant it.

[121] In 2017, 26 pardons were granted; in 2018 (until April 8) that figure dropped to 9, which contrasts with the average of 311 that Spain granted over the previous 10 years. Eva Belmonte & David Cabo, *Casi uno de cada cuatro indultos concedidos en 2017 fue para condenados por corrupción* [*Nearly one in every four pardons granted in 2017 were for those convicted of corruption*], Publico, Apr. 9, 2018, https://www.publico.es/espana/cuatro-indultos-concedidos-2017-condenados-corrupcion.html.

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Nolo Contendere Convictions: The Effect of No Confession in Future Criminal Proceedings

Ramy Simpson

I. Introduction

It is well established that evidence of a defendant's prior convictions can significantly impact the outcome of a criminal trial.[1] Therefore, society has an interest in ensuring that the conviction reliably proves that the defendant committed the prior crime. When courts admit convictions into evidence for purposes allowed by the Federal Rules of Evidence or applicable state rules, the rationale behind their use is that the convictions are reliable and trustworthy.[2] This rationale is also why there is a hearsay exception for admitting them into evidence.[3] However, does the notion that guilt is certain differ based on whether the conviction is the result of a trial, a guilty plea, or a *nolo contendere* plea? Courts have not wavered in holding that for the purposes of the legal proceeding, a conviction based on a trial or a guilty plea is sufficient to prove that the defendant committed the prior act.[4] However, when a defendant pleads *nolo contendere*, commonly known as "no contest," the defendant does not expressly admit guilt, and the judge is not procedurally required to determine whether there is a factual basis for the charge.[5] Is the defendant's guilt here as certain as a conviction based on a trial or guilty plea? Courts have differed on whether the government can proffer records of *nolo contendere* convictions (hereinafter "*nolo* convictions") under Federal Rule of Evidence 404(b) as evidence of prior bad acts.[6] This comment argues that the guilt is less certain, and that because of the lesser degree of certainty, the history of *nolo contendere* pleas, and the construction of the Federal Rules of Evidence, records of *nolo* convictions cannot be used to prove prior bad acts under Rule 404(b). Instead, the government must proffer evidence of the facts underlying the *nolo* conviction to prove matters under 404(b).

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1 *E.g.*, L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After* Ohler v. United States, 34 U.C. Davis L. Rev. 615, 651-52 (2001); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L. Rev. 1, 38 (1999) (citing Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 L. & Hum. Behav. 37, 47 (1985)); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 Emory L.J. 135, 174 (1989) ("The assumption that a defendant can be afforded a fair trial under these conditions is dangerously wrong. The Supreme Court has recognized that serious matters of prejudice cannot be cured by judicial admonition to the jury." (citing Bruton v. United States, 391 U.S. 123, 125-26 (1968)).

2 Anna Robert, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 580 (2014).

3 Hiroshi Motomura, *Using Judgments As Evidence*, 70 Minn. L. Rev. 979, 988-89 (1986).

4 *E.g.*, *United States v. Green*, 873 F.3d 846, 865 (11th Cir. 2017) (en banc); *United States v. Frederickson*, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

5 *Infra* Section II(A), (A)(2).

6 The law is clear that the government can proffer records of *nolo* convictions for impeachment purposes and when a conviction is an element of the crime the defendant is currently charged with, such as the charge of "Felon in Possession of a Firearm." Therefore, this comment will not take a position on the use of *nolo* convictions for those purposes.

II. Background

Federal Rule of Evidence 404(b)(2) allows proof of prior bad acts if the evidence is used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[7] This includes evidence of crimes that the defendant was not charged with.[8]

For a federal court to admit evidence of prior bad acts, the judge needs to make a preliminary determination under Rule 104(a).[9] The judge must determine that "the jury can reasonably conclude that the act occurred and that the defendant was the actor" before allowing the government to use the evidence.[10] This is a modest standard that the government can meet with a certified record of a conviction based on a trial or guilty plea, even without any other evidence accompanying the record.[11] However, courts differ on whether a record of a *nolo* conviction can be admitted under 404(b) when considering other provisions of the Federal Rules of Evidence and what a defendant admits when pleading *nolo*.[12]

A. An Overview of *Nolo Contendere* Pleas

It is not entirely certain what a defendant admits when pleading *nolo contendere*. In *Lott v. United States*, decided in 1961, the Supreme Court held that a defendant who pleads *nolo* is implicitly admitting "every essential element of the offense that is well pleaded in the charge,"[13] and that it "is tantamount to 'an admission of guilt for the purposes of the case.'"[14] In *United States v. Alford*,[15] decided nine years after *Lott*, the Supreme Court hedged on the notion that a *nolo* plea is an admission of guilt. The Court asserted that "it is impossible to state precisely what a defendant does admit when he enters a *nolo* plea in a way that will consistently fit all the cases."[16] The Court then explained that historically, the plea has not been treated as an "express admission of guilt," but rather as the defendant simply not contesting the charges and agreeing to be punished as if he or she were guilty.[17]

Alford did not overrule *Lott* because its analysis on the issue was dictum and it did not cite *Lott* in its analysis of the *nolo* plea. However, *Alford's* assertion that it is uncertain what a defendant admits when pleading *nolo* was highly influential in lower court holdings that a *nolo* conviction cannot be used in subsequent criminal proceedings to prove that the defendant committed the prior crime.[18] Not surprisingly, the Circuit that held that *nolo* convictions can be used in subsequent criminal proceedings for this purpose cited *Lott* in

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7 Fed. R. Evid. 404(b)(2).

8 *E.g.*, *United States v. Ford*, 784 F.3d 1386, 1393-94 (2015); *United States v. Green*, 617 F.3d 233, 249-50 (3d Cir. 2010); *see* Fed. R. Evid. 404 advisory committees' note to 2000 amendments.

9 *Huddleston v. United States*, 485 U.S. 681, 689 (1988) (citation omitted).

10 *Id.*

11 *E.g.*, *United States v. Green*, 873 F.3d 846, 865 (11th Cir. 2017) (en banc); *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997); *United States v. Arambula–Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993).

12 *See infra* Section II(B).

13 367 U.S. 421, 426 (1961) (quoting *United States v. Lair*, 195 F. 47, 52 (8th Cir. 1912)) (internal quotation marks removed).

14 *Id.* (quoting *United States v. Hudson*, 272 U.S. 451, 455 (1927)).

15 400 U.S. 25 (1970).

16 *Id.* at 35 n.8. *Alford* is best known for holding that a defendant may plead guilty even while adamantly declaring innocence if the evidence against the defendant is strong and he pleads guilty at the advice of his counsel to avoid the uncertainty of a sentence after trial. *Id.* at 38. This opinion created the "*Alford* plea." The Court discussed *nolo* pleas to show that that Constitution allows defendants to accept punishment without expressly admitting guilt if going to trial would likely result in worse consequences. *Id.* at 35.

17 *Id.*

18 *See infra* Section II(B).

its analysis.[19] The range in interpretations of what defendants admit when pleading *nolo* has contributed to the circuit split on whether the resulting convictions are admissible to prove the defendant committed the prior crime.

1. How the Nolo Contendere Plea Originated

English common law inspired the use of *nolo contendere* pleas in the American legal system.[20] The Supreme Court has even suggested that the plea originated as an early medieval practice where defendants would request to end the criminal case by offering to pay the King money.[21] When defendants sought this compromise, they did not have to admit guilt.[22] They only had to submit to the King's mercy and ask for a fine.[23] According to an early 19th century treatise, early English law considered this an "implied confession":

> An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission . . . without putting him to a direct confession, or plea (which in some cases seems to be left to discretion), the defendant shall [a] not be estopped to plead not guilty to an action for the same fact, as he shall [b] be where the entry is *quod cognovit indictamentum*."[24]

In English common law, the court entered a judgment of *quod cognovit indictamentum* after a defendant expressly confessed to the crime, making *quod cognovit indictamentum* the equivalent of a guilty verdict in the United States today.[25] This passage shows that defendants who implicitly confessed by submitting to the King's mercy were allowed to plead not guilty in subsequent proceedings that arose from the same occurrence, but those who expressly confessed were forced to plead guilty in those future proceedings.[26] Thus, the King provided protections that accompanied "implied confessions," but these protections were unavailable for "express confessions."[27] This philosophy of leniency extended to American courts in the eighteenth and nineteenth century, which believed that *nolo* convictions could not "rightly be used against [the defendant] in any other case."[28]

[19] *United States v. Frederickson*, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

[20] *See Alford*, 400 U.S. at 35 n.8 (citing old English authorities when explaining how the *nolo contendere* plea originated).

[21] *Id.*; *see* 2 Pollock & Maitland, The History of English Law Before the Time of Edward I (1d Ed. 1899) (explaining that English judges could "pronounce a sentence of imprisonment and then allow the culprit to 'make fine,' that is to make an end (finem facere) of the matter by paying or finding security for a certain sum of money.").

[22] *Alford*, 400 U.S. at 35 n.8 (citing Anon., Y.B.Hil., 9 Hen. 6, f. 59, pl. 8 (1431)).

[23] *Id.*

[24] 2 William Hawkins, Pleas of the Crown; or, a System of the Principal Matters Relating to that Subject, Digested under Proper Heads 466 (8th ed. 1824).

[25] *Id.* (explaining that an express confession "carries with it so strong a presumption of guilt that an entry on record, '*quod cognovit indictamentum,*' etc., in an indictment of trespass estops the defendant to plead 'not guilty' to an action brought afterwards against him for the same matter.").

[26] *Id.*

[27] *Id.*

[28] *United States v. Lair*, 195 F. 47, 52 (8th Cir. 1912) (citing *United States v. Hartwell*, 26 F. Cas. 196, 201 (D. Mass. 1869); *Commonwealth v. Horton*, 26 Mass. 206 (1 Pick.) (1829)).

2. The Procedural Differences Between Nolo Pleas and Guilty Pleas

There are three major procedural differences between *nolo* pleas and guilty pleas, which help explain why *nolo* convictions should be treated differently in future litigation. First, Federal Rule of Criminal Procedure 11(b)(3) requires that the judge inquire into the factual basis for a guilty plea before accepting it. The advisory committee notes explain that the inquiry is meant to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." [29] However, when accepting a *nolo* plea, the judge does not have to extend this protection to the defendant because Rule 11(b)(3) purposefully omits *nolo* pleas from requiring a factual inquiry.[30] Thus, a defendant who pleads *nolo* can theoretically be convicted of a crime outside the range of his conduct.

