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**RESURRECTING THE AMELIORATION DOCTRINE:  
A CALL TO ACTION FOR COURTS AND LEGISLATURES**

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INTRODUCTION

One of the hallmarks of American criminal law is the broad protection offered to the accused. A defendant is presumed innocent until proven guilty, and the government must prove a defendant's guilt beyond a reasonable doubt.<sup>1</sup> The Sixth Amendment has long guaranteed assistance of counsel, in contrast to the old English common law prohibition against obtaining counsel in serious cases.<sup>2</sup> A principle of statutory construction, the rule of lenity,

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<sup>1</sup> See, e.g., *Taylor v. Kentucky*, 436 U.S. 478, 485-86 (1978) (explaining that due process safeguards the presumption of innocence and the requirement that guilt be established beyond a reasonable doubt by probative evidence).

<sup>2</sup> *Powell v. Alabama*, 287 U.S. 45, 60-61 (1932). In *Powell*, Justice Sutherland discussed common law tradition in England as well the numerous state constitutions, which guaranteed the right to counsel even before the adoption of the Federal Constitution. *Id.* at 61-65.

guides courts to construe ambiguous criminal statutes in the defendant's favor.<sup>3</sup> The Constitution protects against ex post facto laws, which punish people for acts that were lawful at the time they were committed<sup>4</sup> or increase the associated penalties after the commission of a crime.<sup>5</sup> In keeping with the protection against ex post facto laws, a long-standing rule of statutory construction guides courts to construe statutes prospectively.

The prohibition against ex post facto laws and the presumption of prospective application are embodiments of the principles of notice and reliance.<sup>6</sup> Notice—an important norm in Anglo-American criminal law—presupposes that people are aware of the laws prescribing criminal conduct.<sup>7</sup> Reliance builds upon this norm, standing for the principle that people act in reliance on the laws in place at the time.<sup>8</sup> That is, most people in society will avoid committing acts that they know are criminalized, whereas they will not have the opportunity to avoid committing a crime if their acts are criminalized after the fact.<sup>9</sup> Ex post facto protections and the guidance to construe statutes prospectively seem facially fair and just.<sup>10</sup>

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<sup>3</sup> BLACK'S LAW DICTIONARY 1532 (10th ed. 2014) (“The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.”). “The rule of lenity also applies when the same conduct satisfies two statutes with inconsistent penalties, requiring the lesser penalty to be applied.” S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 3 n.9 (2009) (citing *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998)).

<sup>4</sup> U.S. CONST. art. 1, § 9, cl. 3; U.S. CONST. art. 1, § 10, cl. 1; THE FEDERALIST NO. 84, at 511-12 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law . . . [is among] the favorite and most formidable instruments of tyranny.”).

<sup>5</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (holding that “[e]very law which aggravates a crime, or . . . inflicts a greater punishment” is an ex post facto law “within the words and the intent of the prohibition”).

<sup>6</sup> *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (“The *ex post facto* prohibition forbids the Congress and the States to enact any law ‘which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’ Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” (citations omitted)).

<sup>7</sup> *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”).

<sup>8</sup> Cf. Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2160 (1996) (“An offender’s reliance interest is most significant when the legislature criminalizes conduct that was permissible when undertaken.”).

<sup>9</sup> See *Dale v. Haeberlin*, 878 F.2d 930, 935 (6th Cir. 1989) (“Whether or not this is an

But what if a change in the law benefits a criminal defendant? Should the presumption against retroactivity still apply? Which law should apply during the transition to the new law?<sup>11</sup> Should a court apply the law in force at the time of the crime, or the law in force at the time the decision is rendered? Professor Kermit Roosevelt has described the two different approaches to this problem as the “transaction-time model” and the “decision-time model.”<sup>12</sup> Courts using the transaction-time model would apply the law in force at the time of the offense; courts choosing the decision-time model would apply the law in force at the time of sentencing.<sup>13</sup> In deciding between these two approaches, notice, reliance, and the Ex Post Facto Clause no longer tip the scale in favor of prospective application. No rational defendant would claim prejudice from a lack of notice regarding a decrease in penalty.<sup>14</sup> Likewise, no rational defendant would claim that she relied on the higher penalty when committing the crime and therefore is prejudiced by a penalty decrease. Accordingly, the Ex Post Facto Clause does not apply.<sup>15</sup> Instead, where changes in the law benefit a defendant, the amelioration doctrine applies.

The amelioration doctrine is a lesser-known common law protection<sup>16</sup> that “allows a defendant to take advantage of a statute that decreases the penalty for

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accurate understanding of human behavior, the belief at the foundation of the ‘fair warning’ component of the *ex post facto* clause . . . is that the person committing an act is a rational actor.”).

<sup>10</sup> See 1 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 174, at 311 (John Lewis ed., 2d ed. 1904) (“The injustice of permitting laws to have retroactive effect by relation is so manifest that it has not had much countenance in the United States.”).

<sup>11</sup> Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1075 (1999) (positing that central to the concept of retroactivity is the question of “to whom the new law should be applied, and to whom the old”). Roosevelt refers to this as “[t]he question of retroactivity.” *Id.*

<sup>12</sup> *Id.* at 1078-79 (explaining that the “decision-time model” was developed in response to the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and that the “transaction-time model,” constituting a “radical break . . . in terms of both the results reached and . . . the analytical approach,” was created by the Court in *Linkletter v. Walker*, 381 U.S. 618 (1965)).

<sup>13</sup> *Id.*

<sup>14</sup> Cf. Krent, *supra* note 8, at 2160-63 (“[F]ew actors calculate the potential penalties before they engage in prohibited conduct . . .”).

<sup>15</sup> Millard H. Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 TEX. L. REV. 285, 288 (1955) (“If the retroactive law deprives a person of a substantial right involved in his liberty or materially alters the situation to his disadvantage, it is *ex post facto*; if it mollifies the rigors of the criminal law it is not.”). Cf. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 245 (1994) (“[G]enuinely retroactive effect . . . would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed . . .”).

<sup>16</sup> See Ryan E. Brungard, *Finally, Crack Sentencing Reform: Why It Should Be Retroactive*, 47 TULSA L. REV. 745, 761 (2012) (“[A]t common law, newly enacted penal statutes that mitigated previous penalties applied retroactively.”).

a crime if the ameliorative amendment is enacted after commission of the crime but before sentencing.”<sup>17</sup> Under this doctrine, ameliorative changes rebut the presumption against statutory retroactivity<sup>18</sup> because amelioration does not implicate the traditional concerns of notice and reliance.<sup>19</sup> Ameliorative changes occur when a legislature amends a penal statute to lessen the penalty attached to certain criminalized conduct or to decrease the scope of criminalized conduct.<sup>20</sup> A legislature can ameliorate a penalty through decriminalizing conduct, reclassifying conduct, redefining criminal responsibility, or reducing a sentence.<sup>21</sup> Decriminalizing conduct may take one of two forms. First, the legislature may delete the statute entirely from the code; this is known as an “unqualified repeal.”<sup>22</sup> Second, the legislature may change the designation of certain conduct from a criminal to a civil violation.<sup>23</sup> Reclassifying conduct involves two steps: first, crimes are differentiated into degrees; second, these degrees are assigned various penalties, most of which are reduced.<sup>24</sup> Redefining criminal responsibility usually occurs when minors are relieved from the same liability as adults.<sup>25</sup>

This Note begins by explaining the history of the common law amelioration doctrine. Part II then discusses the differences in the language of the general saving statutes of the states and federal government, and subsequently analyzes the different ways in which state and federal courts have interpreted these

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<sup>17</sup> TRACY BATEMAN FARREL, 8 INDIANA LAW ENCYCLOPEDIA § 10 (2014) (addressing “[a]mending or repealing criminal statutes”); *People v. Walker*, 623 N.E.2d 1, 4-5 (N.Y. 1993) (citing *People v. Oliver*, 134 N.E.2d 197, 201-02 (N.Y. 1956)) (“When, between the time a person commits a criminal act and the time of sentencing, a criminal statute is repealed or a penalty reduced because of a changed view regarding the gravity of the crime, the amelioration doctrine dictates that the punishment standard at the time of sentencing should guide the sentence.”).