Second, Federal Rule of Evidence 410 allows evidence of a defendant's guilty plea if it becomes relevant in future litigation unless the defendant withdrew the plea.[31] This means that evidence of the plea is allowed when it results in a conviction. However, Rule 410 expressly bans evidence of *nolo* pleas, regardless of whether they were withdrawn, in future litigation with the same defendant.[32] Therefore, evidence of a *nolo* plea is not admissible even when the plea results in a conviction, which is inevitable unless the defendant withdraws the plea or the court rejects it.[33] It is generally accepted that this ban extends to convictions based on a *nolo* plea in a civil proceeding arising out of the same facts.[34] However, there is uncertainty over whether the inevitable resulting conviction from the plea is inadmissible against the defendant in another criminal case.[35]

Third, Federal Rule of Evidence Rule 803(22), a hearsay exception, states that felony convictions based on guilty pleas are a hearsay exception, but explicitly adds that convictions based on *nolo* pleas are not an exception.[36] These differences indicate that there was a clear congressional intent to treat *nolo* convictions differently from guilty convictions in future proceedings.

B. The Circuit Split

The Eighth Circuit was the first Court of Appeals to answer whether a record of a *nolo* conviction is admissible under Rule 404(b) as evidence of prior bad acts.[37] In *United States v. Frederickson*, the defendant was convicted for

[29] Fed. R. Crim. P. 11 advisory committees' note to 1966 amendments.

[30] *Id.* ("For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of *nolo contendere* without inquiry into the factual basis for the plea. The [factual inquiry] is not, therefore, made applicable to pleas of *nolo contendere*.").

[31] Fed. R. Evid. 410(a)(1).

[32] *Id.* 410(a)(2); *see* Roger C. Park et al., Evidence Law: A Student's Guide to the Law of Evidence as Applied to American Trials 229 (3d. 2011) ("[I]n many cases the most compelling motivation to utilize the *nolo contendere* plea is precisely to dispose of the case without creating adverse evidence for subsequent civil or criminal litigation.").

[33] *See* Fed. R. Crim. P. 11(c)(5)-(d).

[34] *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th. Cir. 1988) ("Rule 410 was intended to protect a criminal defendant's use of the *nolo contendere* plea to defend himself from future civil liability."); Colin Miller, Evidence: Plea & Plea Related Statements (Rule 410) 8 (2013); David L. Shapiro, *Should a Guilty Plea Have a Preclusive Effect?*, 70 Iowa L. Rev. 27, 36 (1984) ("[T]he nolo plea has no effect in a later civil suit." (quoting 2 L. Orfield, Criminal Procedure Under The Federal Rules § 11:14 (1966))).

[35] *See* Miller, *supra* note 34, at 12-13 (explaining that courts are "split over whether Rule 410(a)(2) solely precludes the admission of the *nolo contendere* plea itself or whether it also precludes admission of the resulting conviction.").

[36] Fed. R. Evid. 803(22)(A).

[37] *United States v. Frederickson*, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

three counts of knowingly and willfully making threats to harm the President.[38] Given that the defendant's intent when making the threats was at issue, the trial court admitted the defendant's prior *nolo* conviction for making a false bomb threat under Rule 404(b) to prove his intent in the current case.[39] On appeal, the Eighth Circuit held that the *nolo* conviction was admissible.[40] Quoting the Supreme Court in *Lott*, it reasoned that there is no basis for distinguishing between guilty convictions and *nolo* convictions for purposes of admissibility under 404(b) because a defendant who pleaded *nolo* to a prior crime admitted "every essential element of the offense."[41] However, the court did not discuss the statutory distinctions between guilty pleas and *nolo* pleas nor the propriety of using *nolo* convictions in future proceedings.

In 2006, the Ninth Circuit inquired about the admissibility of *nolo* convictions in *United States v. Nguyen*.[42] However, the question before the court was not whether the convictions are admissible under 404(b), but more broadly whether they are admissible to prove that the defendant actually committed a prior crime.[43] In *Nguyen*, the defendant was convicted for "willful failure to comply with terms of release under supervision."[44] The term the defendant allegedly violated stated that the defendant must not "commit any crimes" while on release, and the defendant was convicted of violating this term based solely on two misdemeanors to which he pleaded *nolo contendere*.[45] Citing *Alford*, the Ninth Circuit explained that a *nolo* plea "is, first and foremost, not an admission of factual guilt."[46] It determined that this contributed to *nolo* pleas being a less reliable indicator of actual guilt than a guilty plea.[47]

With this as its guiding philosophy, the Ninth Circuit held that Federal Rule of Evidence 410, which explicitly prohibited evidence of *nolo* pleas, also prohibited "the convictions resulting from them as proof that the pleader actually committed the underlying crimes charged."[48] It explained that allowing the convictions resulting from the pleas, but not the pleas themselves, would produce an irrational result.[49] The court elaborated by stating that "Rule 410's exclusion of a *nolo contendere* plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea."[50]

Additionally, the court held that *nolo* convictions are also barred under a Federal Rule of Evidence hearsay exception, 803(22), which includes felony guilty judgments in the exception but expressly excludes judgments based on *nolo* pleas.[51] However, the court did hold that records of convictions could be admissible under 803(8), the public records hearsay exception, to prove the *mens rea* of a defendant accused of a subsequent crime under 404(b), but it still reversed the defendant's conviction because the evidence was not proffered for that reason.[52] The court's holding suggests

38 *Id.* at 1360.
39 *Id.* at 1364.
40 *Id.* at 1365 n.10.
41 *Id.* (quoting *Lott v. United States*, 367 U.S. 421, 426 (1961)).
42 465 F.3d 1128 (9th Cir. 2006).
43 *Id.* at 1129.
44 *Id.*
45 *Id.*
46 *Id.* at 1130.
47 *Id.* (citing *Olsen v. Correiro*, 189 F.3d 52, 60 n.8 (1st. Cir. 1999)).
48 *Id.* at 1131.
49 *Id.*
50 *Id.*
51 *Id.* at 1131-32; *see* Fed R. Evid. 803(22) (Stating that the following is a hearsay exception: "[e]vidence of a final judgment of conviction if: (A) the judgment was entered after a trial or guilty plea, but not a *nolo contendere* plea.").
52 *Nguyen*, 465 F.3d at 1132.

that the Ninth Circuit believes that admitting a prior conviction under Rule 404(b) to prove a defendant's knowledge or intent in a subsequent crime is distinguishable from using the evidence to prove the defendant was guilty of the prior crime.

Finally, in 2017, the Eleventh Circuit issued an en banc ruling on the matter in *United States v. Green*.[53] In *Green*, the defendant was convicted of "being a felon in possession of a firearm or ammunition."[54] The district court admitted evidence of the defendant's prior 2006 conviction from a *nolo* plea "for being a felon in possession of a firearm, ammunition, or an electric weapon" as evidence of prior bad acts under Rule 404(b).[55] The government intended to use the evidence to help prove that the defendant had the intent to possess a firearm on this occasion.[56] The judge instructed the jury that the evidence could only be used to assess whether the defendant had the required mental state for the charge he is currently facing.[57]

In a thoughtful opinion where the court analyzed both the *Frederickson* and *Nguyen* opinions, discussed the policy implications, and detailed the differences between pleas and convictions, the court held that Federal Rule of Evidence 803(22) barred records of *nolo* convictions from being admissible to prove matters under Rule 404(b).[58] It explained that admitting the *nolo* conviction under 404(b) was erroneous because it was used to indicate that the defendant committed the prior crime, and thus, the *nolo* conviction was not admissible under 404(b).[59] The court elaborated by stating that the government should have presented evidence of the underlying facts of the conviction—that the "Defendant so possessed ammunition on the date in question."[60]

However, it limited its ruling to Rule 803(22) because it determined that Rule 410 was "an uncertain basis on which to rest a determination that a nolo conviction is not admissible."[61] The court reasoned that the plain language of the Rule only excluded *nolo* pleas, and that because *nolo* convictions were commonly used to prove the fact of conviction,[62] this counseled "against a reading that Rule 410 contains an absolute prohibition on the use of nolo convictions."[63] The court did not rely on either *Lott* or *Alford* in its holding.

Frederickson, *Nguyen*, and *Green* are the only three federal circuit court cases where the answer to whether *nolo* convictions are admissible as proof the defendant committed the prior crime was central to their holdings. In *Olsen v. Corriero*, the First Circuit recognized the problems with not interpreting Rule 410's ban on nolo contendere pleas to encompass the resulting convictions when the government proffers the evidence to prove the defendant committed a prior crime.[64] However, it stopped short of holding that Rule 410 applies to the resulting convictions because the court did not have to answer that question.[65]

53 873 F.3d 846 (11th Cir. 2017).
54 *Id.* at 850.
55 *Id.* at 857
56 *Id.* at 868.
57 *Id.* at 851.
58 *Id.* at 861-63, 866.
59 *Id.* at 866.
60 *Id.*
61 *Id.* at 865.
62 An example of this would be using a *nolo* conviction to prove that a defendant was a felon in possession of a firearm, rather than using it to prove that the defendant in fact committed the crime that made him a felon.
63 873 F.3d at 865.
64 189 F.3d 52, 60 (1st Cir. 1999) ("If such convictions and sentences were offered for the purpose of demonstrating that the pleader is guilty of the crime pled to, then the nolo plea would in effect be used as an admission and the purposes of Rule 410 would be undermined.").
65 *Id.* at 62 ("Accordingly, there is no reason here to expand Rule 410 beyond the scope of its plain language, which in relevant part encompasses only nolo pleas." (citation omitted)).

Additionally, in *United States v. Adedoyin*,[66] the Third Circuit suggested that Rules 410 and 803(22) barred the use of *nolo* convictions to prove that the defendant actually committed the prior crime,[67] which is congruent with the holdings in *Nguyen* and *Green*. Both the courts in *Olsen* and *Adedoyin* only had to answer whether the defendant's prior *nolo* conviction could be used to prove that the defendant had been convicted in the past, not whether the defendant actually committed the crime he was charged with.[68] Both courts held that the convictions could be admitted to prove the fact of conviction, if that is an essential element to the crime.[69]

III. Analysis

A. The Key Statutory Distinctions between *Nolo Contendere* Pleas and Guilty Pleas and the Legislative History of the Federal Rules of Evidence

Federal Rule of Criminal Procedure 11 provides for a key difference between guilty pleas and *nolo* pleas that helps show that a *nolo* plea is not tantamount to a guilty plea.[70] The difference is that if a defendant pleads guilty, the court must determine that there is a factual basis for the plea.[71] The court must ensure that "the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty."[72] However, if the defendant pleads *nolo*, then the court does not need to make a factual inquiry into whether the defendant's conduct corresponds with the charge.[73] This means that if the defendant is charged with the wrong crime, or if the facts are more congruent with a lesser charge, the rules allow the court to convict the defendant anyway because it is within the court's discretion whether to review the facts. Therefore, even if it is unlikely that the judge will not make a factual inquiry into the basis for the charge, courts must be cautious when evaluating the reliability of a *nolo* conviction in future proceedings as a procedural matter.