<sup>18</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 402 (1950).

<sup>19</sup> See, e.g., Comment, *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 120 (1972) [hereinafter *Today’s Law and Yesterday’s Crime*] (arguing that concerns such as lack of notice are not implicated where legislative change ameliorates rather than strengthens criminal sanctions).

<sup>20</sup> See *id.* (discussing how ameliorative criminal legislation is characterized by “retroactive application of legislative changes which redefine criminal conduct or reduce the penalty for criminal behavior”).

<sup>21</sup> *Id.* at 131-45; Mitchell, *supra* note 3, at 18 (adopting this typology).

<sup>22</sup> Mitchell, *supra* note 3, at 18 (citing *Today’s Law and Yesterday’s Crime*, *supra* note 19, at 121 n.10).

<sup>23</sup> *Id.*

<sup>24</sup> *Today’s Law and Yesterday’s Crime*, *supra* note 19, at 139.

<sup>25</sup> *Id.* at 140 (“Another class of legislative change is the redefining of criminal responsibility, most typically the removal of adult responsibility and punishment provisions from minors, making their offenses punishable only under juvenile delinquency proceedings.”).

statutes. Part III delves into Massachusetts case law to illustrate how the amelioration doctrine has devolved, ultimately resulting in the Massachusetts Supreme Judicial Court's complete abolition of the amelioration doctrine per the state's general saving statute. Part IV surveys two other examples of conflicting case law in the context of the federal Fair Sentencing Act and California Proposition 36. The Fair Sentencing Act illuminates a striking inconsistency: whereas general saving statutes guide courts to apply sentences in force on the date an offense was committed, the Sentencing Reform Act instructs courts to apply the Sentencing Guidelines in force on the date of sentencing.<sup>26</sup> This statutory inconsistency as well as conflicting case law demonstrate the need to amend general saving statutes.<sup>27</sup> This Note argues that the amelioration doctrine is an accurate reflection of legislative intent and criminal law principles. States and the federal government should swiftly amend their saving statutes to explicitly provide for ameliorative changes to apply retrospectively. The baseline should be the presumption of ameliorative retroactivity. If a legislature desires the amendment to have only prospective effect, the legislature may still enact a specific saving clause within the act.<sup>28</sup> In the meantime, courts should look beyond general saving statutes to discern congressional intent and once again apply the amelioration doctrine at sentencing and on appeal. This interpretation, followed by courts in California, Michigan, Minnesota, and New York, should serve as the model for reform in the rest of the country.<sup>29</sup>

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<sup>26</sup> *United States v. Douglas*, 644 F.3d 39, 41 (1st Cir. 2011) ("By their own terms, guidelines changes are automatically retroactive in one limited sense: defendants, including those who committed their offense when prior guidelines were in effect, are sentenced under the edition of the guidelines in force at the time of sentencing.").

<sup>27</sup> *See id.* at 42 (discussing how "[t]he FSA does not address retroactivity questions at all and Congress, by inadvertence or design, may not have addressed the matter," while case law in other circuits remains inconclusive).

<sup>28</sup> It is important to set the default for amelioration rather than asking legislatures to adopt ameliorative provisions in each statute. First, legislatures may forget to insert ameliorative provisions. *Today's Law and Yesterday's Crime*, *supra* note 19, at 150 ("[I]n the absence of a general saving statute, failure to include a statement indicating retroactive or non-retroactive intent would present a situation in which a court would have no standard other than common law abatement to apply in determining the application of the new statute."). Second, it is important to provide for uniform application of ameliorative changes, which will require robust provisions better left to a general statute. Finally, securing support for a general ameliorative provision undoubtedly will be easier than securing ameliorative provisions in every bill. *Id.* ("As a practical matter, this may create problems in securing passage of an ameliorative act since it will draw attention to the effect of the act upon past violators.").