Federal Rule of Evidence 410 provides a second key difference between guilty pleas and *nolo* pleas. It states that for a guilty plea to be inadmissible against a defendant in a subsequent case, the defendant needs to withdraw the guilty plea.[74] However, the defendant's *nolo* plea is inadmissible even if the defendant does not withdraw it, and thus, even when it leads to a conviction.[75] Therefore, to allow evidence of the conviction that inevitably results from the plea would seemingly undermine any intended benefits that would come with prohibiting evidence of the plea. As the Ninth Circuit stated in *Nguyen*, construing Rule 410 to permit *nolo* convictions would produce an "illogical result" and would make Rule 410's prohibition on *nolo* pleas meaningless.[76]

A third distinction is that Federal Rule of Evidence 803(22) makes evidence of a guilty conviction a hearsay exception, but explicitly states that *nolo contendere* convictions are not

66 369 F.3d 337 (3d Cir. 2004).
67 Id. at 344 ("It is true that a plea of nolo contendere is not an admission of guilt and thus the fact that a defendant made such a plea cannot be used to demonstrate that he was guilty of the crime in question." (citing *Olsen*, 189 F.3d at 60)).
68 *Adedoyin*, 369 F.3d at 345; *Olsen*, 189 F.3d at 62.
69 *Adedoyin*, 369 F.3d at 344; *Olsen*, 189 F.3d at 61-62.
70 Fed. R. Crim. P. 11.
71 *Id.* 11(b)(3).
72 *Id.* advisory committees' note to 1966 amendments.
73 *Id.*
74 Fed. R. Evid. 410(a)(1).
75 *Id.* 410(a)(2).
76 *United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006).

a hearsay exception. This is an important distinction based on the notion that "an implied confession of guilt cannot rise to the degree of certainty which would make it the equivalent of an express confession."[77] The differences prescribed in the Federal Rules of Criminal Procedure and the Federal Rules of Evidence suggest that a guilty plea is more serious, and more indicative of guilt, than a *nolo* plea.

Furthermore, the legislative history of the Federal Rules of Evidence discusses *nolo* pleas, albeit briefly, and it leans towards an interpretation that the convictions are barred under Rules 410 and 803(22).[78] The advisory committee that drafted the Federal Rules of Evidence supported Rule 803(22) by stating that convictions based on *nolo* contendere pleas were not included because "[t]his position is consistent with the treatment of nolo pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof."[79] Thus, the advisory committee drafted Rules 410 and 803(22) with the intention that the *nolo* convictions would be inadmissible, and Congress accepted the proposed rules without altering this.[80] The court in *Nguyen* used this language as a basis for holding that *nolo* convictions are inadmissible under Rules 410 and 803(22) to prove that the defendant committed the prior bad act.[81]

The statutory distinctions and legislative history are congruent with what American courts held in the 18th and early 19th Century: that *nolo* convictions could not "rightly be used against [the defendant] in any other case."[82] It is well recognized in the United States that a *nolo* conviction cannot be used against the defendant in a civil proceeding arising from the same occurrence, and that guilt in the civil case will be litigated.[83] Therefore, there is no reason why this same rule should not apply when the government proffers the evidence in a criminal case to prove that the defendant committed a prior crime. As in a civil case, evidence proving the facts underlying the conviction should be admissible in a criminal case, but the record of the conviction should not be admissible.

B. Where the Courts Were Correct and Where They Went Awry

The Eighth Circuit in *Frederickson* erred in holding that *nolo* convictions are admissible under 404(b) as evidence of prior bad acts.[84] The court only considered the Supreme Court's holding in *Lott*, that a defendant who pleads *nolo* admits "every essential element of the offense (that is) well pleaded in the charge," when holding this way.[85] However, the court should have considered the history of *nolo* pleas and the statutory protections provided for those in future proceedings who pleaded *nolo* to a prior charge. The history of *nolo* pleas and statutory

77 Nathan B. Lenvin & Ernest S. Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L. J. 1255, 1258 (discussing why *nolo contendere* pleas cannot be used for capital crimes (quoting *Commonwealth v. Shrope*, 264 Pa. 246, 250, 107 Atl. 729, 730 (1919))) (internal quotation marks omitted); *See Nguyen*, 465 F.3d at 1131 (citation omitted); *Olsen v. Correiro*, 189 F.3d 52, 60 (1st. Cir. 1999).

78 H.R. Doc No. 93-46, at 140 (1978).

79 *Id.*

80 *Id.*

81 465 F.3d 1128, 1131-32 (9th Cir. 2006).

82 *United States v. Lair*, 195 F. 47, 52 (8th Cir. 1912) (citing *United States v. Hartwell*, 26 F. Cas. 196, 201 (D. Mass. 1869); *Commonwealth v. Horton*, 26 Mass. 206 (1 Pick.) (1829)).

83 *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th. Cir. 1988) ("Rule 410 was intended to protect a criminal defendant's use of the *nolo contendere* plea to defend himself from future civil liability."); Miller, *supra* note 34, at 8; David L. Shapiro, *Should a Guilty Plea Have a Preclusive Effect?*, 70 Iowa L. Rev. 27, 36 (1984) ("[T]he *nolo* plea has no effect in a later civil suit." (quoting 2 L. Orfield, Criminal Procedure Under The Federal Rules § 11:14 (1966))).

84 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

85 *Id.* (alteration in original) (quoting *Lott v. United States*, 367 U.S. 421, 426 (1961)).

protections should have been the basis of the court's analysis because they reflect the common law and congressional intent better than a sole inquiry into what a defendant admits when pleading guilty.

Additionally, the court's explanation of what a defendant admits when pleading *nolo* is debatable because the Supreme Court in *United States v. Alford* explained in dictum that "it is impossible to state precisely what a defendant does admit" when doing so.[86] Furthermore, even if a court determines it is bound by *Lott* rather *Alford* on the issue and that this is an adequate legal basis for determining whether *nolo* convictions are admissible under 404(b), it should still hold that the convictions are not admissible because *Lott* made clear that the plea was an admission of guilt "for the purposes of the case."[87] The plea would only act as an admission for the purposes of the case because at common law, the conviction could not be used against the defendant in any subsequent proceeding.[88] Therefore, even if a court follows *Lott's* determination of what a defendant admits, the court should not allow a *nolo* conviction to be admitted under 404(b) because that would be using the conviction against the defendant in a future proceeding.

The Eleventh Circuit in *Green* considered the statutory protections and interpreted the law correctly when it held that *nolo* convictions are not admissible under 404(b) to prove the defendant's guilt of the prior crime.[89] It held that 803(22) was the only basis for this, and not Rule 410.[90] However, courts should interpret both Rules 410 and 803(22) as barring *nolo* convictions from evidence to prove guilt. The legislative history of the Federal Rules of Evidence explains that the advisory committee intentionally did not include *nolo* convictions as a hearsay exception under Rule 803(22) so that the Rule was consistent with Rule 410's "treatment of *nolo* pleas."[91] This legislative history should have remedied the court's concern that the plain language of the Rule only prohibits the admission of *nolo* pleas. Additionally, the court's argument that Rule 410 cannot act as an absolute prohibition on *nolo* convictions because courts have allowed their use to prove the fact of conviction[92] does not mean that Rule 410 theoretically could allow *nolo* convictions to be used to prove the defendant committed the prior crime. Proving the fact of conviction has been distinguished from proving actual guilt because records of a *nolo* conviction have been considered reliable enough to prove the defendant was convicted, and courts have construed certain federal statutes to allow *nolo* convictions to prove the fact of conviction.[93]

86 400 U.S. 25, 35 n.8 (1970).

87 *Lott*, 367 U.S. at 426 (quoting *Hudson v. United States*, 272 U.S. 451, 455 (1926)) (internal quotation marks removed).

88 *Hudson*, 272 U.S. at 455 (describing how at common law, a defendant who pleaded *nolo* can plead not guilty in any other case brought against the defendant) (citation omitted); *United States v. Lair*, 195 F. 47, 52 (1906) (explaining that even though a defendant who pleads *nolo* admits to every essential element of the crime, "the conviction cannot rightly be used against him in any other case. Such is the effect of the plea of nolo contendere.") (citations omitted); Leonard W. Levy & Kenneth L. Karst, Encyclopedia of the American Constitution 1820 (2d ed. 2000) ("Of the same immediate effect as a guilty plea, [a *nolo* plea] admits the facts charged but cannot be used as a confession of guilty in any other proceeding."); *see supra* II.A.1.

89 873 F.3d 846, 866 (11th Cir. 2017) (en banc).

90 *Id.* at 865.

91 H.R. Doc No. 93-46, at 140 (1978).

92 873 F.3d at 865.

93 *See United States v. Adedoyin*, 369 F.3d 337, 344 (3rd Cir. 2004) (quoting Pearce v. United States Dep't of Justice, 836 F.2d 1028, 1029 (6th Cir.1988) ("Notwithstanding Rule 410, a conviction pursuant to a nolo contendere plea is a conviction within the meaning of [21 U.S.C. § 824] and gives rise to a variety of collateral consequences in subsequent proceedings.")); *Olsen v. Correiro*, 189 F.3d 52, 61 (1st. Cir. 1999) (quoting Fed.R.Crim.P. 11(e)(6) advisory committee's notes, 1974 amendment ("A judgment upon the plea is a conviction and may be used to apply multiple offender statutes.")).