<sup>29</sup> *See In re Estrada*, 408 P.2d 948, 951 (Cal. 1965); *People v. Schultz*, 460 N.W.2d 505, 510 (Mich. 1990); *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979); *People v. Oliver*, 134 N.E.2d 197, 202 (N.Y. 1956).

I. THE AMELIORATION DOCTRINE, ITS ORIGINS, AND ITS RELEVANCE TODAY

The protection against ex post facto laws had unintended consequences in the United States. The ex post facto clause was a direct response to practices in England, which had no such prohibition.<sup>30</sup> What England did have was the common law doctrine of abatement. The common law doctrine of abatement held that the repeal of a criminal statute terminated all prosecutions that had not yet reached a final conviction.<sup>31</sup> The doctrine of abatement applies to repeals of criminal statutes, whereas the amelioration doctrine addresses amendments to penalties in criminal statutes that remain in force.

This distinction becomes difficult to maintain when taking into consideration another principle of statutory construction: that even a mitigation in penalty is a repeal of the entire prior statute.<sup>32</sup> Following that principle, the amelioration doctrine would never come into play, because any change in penalty would repeal the statute. The statute's repeal would result in the forfeiture of all pending prosecutions. In England, this did not present a problem because a reduction in penalty simply meant that the prosecution against the accused was terminated and a new prosecution was initiated under the new law.<sup>33</sup> In the United States, the constitutional prohibition against ex post facto laws meant that a defendant could not be charged under either law: the doctrine of abatement combined with the prohibition against ex post facto laws resulted in an effective pardon every time a penal statute was amended.<sup>34</sup> Therefore, changes to the law, whether harsher or more lenient, resulted in an effective pardon in all criminal cases that had not yet reached a final judgment.<sup>35</sup>

Some courts adhered strictly to this doctrinal interplay and granted pardons not intended by the legislature.<sup>36</sup> To prevent further inadvertent pardons,

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<sup>30</sup> *Today's Law and Yesterday's Crime*, *supra* note 19, at 124 ("Parliament's power to pass laws with retroactive effect was unquestioned.").

<sup>31</sup> Brungard, *supra* note 16, at 766. The doctrine of abatement is applicable in civil cases as well. In fact, the first case in the United States to apply the doctrine of abatement was in the civil context. *Today's Law and Yesterday's Crime*, *supra* note 19, at 124 n.31 (discussing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)).

<sup>32</sup> THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 82, 125-26 (1857) (citing *Commonwealth v. Kimball*, 38 Mass. (21 Pick.) 373 (1838)) ("[I]n general, where a statute imposes a new penalty for an offense, it repeals, by implication, so much of a former statute as established a different penalty.").

<sup>33</sup> See *Today's Law and Yesterday's Crime*, *supra* note 19, at 123-24.

<sup>34</sup> *Id.* at 124-25.

<sup>35</sup> *Id.* at 126-27 (discussing the cases of *Kimball*, 38 Mass. (21 Pick.) 373, and *State v. Daley*, 29 Conn. 272 (1860)).

<sup>36</sup> See, e.g., *Kimball*, 38 Mass. (21 Pick.) at 376-77 ("The result may or may not be conformable to the actual intent of those who passed the latter statute.").

legislatures began adopting general saving statutes.<sup>37</sup> The federal general saving statute reads as follows:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.<sup>38</sup>

Although there is considerable variation in general saving statutes across the states, the federal general saving statute is in line with the majority of states'.<sup>39</sup>

General saving statutes were meant to address the limited problem of pardons resulting from the interplay between the doctrine of abatement and the constitutional prohibition against ex post facto laws.<sup>40</sup> General saving statutes shift the legislative presumption from the common law doctrine of abatement—which halted prosecutions altogether—to non-abatement.<sup>41</sup> General saving statutes were not intended to eliminate the amelioration