Therefore, the Eleventh Circuit should have held that both Rules barred records of *nolo* convictions to prove matters under 404(b). The First Circuit in *Olsen* and the Third Circuit in *Adedoyin* were correct to distinguish between the use of *nolo* convictions to prove the fact of conviction and their use to prove the defendant's guilt of the underlying facts that led to the conviction.[94] Those circuits were correct to assert, although in dicta, that Rule 410 prohibited the use of *nolo* convictions to prove the defendant's guilt of the prior crime.[95]

The Ninth Circuit's opinion in *Nguyen* was the most puzzling compared to the other cases. The court was correct in most of the opinion when it determined that Rules 410 and 803(22) both barred evidence of *nolo* convictions to prove the defendant committed the prior crime.[96] However, it undermined its reasoning when it held that these convictions are admissible under Rule 803(8), the public records hearsay exception, to prove the defendant's mental state under Rule 404(b), such as intent or knowledge, in a subsequent criminal case.[97] The court, explicitly discussing misdemeanor convictions but also referring to *nolo* convictions, stated that these convictions "may be admissible under Rule 803(8) to prove some other element of a subsequently charged crime, but they are not admissible to prove that the defendant actually committed the underlying crimes charged. . . ."[98]

In justifying this, the Ninth Circuit cited *United States v. Loera*, which was a case where the court admitted evidence of a prior conviction under 803(8) to prove the defendant's knowledge under 404(b).[99] The defendant in *Loera*, Reginald Loera, was charged with second-degree murder after driving while under the influence of alcohol and causing a traffic accident that killed someone.[100] Loera had three prior convictions in California for "driving under the influence of intoxicating liquor," and the trial judge allowed the prosecution to introduce evidence of those records to prove the malice required in second-degree murder.[101] The Ninth Circuit held that it was permissible to introduce these records under Rule 404(b).[102]

However, the Ninth Circuit in *Nguyen* and *Loera* erred in ruling that Rule 803(8) is a basis for admitting prior *nolo* convictions to prove the defendant's mental state because Rule 803(22), the hearsay exception for prior convictions, already explicitly states that *nolo* convictions are not included in the exception.[103] To use 803(8) as a basis for admitting *nolo* convictions would undermine 803(22) and make it irrelevant on the issue.[104] Even the court in *Nguyen* stated that "[a]ll judgments of conviction may be said to be public records, but the exemption under Rule 803(8) cannot be deemed to cover such judgments because it would make Rule 803(22) superfluous."[105] It appears the court determined that a *nolo* conviction is admissible as evidence to prove the defendant's mental state in a sub-

94 *Adedoyin*, 369 F.3d at 344; *Olsen* 189 F.3d at 61.
95 *Adedoyin*, 369 F.3d at 344; *Olsen* 189 F.3d at 60-61.
96 465 F.3d 1128, 1131-32 (9th Cir. 2006).
97 *Id.* at 1132.
98 *Id.* (citation omitted).
99 923 F.2d 725, 729-30 (9th Cir. 1991).
100 United States v. Loera, 923 F.2d 725, 726-27 (1991).
101 *Id.* at 727.
102 *Id.* at 729.
103 Fed. R. Evid. 802(22)(A).
104 Park, *supra* note 32, at 357 ("It would be peculiar to allow the broader rule, Rule 803(8), which was drafted without an eye to the problem of evidentiary use of criminal convictions, to be used as a way of getting around [the] intended limit [of Rule 803(22)]."); *see Hancock v. Dodson*, 958 F.2d 1367, 1378 n.3 (6th Cir. 1991) (holding that issues arise when other hearsay requirements are used to "avoid the requirements of Rule 803(22).").
105 *Nguyen*, 465 F.3d at 1132.

sequent case because it is not being used to prove that the defendant actually committed the prior crime.[106] However, this logic is flawed because to use it to show that the defendant had the required *mens rea* in the subsequent case is to show that the defendant had the required *mens rea* because he or she committed the prior crime. To use the Ninth Circuit's own example in *Loera*—admitting evidence of a prior drunk driving offense to establish "the element of malice required for second degree murder, *i.e.,* that the defendant had grounds to be aware of the risk that drunk driving presented to others,"—is to show that the defendant was aware of the risks of drunk driving because he committed the prior drunk driving offense.[107] Using a *nolo* conviction to prove matters under 404(b) undermines the notion that *nolo* convictions cannot be used to prove that the defendant actually committed the prior crime.

C. The Effect This Will Have On Defendants

Disallowing the use of conviction records as proof of prior bad acts when the conviction was based on a *nolo contendere* plea will not close all avenues for the government to prove that the prior crime occurred. Federal Rule of Evidence 404(b) permits evidence of uncharged crimes as proof of prior bad acts.[108] Thus, even though a record of a *nolo* conviction is inadmissible, independent proof of the underlying facts of the crime through testimony or appropriate hearsay exceptions will be admissible under 404(b).[109]

If the government cannot proffer any independent evidence of the underlying facts that led to the conviction, then this could significantly impact a defendant's trial because studies have shown that evidence of prior convictions and bad acts has a devastating impact on a defendant's likelihood of acquittal.[110] One prominent study that Professors Roselle Wissler and Michael Saks conducted using mock jurors in a hypothetical simulation showed that the conviction rate when the jury learned of a prior crime was 75% when the crime was similar in nature, 52.5% when it was not similar, and 42.5% when it did not know about the crime.[111] If a prosecutor only has a record of a *nolo* conviction as proof that a prior crime occurred and is unable to obtain evidence of the *nolo* conviction's underlying facts, that could be the difference between a conviction and an acquittal.

[106] *Id.*

[107] *Nguyen*, 465 F.3d at 1132 (citing *Loera*, 923 F.2d at 729).

[108] *E.g.* United States v. Ford, 784 F.3d 1386, 1393-94 (2015); United States v. Green, 617 F.3d 233, 249-50 (3rd Cir. 2010); *see* Fed. R. Evid. 404 advisory committees' note to 2000 amendments ("The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b).").

[109] Fed. R. Evid. 404(b). The evidentiary standard the government must meet for the court to admit evidence of prior bad acts is whether "the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689 (1988).

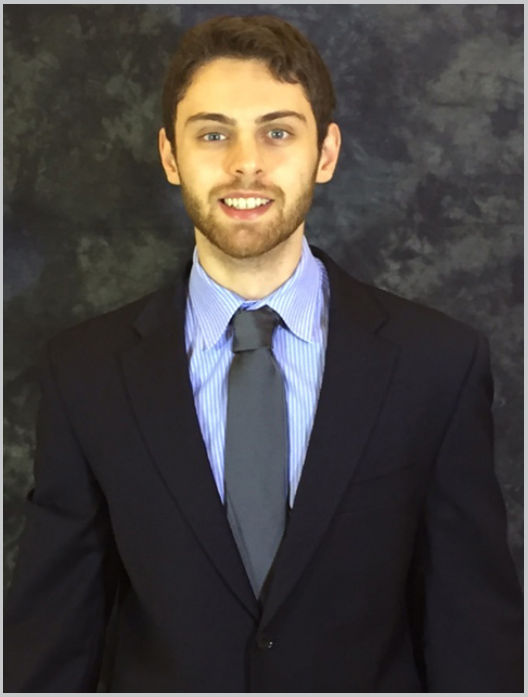
[110] Dodson, *supra* note 1 (Wissler, *supra* note 1, at 47 (1985)); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 Vill. L. Rev. 533, 552 (1992) (citing Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L.Q. 235 (1975-1976)); *see also* A. N. Doob and H. M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 Crim. L.Q. 88, 93 (1972) (finding in a Canadian study that on a scale from 1-7, 1 being guilty and 7 being not guilty, learning about a prior conviction brought the perception of guilt from 4 to 3). *Contra* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. Crim. L. & Criminology 493, 506 (2011) (citation omitted) (concluding that the introduction of prior convictions only increases conviction rates by slightly more than 1%).

[111] Dodson, *supra* note 1, at 38; Antonia M. Kopeć, Comment, *They Did It Before, They Must Have Done It Again; The Seventh Circuit's Propensity to Use a New Analysis of 404(b) Evidence*, 65 DePaul L. Rev. 1055, 1087-88 (2016) (citing Wissler, *supra* note 1, at 40).

IV. Conclusion

Based on the *nolo contendere* plea's origin, its history, and statutory distinctions between guilty pleas and *nolo* pleas, records of the resulting convictions should not be admissible for the purposes of proving any matter under 404(b). The records of the convictions cannot be used to prove that the defendant actually committed the prior crime. Therefore, the government instead must proffer evidence of the underlying facts that led to the *nolo* conviction to prove matters under 404(b).

About the AUTHOR



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Junk Tales: Incorporating Drug Addicts' Narratives In Law School Courses

Sara Schotland

This essay argues that our criminal law curricula should be enriched and expanded by inclusion of "junk tales"—the stories of junkies that explain the course of their addiction and their interactions with criminal law. The contents of leading criminal law casebooks largely consist of court cases and statutes;[1] narratives about the lived experience of drug addicts are conspicuously absent. This article proposes that both traditional criminal law courses and more specialized courses in regulation of narcotic drugs or "vice crimes" be expanded to include narratives relating the experience of addicted criminals.

I urge the inclusion of "junk tales," which I define to include both true accounts and realistic fiction, on two principal grounds. These narratives offer readers vicarious identification with the lived experience of addiction—the back stories underlying the individuals' dependency and involvement in crime, and the impact of the incarceration on the individuals and their families. While true accounts offer authenticity, well-crafted, realistic fiction is equally valuable; fiction packs a wallop and is therefore likely to engage the reader's empathy.

Second, junk tales enable consideration of key choices in punishing drug addicts. According to the U.S. Department of Justice, 58% of state prisoners and 63% of sentenced jail inmates meet the criteria for drug dependence of abuse, as against approximately 5% of the general population.[2] More female prisoners used drugs in the month before the current offense than men.[3] In New York, 91% of women sentenced to prison for drug crimes are women of color although they make up just 32% of the state's female population.[4] In a rare moment of bipartisan consensus, Congress passed The First Step Act on December 18, 2018, with the objective of reducing mass incarceration.[5] However, this makes only minimal changes in the regime for punishment of addicts. While the Act does reduce some mandatory sentencing minimums, long periods of default sentences and sentencing enhancements remain.[6]

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1 *See, e.g.*, Joshua Dressler & Stephen P. Garvey, Cases and Materials on Criminal Law (7th ed. 2016); Sanford Kadish, Criminal Law and its Processes: Cases and Materials, (10th ed. 2017); Wayne R. LaFave, Modern Criminal Law: Cases, Comments and Questions (6th ed. 2017).

2 U.S. Dep't. Just., Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007–2009 (2017), https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf.

3 *Id.*

4 *Incarcerated Women and Girls*, The Sentencing Project, 1980–2016 (2018), https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls-1980-2016.pdf. Although incarceration rates for all women are skyrocketing, since 1986, the rate of increase for African-American women are twice as much as for white women. Women in state prisons are more likely than men to be incarcerated for a drug offense. Twenty-five percent of female prisoners have been convicted of a drug offense, compared to fourteen of male prisoners. *See id.*

5 First Step Act of 2018, Pub. L. No. 115-391, 2018 Stat. 1 (2018).

6 Among other reforms, relative to sentencing for drug offenses the new law: (1) reduces a mandatory minimum sentence for second felony drug offenders from twenty years to fifteen years; (2) revises a "three strikes rule" so that individuals with three or more felony convictions including drug offenses face an automatic maximum sentence of twenty-five years instead of life imprisonment; (3) expands the safety valve allowing judges to impose a sentence below the statutory minimum for certain non-violent low-level drug offenders; (4) prevents "stacking" for drug offenses committed with a firearm, so that first-time offenders do not receive the twenty-five year mandatory minimum intended for repeat offenders; (5) retroactively applies the Fair Sentencing Act

Part I of this essay discusses the role of "outsider narratives," and argues for the inclusion of junk tales in criminal law and vice crime courses. Part II illustrates how junk tales can inform important pending policy issues, including the justification for imposing criminal responsibility and prison sentences on confirmed addicts, the vulnerability of women peripherally involved in drug conspiracies to heavy prison sentences, and the termination of parental rights when women are convicted of drug offenses.