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<sup>37</sup> See, e.g., *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974) (“Congress enacted its first general saving provision, c. 71, 16 Stat. 432 (1871), to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of ‘all prosecutions which had not reached final disposition in the highest court authorized to review them.’”); *People v. Schultz*, 460 N.W.2d 505, 510 (Mich. 1990) (detailing the history of the Michigan general saving statute; the Michigan Supreme Court “invited the Legislature to enact a general saving statute” in *People v. Lowell*, 230 N.W. 202, 206 (Mich. 1930)); *People v. Behlog*, 543 N.E.2d 69, 71 (N.Y. 1989) (citing *People v. Oliver*, 134 N.E.2d 197, 201 (N.Y. 1956)) (“The ‘savings clauses’ were enacted principally to prevent the resultant anomaly in such case—of allowing criminals to go unpunished—by specifically providing for continued prosecution under the older more lenient statute.”).

<sup>38</sup> 1 U.S.C. § 109 (2012).

<sup>39</sup> See, e.g., ALASKA STAT. § 01.10.100 (2012) (“The repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred or right accruing or accrued under that law, unless the repealing or amending act so provides expressly. The law shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the right, penalty, forfeiture, or liability.”).

<sup>40</sup> See *Ruud*, *supra* note 15, at 298 (discussing *La Porte v. State*, 132 P. 563, 564-65 (Ariz. 1913)).

<sup>41</sup> See *Today’s Law and Yesterday’s Crime*, *supra* note 19, at 125 n.34 (“A saving clause refers to any language that would ‘save’ pending prosecutions or future prosecutions for acts committed under the repealed statute from being abated.”).

doctrine, which merely offered a defendant the benefit of a reduction in penalty after a legislature amended the charging statute.<sup>42</sup>

The plethora of statutory construction tools often point in different directions.<sup>43</sup> General saving statutes are but one tool of statutory interpretation with which legislatures seek to guide courts to construe all other legislation prospectively unless otherwise noted.<sup>44</sup> Courts may, and do, choose to consider ameliorative changes in context to analyze whether the legislature desired retroactive application.<sup>45</sup> However, many courts ignore the historical basis of general saving statutes, which were intended to address the limited situation in which unintended pardons occurred.<sup>46</sup> These courts refuse to apply the common law amelioration doctrine and prohibit the retroactive application of ameliorative changes.<sup>47</sup>

The need to resurrect the amelioration doctrine is clear. There is a growing recognition that many of the United States' criminal laws prescribe punishments that are too harsh, resulting in a prison population that is far too large.<sup>48</sup> As legislatures ameliorate penalties, an important question regarding

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<sup>42</sup> See, e.g., *Schultz*, 460 N.W.2d at 510 (“[Michigan’s general saving statute] was specifically adopted to abrogate an anomaly resulting from the interplay between the common law abatement doctrine and the constitutional Ex Post Facto Clause.”).

<sup>43</sup> See Llewellyn, *supra* note 18, at 402.

<sup>44</sup> See *Today’s Law and Yesterday’s Crime*, *supra* note 19, at 127-28 (“Forty-two states currently have general saving statutes which apply to criminal prosecutions, many of which are part of the state general statutory construction law.”).

<sup>45</sup> It is important to recognize that amelioration in the criminal law context does not impair the rights of parties, and therefore does not have a truly “retroactive” effect. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 245 (1994) (“[G]enuinely retroactive effect . . . [is] where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed . . .”).

<sup>46</sup> *La Porte v. State*, 132 P. 563, 564-65 (Ariz. 1913) (“The history of legislation . . . shows that through the inattention, carelessness, and inadvertence of the lawmaking body crimes and penalties have been abolished, changed, or modified after the commission of the offense and before trial in such material way as to effect many legislative pardons. To prevent such mistakes and miscarriages of justice many of the states have enacted general saving statutes.”).

<sup>47</sup> See *id.* at 565 (“The old law is abrogated, repealed, and modified for future offenses, but preserved by the saving clause contained in the general body of the Penal Code in so far as the penalties to be inflicted for offenses committed under it are concerned as much as if the latter act had contained a special saving clause.”).