I. VALUE OF OUTSIDER NARRATIVES AND SPECIAL CONTRIBUTION OF PEN WRITING

Junk tales—both true accounts and fiction—usefully supplement criminal law syllabi that ordinarily rely primarily on case law, public policy, and economics materials. Narratives personalize while social science data often generalizes.[7] Addict narratives convey—in a way that statistics cannot—the domination of the addict's life by the constant demand to feel narcotic need, the psychological effect of incarceration, the impact of loss of family connection, or the struggle for effective treatment and recovery.[8] Nonfiction accounts provide oral histories of individuals who are otherwise anonymous and powerless. They have the obvious benefit of authenticity.

Fictional accounts, as Marijane Camilleri has written, enable the reader to be "a creative participant in the inner experience of the protagonist, gaining intimate knowledge about the protagonist's history, joys, frustrations, agonies, reasons, and irrationalities."[9] A primary goal of the law and literature movement is to illustrate the effect of law on subpopulations; fiction has a value in stirring empathy.

Outsider narratives correct a myopic tendency to see the world through middle class lenses and bring to students' attention the effect of law on "the poor, the undereducated, unrepresented, and the physically, mentally, linguistically, and psychologically disadvantaged."[10] As Leslie Espinoza has observed, outsider narratives are essential to convey sociopolitical realities and the impact of oppression in the lives of individuals dominated on the basis of gender or race.[11]

The professor who decides to teach junk tales confronts the question of what type of materials to assign or suggest for term papers or presentations. At least the following may be in play: true accounts/oral histories of addict prisoners; fiction by addict prisoners; fiction by professional authors; documentaries, Hollywood films, or television series (e.g., programs such as *The Wire*). Another threshold question

of 2010 that helped reduce a sentencing disparity between crack and powder cocaine offenses that had disadvantaged minority defendants. *Id.* §§101(a), 102–03.

7 *See* Michael F. Dahlstorm, *Using Narratives and Storytelling to Communicate Science with Nonexpert Audiences,* 111 PNAS 1314, 1314, 1316 (2014) (explaining that narratives are easier to comprehend and are more engaging and persuasive to lay listeners).

8 *See, e.g.,* Srdjan Sremac and R. Ruard Ganzevoort, *Addiction and Spiritual Transformation: An Empirical Study on Narratives of Recovering Addicts' Conversion Testimonies in Dutch and Serbian Contexts*, 35 Archive for Psychol. Religion 406, 408–09 (2013) (demonstrating how narratives can provide more in-depth stories of addicts' experiences).

9 Marijane Camilleri, Comment, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury*, 39 Cath U. L. Rev. 557, 564 (1990).

10 Nancy L. Cook*, Outside the Tradition: Literature as Legal Scholarship*, 63 U. Cin. L. Rev. 95, 142 (1994); *see* Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. Rev. 1597, 1599 (2015).

11 *See* Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 Mich. L. Rev. 901, 914–15 (1997).

relates to what types of addiction and abuse to address. I focus my students on narratives related to "hard drug" addiction (such as cocaine, heroin, and OxyContin) given the strength of the addiction and the relationship to incarceration.[12] Professors may assign junk tales as required reading or alternatively propose such narratives as optional topics for written assignments or oral presentations (especially suited for film). Another option is to require or permit submission of original fiction in which students write their own "junk tales."

A very rich resource is available for incorporating junk tales. PEN America, an umbrella organization that encourages emerging writers to protect free expression, has created a prison writing project.[13] PEN America provides mentors and resources to facilitate writing by prisoners; their web site includes selected essays, short stories, poems, and plays from prisoners whose writing has won awards.[14] I have found that students are very interested in and moved by reading prisoners' work.

I also assign writings by professional authors who have acknowledged a personal history of addiction. William Burroughs famously says in his classic 1953 novel *Junky: The Definitive Text of "Junk"*, "[l]ife telescopes down to junk, one fix and looking forward to the next."[15] Like a bullet, heroin claims its victims regardless of class. "All of a sudden the addict looks in the mirror and does not recognize himself."[16] In his novel, "Junk" virtually personifies drug addiction: "in the junk-junkie relationship only junk retains human attributes."[17] Junk in effect has control and agency, taking possession of a "grotesque consumer whose needs and desires have all been replaced by one simple and overpowering bodily need."[18]

However, prisoner addict narratives differ from Burroughs's writing in several respects. Most prisoner addict narratives begin with autobiographical detail exposing a dysfunctional upbringing, a parent or parents addicted to alcohol or drugs, physical and/or sexual abuse.[19] Unlike the majority of incarcerated addicts, Burroughs comes from a wealthy background and was not abused as a child.[20] Further, Burroughs's telling of the addict's experience comes across as sardonic and witty. In contrast, in prisoners' addict narratives, often there is a tone of apology and confession, regret for the impact of addiction on one's parents and children.[21] Poverty runs as a leitmotif; selling drugs promises a profitable livelihood. Female drug users are generally initiated by men and as many become addicted prostitution becomes the only means to pay for their habit.[22] Many

12 *See* Dorthoy J. Henderson, *Drug Abuse and Incarcerated Women,* 15 J. Substance Abuse Treatment 579, 581 (1998) (stating that women who use hard drugs are more frequently incarcerated).

13 *See* Pen America, *The Freedom to Write*, https://pen.org/prison-writing/ (last visited Mar. 31, 2019); *see also* American Prison Writing Archive, https://apw.dhinitiative.org/collection-description (last visited Mar. 31, 2019).

14 *Id.*

15 William S. Burroughs, Junky 19 (50th Anniversary Ed. 2003).

16 *Id*. at 18–19.

17 Timothy Melley, *A Terminal Case: William Burroughs and the Logic of Addiction*, *in* High Anxieties: Cultural Studies in Addiction 38, 43 (Janet Farrell Brodie & Marc Redfield eds., 2002).

18 *Id.*

19 *See* Paula C. Johnson, Inner Lives: Voices of American Women in Prison 7–8 (2003); Kristine Riley et. al, *Overlooked: Women and Jails in an Era of Reform,* Vera Institute of Justice 8–9 (2016), https://storage.googleapis.com/vera-web-assets/downloads/Publications/overlooked-women-and-jails-report/legacy_downloads/overlooked-women-and-jails-report-updated.pdf.

20 Peter Schjeldahl, *William S. Burroughs, Outlaw and Beat*, The New Yorker (Feb. 3, 2014), https://www.newyorker.com/magazine/2014/02/03/the-outlaw-2.

21 *See* Johnson, *supra* note 19.

22 *See, e.g.,* Johnson, *supra* note 19, at 96–106, 195–97; Natasha Du Rose, The Governance of Female Drug Users:

narratives read as tales of redemption, often catalyzed by religious engagement.[23]

While some professors will choose to focus on true accounts, I argue that no literature background is required for a professor who wishes to introduce fiction into the curriculum.[24] For purposes of criminal law courses, it is the thematic component of a story that is of greatest importance. Moreover, as the *Pen Fiction* entries illustrate, the line between true account and fiction is very tenuous since most addict authors base their narratives on personal experience.

II. EXAMPLES INCORPORATING JUNK NARRATIVES INTO CRIMINAL LAW CURRICULA

Below I illustrate how junk tales can enable more informed consideration of drug policy questions related to the criminal responsibility of addicts in general and policy issues related to women addicts. In each case I will offer an illustration from a true account, followed by short fiction.

A. CONSIDERING THE CRIMINAL RESPONSIBILITY OF CONFIRMED ADDICTS

How should the law address the question of criminal responsibility for addicts? Is the compulsion such that conviction is unjustified? A user of crack cocaine describes what motivated her to steal in Natasha DuRose's collection of oral histories of female drug users:

> Yeah, and smoking crack done that. Do you know what I mean? Crack done that. That's not me. I wouldn't go and rob someone's house normal. It controls your life unless you take the control back, which I have done now. It controls you, any which way. It controls what you eat. It controls when you sleep. It controls what you do with your money. 'Cause all you're thinking about is crack, crack, crack, crack. It controls everything, every aspect of your life. It controls whether you have a bath in the morning. . . . My sister wouldn't lend me a tenner. I just smashed the flat up, just switched. I wasn't like that before, you know what I mean? I was never like that.[25]

Courts have routinely held that while the status of being an addict is not punishable,[26] the conviction of an addict for an offense does not violate the Eighth Amendment's "cruel and unusual punishment" clause.[27] For example, in *United States v. Moore*[28], a defendant argued that as a result of his long and intense addiction to

Women's Experience of Drug Policy 29–36 (Policy Press).

[23] *See, e.g.*, Johnson, *supra* note 19, at 173–74.

[24] Professors may choose to assign short stories rather than novels based on length and practicality given that cases and statutory material often form the main reading in criminal law and vice crime course.

[25] Du Rose, *supra* note 22, at 187–88.

[26] In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court held that drug addiction was a disease and declared unconstitutional a California law that criminalized the mere "status" of being an addict in the absence of any requirement of *actus reus.* The Court held that criminalizing a "disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S. at 666–67.

[27] *See Powell v. Texas*, 392 U.S. 516, 535 (1968) (ruling an addicted defendant unsuccessfully challenged his conviction for violating a public drunkenness law on the basis that his appearance in public while drunk was essentially involuntary). The Court distinguished Robinson because Powell had committed an act, a behavior "which society has an interest in preventing." *Id.* at 533.

[28] 486 F.2d 1140 (D.C. Cir. 1973).

heroin, he had lost self-control over its use and thus should be exculpated from a possession charge.[29] Via multiple opinions, the court upheld the conviction on the grounds that the initial choice to use heroin was voluntary and that the choice to possess was difficult but not involuntary.[30]

Addicts' compulsion to commit drug related crimes does not give rise to an insanity defense either in those jurisdictions that apply the rule in *M'Naughten* (requiring that the mental disease render the defendant incapable of distinguishing right from wrong),[31] or in states that follow the Model Penal Code ("MPC") (requiring a showing that as a result of mental disease the defendant lacks "substantial capacity" to "conform his conduct to the requirements of law").[32] As the Fifth Circuit stated in declining to apply the MPC to drug addicts, "[t]here is an element of reasoned choice when an addict knowingly acquires and uses drugs; he could instead have participated in an addiction treatment program. A person is not to be excused for offending simply because he wanted to very, very badly."[33] However, in occasional cases, courts have found that some addicted defendants exhibit atypical "settled insanity" from drug use which renders the defendant incapable of distinguishing right from wrong.[34]

Legal scholarship has addressed the topic whether criminal punishment of addicts is appropriate. Stephen Morse argues that opioid addicts do have a meaningful choice about whether to use: "Almost all addicts have lucid, rational intervals between episodes of use during which they could act on the good reasons to seek help quitting or otherwise take steps to avoid engaging in harmful drug related behavior."[35] However, as difficult as it is to quit using, drug addicts are not like Parkinson's patients who will continue to shake even if you threaten to kill them if they don't stop.[36] Epileptics are found responsible if they get behind the wheel of a car because they know that they can cause an accident if they have a blackout while driving.[37] Morse argues that most addicts are not so mentally disabled that they cannot be criminally responsible, excepting a few who may have developed "settled insanity."[38] Sentencing judges may apply mitigation, but addicts should not be excused from criminal responsibility.[39] Medical treatment services should be available in the community and possession should be decriminalized.[40]

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[29] *See id.* at 1144.

[30] The decision in *Moore* also reflects concern that if addiction were recognized as an affirmative defense to possession it could also be recognized as a defense to any crime related to the addict's need to acquire the drug. *Id.* at 1206 (Robb, J., concurring).

[31] *Daniel M'Naghten's Case* [1843] 8 Eng. Rep. 718 (PC), 722.

[32] Model Penal Code § 4.01(1) (Am. Law Inst. 1962).

[33] *United States v. Lyons*, 731 F.2d 243, 245 (1984) (citing *Moore*, 486 F.2d at 1183 and *Bailey v. United States*, 386 F.2d 1, 4 (5th Cir. 1967)); *see* Cal. Penal Code § 29.8 (2017) ("In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of . . . an addiction to, or abuse of, intoxicating substances.").

[34] *See People v. Kelly*, 516 P.2d 875, 881, 883 (Cal. 1973) (*en banc*).

[35] Stephen J. Morse, *A Good Enough Reason: Addiction, Agency and Criminal Responsibility*, Faculty Scholarship, Paper 1605 (2013), http://scholarship.law.upenn.edu/faculty_scholarship/1605.

[36] Stephen J. Morse, *Compelled or Cajoled? The Criminal Responsibility of Opioid Addicts*, The American Interest (Nov. 6, 2018), https://www.the-american-interest.com/2018/11/06/the-criminal-responsibility-of-opioid-addicts/.

[37] *See* Morse, *supra* note 35.

[38] *Id.*

[39] *Id*.

[40] Patrick Murray proposes the creation of a verdict of "not guilty but responsible" because it forces the addict to take responsibility for addiction and obligates him or her to a treatment program but not to prison. Patrick E. Murray, *In Need of a Fix: Reforming Criminal Law in Light of a Contemporary Understanding of Drug Addiction*, 60 U.C.L.A. L. Rev. 1006,

Haley Teget's "Junk Menagerie" illustrates the constancy of the junkie's need for heroin.[41] While submitted on the *Pen America* website as fiction, it is autobiographical in that Haley Teget was herself arrested for drug trafficking at age twenty-two in Boise; she is eight years into a twenty-two-year sentence and first eligible for parole in 2020.[42] The story is yet more powerful to students because details such as the identity of her companion can be confirmed through the public record.[43]

In Teget's story, a junkie describes the road trips she takes with her boyfriend in their ceaseless quest for heroin.[44] The first part of the story is told through the perspective of a first-person narrator, but the reader is engaged by several strategies, including the use of second person address. Teget compares her craving for a whole lot of heroin to "your" craving for a whole bag of potato chips when you, the reader, are starving.[45] The road trip that she takes with Matt evokes the reader's own experience with road trips but the trope is altered (in literary terms, defamiliarized) so that we see the incidents of travel in a new way. Their destinations are driven not by social, economic, or touristic interests but solely by drug availability. Charlotte and Matt bribe drivers with booze and drugs; when hitching a ride becomes problematic they take a Greyhound bus because junkies can get high without fear that they or their gear will be searched.[46] The story dramatizes the couple's inability to manage their consumption. Charlotte is unable to defer a shot she planned to take when they are halfway to Portland; she takes risks in her preparation by letting the heroin boil, by drawing water in a needle from a puddle.[47]

The second part of the story consists of a police report relating that Charlotte and Matt have been arrested in their motel room and taken into custody for selling heroin.[48] The matter of fact detail describing the arrest illustrates bureaucratic indifference. These individuals have no personality or back story because that is irrelevant to their arrest; they are simply itemized and catalogued for the police system.

In the third part of the story, Charlotte is in jail. She describes in graphic detail the process of withdrawal as you vomit and expel from every cavity of your body.[49] There is no help from the prison staff, no medication for relief of symptoms or insomnia.[50]

> You don't sleep, only hallucinate. And the deeper your withdrawal, the worse your cravings—the number one reason you've never been able to kick in the first place. You've long since stopped

1006 (2013). Murray addresses a principal argument against more leniency for addicts, which is the choice to consume. He argues that "the choice to become an addict is often far removed from the criminal behavior, and its connection with the criminal behavior is considerably attenuated. . . . An individual who chooses to use drugs recreationally does not choose to become an addict." *Id.* at 1032. Mirko Bagaric and Sandeep Gopalan argue that substance abuse should have no effect on the sentencing calculus. A murder victim is dead regardless of whether the shooter was sober or substance impaired. The focus should be on treatment, whether through drug treatment courts or rehabilitation. Mirko Bagaric & Sandeep Gopalan, *A Sober Assessment of the Link Between Substance Abuse and Crime—Eliminating Drug and Alcohol Abuse from the Sentencing Calculus*, 56 Santa Clara L. Rev. 243, 277 (2016).

41 Haley Teget, *Junk Menagerie*, Pen America (Nov. 23, 2015), https://pen.org/junk-menagerie/.

42 *See id.*

43 Morgan Boydston, "Police: Heroin Dealers Busted after Selling to Undercover Cops," Idaho News (May 30, 2012), https://idahonews.com/archive/police-heroin-dealers-busted-after-selling-to-undercover-cops.

44 *See* Teget, *supra* note 41.

45 *See id.*

46 *See id.*

47 *See id.*

48 *See id.*

49 *See id.*

50 *See id.*

> looking for the high—it's about the not-getting-sick. The maintain. The stave. All those euphoric highs you experienced in the early days? Welcome to the other side.[51]

Charlotte hopes in vain for lenient treatment; her prison sentence may extend to ten to fifteen years.[52] As she struggles with confinement, and the pain of disappointing her mother, she wishes she had died.[53] And the story ends with Charlotte not knowing who she really is:

> I need to remember who I really am. Who will I be when I finally get out? Do I want to change? Who is the real Charlotte? As a heroin junkie, with Matt, who was I? Who am I without heroin, without Matt—who am I alone? Tell me who I am because I've lost myself and I just don't know.[54]

I ask my students to evaluate this story in terms of the voluntariness issue. Criminal punishment may be justified on the basis that the addict's decision to consume drugs was voluntary. However, that decision may have occurred during adolescence (as in "Junk Menagerie"). The Supreme Court has ruled that the death penalty and sentences of life without parole are unconstitutional as applied to individuals under eighteen.[55] Writing for the majority in *Miller v. Alabama*, Justice Kagan stated:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.[56]

"Junk Menagerie" exposes the complexity of the addict's life and the difficulty of concluding that she is not criminally responsible.[57] Charlotte has a continuing compulsion to inject heroin that is not controllable but she and her boyfriend connive and con their acquisition of drugs with considerable premeditation.[58] The couple are capable of executive functioning: they know which substance (even down to the type of alcohol) will appeal to the drivers whom they "hire"; they change from driving themselves to hiring drivers to riding buses to manage risk.[59] They calculate where to buy and sell heroin by taking into account differences in local sales prices.[60] Why didn't Charlotte during a period of lucidity exercise agency and abandon drugs? Teget suggests that the reason for Charlotte's persistence is the pain of withdrawal.[61]

Yasmina Katsulis and Kim Blankenship, who have conducted life history interviews

[51] *Id*.
[52] *See id.*
[53] *See id*.
[54] *Id*.
[55] *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Miller v. Alabama*, 567 U.S. 460, 466, 480 (2012) (highlighting the invalidation of the death penalty of minors and the critique of life imprisonment of juveniles).
[56] *Miller*, 567 U.S. at 477..
[57] *See* Teget, *supra* note 41 (noting how "Junk Menagerie" departs from many similar narratives as the narrator does not suggest abuse in her background; and indeed, she has family support at the court hearing and a close relationship with her mother).
[58] *See id.*
[59] *See id.*
[60] *See id.*
[61] *See id.*

with drug addicted female sex workers, address the question of agency among drug addicts.[62] Their example addict, "Mary," takes pride in her well-honed strategy for acquiring money to buy drugs.[63] Mary establishes a network of fellow addicts, pooled cash to buy their drugs, and kept some of the profits for herself.[64] Similarly, in Teget's story, Charlotte and Matt are proud of their cunning and competence.[65] Katsulis and Blankenship observe that the women whom they have interviewed can change their behavior; the process of recovery involves a new self-fashioning where the addict learns to "distinguish between her past (as an addicted, emotionally unhealthy person), and her current or future potential."[66]

In response to mass incarceration, drug treatment courts were created to offer certain offenders participation in court-supervised treatment as an alternative to incarceration.[67] Where the offender successfully completes the program, charges may be dismissed or a no-time sentence may be entered.[68] Drug treatment courts typically are limited to low-level, non-violent drug offenders, excluding individuals who used a weapon in commission of an offense, were involved in high-level trafficking, or have been convicted of a crime of violence.[69] As a result, the majority of drug offenders are excluded from the purview of drug treatment courts when they are incarcerated.[70]

I invite my students to see that while there is considerable disagreement among legal scholars about the type of sentence that should be imposed when confirmed addicts commit crimes, there is a consensus that addicts need to be treated not merely incarcerated.[71] Unfortunately our prisons do not achieve that objective.

David Lebowitz argues that under the Eighth Amendment there should be a constitutional right to prison-based drug treatment as there is for other diseases; prisons have been required to treat prisoners for numerous illnesses such as lung cancer and diabetes to which the individual contributed through voluntary behavior.[72] Under the doctrine of *Estelle v. Gamble*,[73]

> Deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors

[62] *See* Yasmina Katsulis & Kim Blankenship, *Women's Agency in the Context of Drug Use*, *in* Neither Villain Nor Victim: Empowerment and Agency among Women Substance Abusers 89–101 (Terry Anderson ed. 2008).

[63] *See id*. at 95.

[64] *See id*. at 96.

[65] *See* Teget, *supra* note 41.

[66] *See* Katsulis, *supra* note 62, at 98.

[67] *See* Margaret Malloch, *A Spoonful of Sugar? Treating Women in Prison*, *in* Neither Villain Nor Victim: Empowerment and Agency among Women Substance Abusers 139–56 (Tammy Anderson ed. 2008).

[68] *See* Christine Saum & Alison Gray, *Facilitating Change for Women? Exploring the Role of Therapeutic Jurisprudence in Drug Court*, *in* Neither Villain Nor Victim: Empowerment and Agency among Women Substance Abusers 102–16 (Tammy Anderson ed. 2008).

[69] *See* Jessica M. Eaglin, *The Drug Court Paradigm* 53 Am. Crim. L. Rev. 595, 604 (2016).

[70] *See id.* at 604–05.

[71] *91 Percent of Americans Support Criminal Justice Reform*, ACLU (Nov. 16 2017), https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds.

[72] David Lebowitz, *Proper Subjects for Medical Treatment? Addiction, Prison-based Drug Treatment and the Eighth Amendment*, 14 DePaul J. Health Care 271 (2012). *See also* Michael Linden *et al*., *Prisoners as Patients; The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment,* 46 U. L. Med. & Ethics 252 (2018); Leo Beletsky et al., *Opportunities to Curb Opioid Overdose among Individuals Newly Released from Incarceration,* 7 Ne .U. L. J. 150 (2015).

[73] 429 U.S. 97 (1976).

> in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.[74]

Lebowitz contests that because the choice to use drugs is voluntary, self-harm precludes a right to treatment, noting the obligation of prison officials to treat diabetes, hypertension, and lung cancer.[75]

The National Institute on Drug Abuse recognizes addiction as "an intense and, at times, uncontrollable drug craving, along with compulsive drug seeking and use that persist even in the face of devastating consequences."[76] The Institute recommends that medications be administered to prisoners along with behavioral therapy, including methadone, buprenorphine, and naltrexone for individuals addicted to heroin or other opioids.[77] Yet the Justice Department reports that among inmates who met the DSM-IV criteria for drug dependence or abuse, 28% of prisoners and 22% of jail inmates received drug treatment or participated in a program since admission to the current facility.[78]

Rhode Island is the only state to screen all inmates in the correctional system for drug abuse and to offer not only drug counseling but methadone, buprenorphine, and naltrexone as part of a comprehensive attack on opioid addiction.[79] Moreover, individuals who leave the system walk out with medications and can continue treatment after release thereby reducing the risk of overdose.[80] Rikers Island in New York also offers a model methadone program; instances of diversion of methadone for improper use have been rare.[81]

Providing treatment partially addressed concerns over imposing criminal responsibility on those whose inability to conform their conduct to law is driven by uncontrollable addiction. Treatment offers hope to the addict, serves rehabilitative goals, may reduce recidivism, and may enable those prisoners who are released a better prospect for reintegrating into society.[82]

B. REFORM OF CONSPIRACY AND SENTENCING LAWS TO ADDRESS PERIPHERALLY-INVOLVED "WOMEN OF CIRCUMSTANCE"

As the Sentencing Project has observed, women who are incarcerated for drug offenses are more likely to serve longer sentences than their male partners, even if the male is the more culpable party:

> . . . [S]ince the only means of avoiding a mandatory penalty is generally to cooperate with the prosecution by providing infor-

[74] *Id*. 429 U.S. at 104–05.

[75] *See Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999); *Taylor v. Anderson*, 868 F. Supp. 1024, 1026 (N.D. Ill. 1994).

[76] National Institute on Drug Abuse, Principles of Drug Addiction Treatment for Criminal Justice Populations: A Research-Based Guide 3 (2018) (hereinafter "Principles of Drug Addiction Treatment"), https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/preface.

[77] *Id.* at 6.

[78] *Id*. at 13. Among state prisoners, 10% were placed in a residential facility or unit, 6% received drug-related counseling by a professional, and 0.4% received a maintenance drug; corresponding figures for jail inmates were 8%, 6%, and 0.9%. *Id.*

[79] Michael Linden *et al*., *supra* note 72, at 253.

[80] *Id.*

[81] *Id.* at 259.

[82] *See* Principles of Drug Addiction Treatment, *supra* note 76, at 11–15, 18.

> mation on higher-ups in the drug trade, women who have a partner who is a drug seller may be aiding that seller, but have relatively little information to trade in exchange for a more lenient sentence. In contrast, the "boyfriend" drug seller is likely to be in a better position to offer information, and so may receive less prison time for his offense than does the less culpable woman.[83]

True accounts and case histories illustrate how women become caught up in the drug trade by controlling and often abusive male partners. They further illustrate the draconian sentencing that results from the interplay of mandatory sentencing and conspiracy law.[84]

Ramona Brant's case is illustrative. A first time drug offender, she was given a mandatory life sentence without the possibility of parole for conspiracy to possess and distribute heroin.[85] Ramona was aware that her abusive husband, the father of their two children, was a drug dealer.[86] Although she wasn't a dealer and never bought or sold drugs, "there were times I would accompany him when he picked up cocaine or I'd help him deliver messages over the phone."[87] When Ramona tried to leave, Donald Barber threatened her or her children.[88] When Barber was arrested, Ramona was found legally responsible for the entire amount of drugs sold by Barber, the ring leader, despite her peripheral involvement.[89]

> At sentencing, my lawyer tried to introduce evidence that I had been abused, including police reports, but it wasn't allowed. It seemed like nobody was concerned that I was in this abusive relationship or that I was always under his control. I felt helpless. The only thing the jury heard was testimony from others who received lesser sentences and they weren't aware that I was facing a life sentence. I want to believe that had they known this, as well as the abuse I endured, they would have decided differently.[90]

Even the judge expressed dismay that he was required to impose a life sentence.[91]

Anna Vanderford's "Double Time/Borrowed Time/Time's Up" is a triptych tale that illustrates how a young woman can become embroiled in the drug trade.[92] The first section

[83] Mark Maurer, *The Changing Racial Dynamics of Women's Incarceration,* The Sentencing Project 5 (2013) https://www.sentencingproject.org/publications/the-changing-racial-dynamics-of-womens-incarceration/; *see* Holly Jeanine Boux & and Courtenay W. Daum, *Stuck between a Rock and a Meth Cooking Husband: What Breaking Bad's Skyler White Teaches Us about How the War on Drugs and Public Antipathy Constrain Women of Circumstance's Choices*, 45 N.M. L. Rev. 567, 574 (2015).

[84] Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. of Gender Race & Just. 277, 294 (2002); *see* Amanda E. Smallhorn, *Excusing "Women of Circumstance": Redefining Conspiracy Law to Hold Culpable Offenders Accountable*, 36 Quinnipiac L. Rev. 409, 421 (2018) (discussing the need for "women-only" excuses addressing the reality of coercion by husband).

[85] Jon Perri, *Ramona Brant*, Nation of Second Chances, 1, 4–5 (2018), https://www.nationofsecondchances.org/ramona-brant/.

[86] *Id.* at 2.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 3.

[90] *Id.* at 4.

[91] *See* Smallhorn, *supra* note 84, at 417 (noting the judge felt the sentence imposed, based on the sentencing guidelines, was "entirely too harsh").

[92] Anna Vanderford, *Double Time/Borrowed Time/Time's Up*, Pen America (Aug. 6, 2018), https://pen.org/double-time-borrowed-time-times-up/. According to the web site, Vanderford is a fifty-year-old lifer who has served thirty-one years. *Id.*

describes how the first person narrator became a drug hustler for her boyfriend; the second part describes the daily routine for a prisoner serving a life sentence; the conclusion tells of the final days of the narrator's friend, a woman who is moved to "the Cage" for execution.[93] In "Double Time," the narrator describes the events that led her to become a criminal. At the age of twelve or thirteen she is seduced by her mother's boyfriend and kicked out of the house when her mother discovers the relationship.[94] The homeless teenager lives off of locating "good trash," and she competes with cats for edible garbage.[95] She encounters a young man who offers the narrator food and a clean place to sleep but she must compensate him by hustling to supply his heroin habit.[96] She becomes his drug "gopher," getting drugs for Scott and stretching or re-selling the drugs as needed.[97] Eventually they are busted; Scott saves himself and lets her take the fall. It does not come as a surprise to the narrator that she shoulders all the blame: "I never really held it against Scott for blaming me when he was interrogated"; "when it comes to being busted it seems it is 'every man for himself.'"[98] It does come as a surprise that without committing murder she is sentenced to life for having committed a felony in the commission of another felony.

Amanda Smallhorn recommends changes in conspiracy law to mitigate the "culpability gap" for "women of circumstance":

> By ignoring the context of the domestic relationship during sentencing, the legal system ignores the possibility that a particular woman of circumstance had limited options and was only acting out of fear for her own safety, or the safety of her family. Often times, a woman of circumstance has drug and alcohol addiction problems of her own, has endured physical and sexual abuse, and is dependent upon her abuser, but her overarching need to keep the family together above all else outweighs her own safety concerns.[99]

Under conspiracy law, conspirators are liable for all of the reasonably foreseeable crimes committed by co-conspirators; further, drug conspirators can receive the mandatory minimum sentence for the full amount of drugs charged in the conspiracy regardless of individual culpability.[100] The "woman of circumstance" may not be able to accomplish a withdrawal from a conspiracy that insulates her from her partner's actions especially where his drug business is centered in the home. Smallhorn recommends:

> When domestic partners are charged as co-conspirators in a larger conspiracy involving third parties, the jury should be required to find that the less-involved domestic partner was actively initiating and encouraging the criminal scheme, not just acquiescing in isolated acts of aiding and abetting under the influence of the more-involved domestic partner. . . . Excusing a woman of

93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*

99 Smallhorn, *supra* note 84, at 428.
100 *See Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *see also* the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (having the practical effect of holding conspirators to the same level of responsibility as more significant dealers, regardless of individual culpability).

> circumstance from the mandatory minimums tied to conspiracy means that the government can only try her for the actual crimes she is alleged to have committed rather than saddling her with the punishments of the entire conspiracy. . . . [T]he streets are no safer with a nonviolent, peripherally involved woman of circumstance behind bars.[101]

The current parameters of a duress defense require that a woman show that she had a well-grounded belief that she would be subject to "an immediate threat of serious bodily injury."[102] Smallhorn proposes that "a woman of circumstance should be allowed to raise a duress defense if she can demonstrate that she would have lost her home, her job, or custody of children because of her dependence upon the principal drug dealer."[103] Smallhorn argues that adjusting the duress defense "is not singling out women as the inferior sex" but rather reflecting the particular pressures involved in these relationships.[104]

The suggestion that women *qua* women require special legal protection in drug sentencing provokes lively debate in the law school classroom. In effect a "women of circumstance defense," like a defense based on battered woman syndrome, challenges certain feminist perceptions of gender equality and arguably portrays women as the weaker gender, unable to exercise autonomy. *Contra* are the realities that an unintended aspect of plea bargaining, and drug sentencing policy is the perverse effect that less culpable parties are sentenced longer. Moreover, to the extent that women in the drug trade are disproportionately minorities or poor or otherwise marginalized, there may be real power gaps where patriarchal abuse requires reform. As Stephanie Covington writes, where sexism and or racism are prevalent, terms such as "gender neutral" or "race neutral" obscure gender discrimination.[105]

I assign Adam Fout's, "A Beautiful Death," as a corrective to the assumption that males are inevitably in the driver's seat in drug crime.[106] In Fout's story, an unnamed middle-class young woman is driven to crime to secure the always escalating amount of OxyContin that her body craves.[107] Family dynamics are important here: the protagonist's addiction is related to the death of her soldier brother and her mother is also opioid dependent.[108] The story begins with the protagonist's belting a male acquaintance with OxyContin so that she can rob him to fund her drug habit.[109] Tyler is a "beautiful boy" whom she did not mean to kill, but she delivered a knock-out dose that proves fatal.[110] The young woman then leads another vulnerable student, Dereck, on a desperate search for pills.[111] When she cannot obtain pills from her preferred pusher, the protagonist leads Dereck to the house of a dangerous drug dealer, known as "The Mountain."[112]

Fout provides two endings: in one the girl survives while Dereck dies of an embolism

[101] Smallhorn, *supra* note 84, at 440–41.
[102] *Id.* at 442.
[103] *Id.* at 443.
[104] *Id*.

[105] Stephanie Covington, *A Woman's Journey: Challenges for Female Offenders, in* Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities (Jeremy Travis & Michelle Waul 2003).
[106] Adam Fout, *Drug Addiction Stories—A Beautiful Death* (Aug. 9 2017), https://adamfout.com/drug-addiction-stories-a-beautiful-death/.
[107] *Id.*
[108] *Id.*
[109] *See id.*
[110] *See id.*
[111] *See id.*
[112] *See id.*

three days after they go to The Mountain.[113] The young woman does not die until fifteen years later when she contracts cancer associated with OxyContin use.[114] The protagonist and her mother have kicked the habit and they die in a state of grace.[115] In the alternate ending, Dereck leaves the house safely but detectives who arrive at the Mountain's house find the young woman in the throes of death.[116] Her last word is "beautiful."[117]

There is much irony to this story; the young woman calls Dereck "idiot" repeatedly but ultimately it is the protagonist who must confront her own lack of rationality driven by her addiction.[118] Fout's story evokes the well-known passage in which Macbeth famously refers to life as a "tale told by an idiot, full of sound and fury, signifying nothing."[119] Tyler's life and the protagonist's life are meaningless as a result of drug and death by OxyContin is not in any way "beautiful."

C. EVALUATING REMEDIAL LEGISLATION TERMINATING PARENTAL RIGHTS OF DRUG ADDICTS

Drug addiction can lead to child neglect serous enough to require that the child be removed from the home.[120] Two thirds of women in state prisons are mothers,[121] and while women imprisoned for drug offenses are often portrayed as indifferent to their children's welfare, prisoners' narratives reflect that one of the most significant concerns relates to anxiety about the fate of their children.[122] In her first person account, Donna Spearman describes the concern that African American women have when they are separated from their children, who are often raised by grandmothers or relegated to foster homes.[123] Spearman complains that the women prisoners often do not know where their children are for extended periods of time.

> We are seen as these breeders. We have all these babies, but we're not prepared to take care of them. We're not capable of taking care of them. When we go to prison and have to deal with being separated from our children, no matter how good a mother we were, it's perceived very differently when we start saying, "I want my kids back. I want to be a mother again." I felt very much like I was on a plantation many times when I was talking in a prison system to my counselors and others about being a mother again and about taking responsibility for my children. I did not see White women having that kind of problem when they wanted to make a phone call or to see about their kids. For us it was, "Well, they're better off without you, anyway." More often you heard Black women being told,

[113] *See id.*
[114] *See id*.
[115] *See id*.
[116] *See id.*
[117] *Id*.
[118] *See Id*.
[119] Shakespeare, *Macbeth*, Act V, Sc. V, *in* The Plays and Sonnets of William Shakespeare 309 (William G. Clarke & William A. Wright eds., 1952).
[120] U.S. Department of Health and Human Services, Children's Bureau, *Parental Substance Abuse and the Child Welfare System, Bulletin for Professionals* (2014), https://www.childwelfare.gov/pubpdfs/parentalsubabuse.pdf.
[121] According to a Bureau of Justice Statistics study, 64% of women incarcerated in state prisons lived with a minor child in the month before arrest or immediately before incarceration. L. Glaze & L. Maruschak, *Parents in Prison and Their Minor Children* (2010), https://www.bjs.gov/content/pub/pdf/pptmc.pdf.
[122] Covington, *supra* note 105, at 8.
[123] *See generally*, Johnson, *supra* note 19.

> "Don't you think you ought to consider adoption, since you have such a long period of time to do?" White women weren't told that.[124]

The question arises under what circumstances parental rights should be reinstated.[125] The Adoption & Safe Families Act of 1997 (ASFA) requires a child welfare agency to commence termination of parental rights (TPR) proceedings in cases where children have been in foster care for fifteen out of twenty-two months.[126] TPR is a drastic statute that not only ends a parent's physical custody, but also severs legal ties and the parent's rights to visit, communicate with, or regain custody of the child.[127] ASFA's stringent timetable is the leading reason for termination of parental rights. A significant omission in ASFA is the lack of a provision exempting parents in prisons from the stringent time line or addressing those in residential treatment programs. Given long drug sentences parents may not have completed their prison sentences or achieved sobriety prior to deadlines imposed under ASFA. Allison Korn offers several recommendations for reform, including altering the stringent requirement of reunification within fifteen months where substance treatment is under way, as well as allowing some leeway for occasional relapse as part of the recovery process.[128]

Madison Bell's "Customs of the Country" presents an excellent vehicle for considering the termination of parental rights.[129] The story is told from the perspective of an unnamed mother, as first person narrator, who has lost custody of her child.[130] The mother has served her sentence, insofar as we know is no longer using, works a steady job as a waitress, and maintains a clean house.[131] Initially we sympathize with her desire to reclaim her child who has been placed in the care of a foster family. She blames the injury she caused to Davey, one significant enough that he was hospitalized, on her addiction to Dilaudid; her mind "wasn't working right just then."[132] Like so many women, she was introduced to the mind altering pills through Davey's father.[133] Davey's mother broke her son's leg on a day when she had ingested her last Dilaudid pill and was in throbbing pain.[134] Davey has been placed in foster care; the Bakers are responsible and attentive to the child's needs.[135] This is a positive foster care scenario as Davey is well cared for and she can occasionally visit her child; yet the fact that he is so well placed dooms her chances of re-

[124] *See id.* at 219–20.

[125] Kerry E. West, *Shame, in* The Cocaine Chronicles 127–38 (Gary Phillips & Jervey Tevalon eds. 2005) (explaining compelling junk tales about the effect of parental addiction on minor children). In Kerry West's "Shame," a twelve-year-old girl is in charge of her two smaller siblings; she keeps them locked in a playpen because her crack-addicted mother is totally unable to cope. In Detrice Jones's *Just Surviving Another Day,* a starving teenager tries to get lunch money; far from supporting her, the teenager's crack-addicted parents steal from her to feed their habit. Detrice Jones, *"Just Surviving Another Day": A Teen's Struggle*, NPR (Apr. 27, 2005), https://www.npr.org/templates/story/story.php?storyId=4621072.

[126] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1998). Exceptions are provided to initiation of termination where the child is in kinship foster care, the state demonstrates a compelling reason why termination is not in the child's best interest, or the state has been unable to provide services which its own case plan deems necessary for safe return of the child to the home.

[127] Allison E. Korn, *Detoxing the Child Welfare System*, 23 Va. J. Soc. Pol'y & L. 293, 310 (2016). *See also* Stephanie Sherry, *When Jail Fails: Amending ASFA to Reduce its Negative Impact on Children of Incarcerated Parents*, 48 Fam. Ct. Rev. 380, 380–81 (2010); Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 Yale J.L. & Feminism 175, 176–77 (2012).

[128] Korn, *supra* note 127, at 310.

[129] Madison Smartt Bell, *Customs of the Country*, *in* Barking Man and Other Stories 38–57 (1990).

[130] *See id.*

[131] *Id.* at 40.

[132] *Id.* at 51.

[133] *Id.* at 46.

[134] *Id.* at 51.

[135] *Id.* at 43.

gaining custody.[136] Right after learning the bad news that she is unlikely to regain custody of Davey, the mother gets into an argument with her employer.[137] She drives home in "a poison mood" in which she is "ripe to get killed or kill somebody."[138] Shortly thereafter she goes to her neighbor's home and beats a man who has been abusing his wife by hitting the abuser over the head with a skillet.[139] Perhaps the loud noise made by the husband's beating of her neighbor next door reactivated the trigger for her injury to Davey; she broke his leg while he was banging loud pots and pans.[140] Do we admire her courage or doubt her judgment in failing to notify the police? Is she bravely coming to the defense of another woman in need or does she have an anger management problem that confirms the wisdom of terminating her parental rights?

The termination of parental rights is a vexing problem in drug policy. Children can be victimized while they live in a home where they are abused or neglected; when they are "farmed out" to relatives or foster parents who may be indifferent or incapable of providing adequate care and nurture; when they are unable to visit parents who have been imprisoned in remote locations; and when as a result of long sentences parental rights are terminated. Hope of regaining custody can encourage the rehabilitation of incarcerated women.

CONCLUSION

This essay has offered illustrations of ways in which criminal law instruction can be enhanced by letting students read and hear from true accounts or realistic junk tales. While I have emphasized the incorporation of addict narratives in criminal law and vice crime courses, I also urge that law and literature courses incorporate junk tales, as I do in my own teaching. The goal of this essay is to stimulate discussion about creative approaches to incorporate the lived experience of addicts in course material with a view of stimulating fresh thinking about criminal policy and sentencing reform.

[136] *Id.*
[137] *Id.* at 54.
[138] *Id.*
[139] *Id.* at 55–56.
[140] *Id.* at 51.

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