<sup>48</sup> See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 56 (2011); Robin Wilkey & Ryan J. Reilly, *Eric Holder: “Broken” Justice System Needs “Sweeping” Changes, Reforms to Mandatory Minimum*, HUFFINGTON POST (Aug. 12, 2013), [http://www.huffingtonpost.com/2013/08/12/eric-holder-mandatory-minimum\\_n\\_3744575.html](http://www.huffingtonpost.com/2013/08/12/eric-holder-mandatory-minimum_n_3744575.html), archived at <http://perma.cc/D2CW-TF82> (discussing Attorney General Eric Holder’s memo guiding federal prosecutors to elude mandatory minimum sentences for low-level, non-violent drug offenses).



the application of these changes arises: To which defendants do these changes apply?

The Fair Sentencing Act<sup>49</sup> and Proposition 36<sup>50</sup> are two recent examples of these ameliorative changes. The Fair Sentencing Act ameliorated the penalty for possession of crack cocaine by raising the amount of the drug required to implicate increasing mandatory minimum penalties.<sup>51</sup> Proposition 36 ameliorated California's Three Strikes Law.<sup>52</sup>

"Three strikes" laws increase punishment for repeat offenders by requiring increasing sentences for subsequent convictions.<sup>53</sup> Currently, twenty-four states and the federal government have three strikes laws, all of which were adopted between 1993 and 1995.<sup>54</sup> The first true three strikes law was passed in Washington State in 1993, when voters passed Initiative 593.<sup>55</sup> California followed the next year with Proposition 184.<sup>56</sup> California's Three Strikes law was the "harshest and most broadly applied (noncapital) sentencing scheme in

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<sup>49</sup> Fair Sentencing Act of 2010, Pub L. No. 111-220, 124 Stat. 2372.

<sup>50</sup> CAL. PENAL CODE §1170.126 (West 2012).

<sup>51</sup> Editorial, *The Fair Sentencing Act Corrects a Long-Time Wrong in Cocaine Cases*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>, archived at <http://perma.cc/ZJ46-HDWK> ("A person found holding 500 grams of powder cocaine would face a five-year mandatory minimum; crack offenders would have to be in possession of a mere 5 grams to face the same obligatory sentence. . . . The Fair Sentencing Act of 2010 reduced the disparity to 18 to 1. An offender would have to be convicted of peddling 28 grams or more of crack to be hit with a five-year mandatory sentence.").

<sup>52</sup> *People v. Yearwood*, 151 Cal. Rptr. 3d 901, 904 (Cal. Ct. App. 2013) ("The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender.").

<sup>53</sup> Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 1 (1998) ("Pursuant to its provisions, Three Strikes exacts enhanced punishment for recidivists who have been previously convicted of serious or violent felonies.").

<sup>54</sup> Jennifer Cox Shapiro, Note, *Life in Prison for Stealing \$48?: Rethinking Second-Degree Robbery As A Strike Offense in Washington State*, 34 SEATTLE U. L. REV. 935, 940 (2011).

<sup>55</sup> David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 568 (2000) ("The state of Washington, the first state to adopt three strikes legislation, did so via a voter initiative that supported the law by a three-to-one margin."); Daniel W. Stiller, Note, *Initiative 593: Washington's Voters Go Down Swinging*, 30 GONZ. L. REV. 433, 436 (1994-1995).

<sup>56</sup> Brian Brown & Greg Jolivet, *A Primer: Three Strikes – The Impact After More Than a Decade*, LEGISLATIVE ANALYST'S OFFICE (Oct. 2005), available at [http://www.lao.ca.gov/2005/3\\_Strikes/3\\_strikes\\_102005.htm](http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.htm), archived at <http://perma.cc/7QS5-FRE2>.

the country.”<sup>57</sup> Professor Erik G. Luna described California’s Three Strikes law as follows:

Recidivists with one prior serious or violent felony conviction must receive twice the normal term for the current felony conviction. In other words, an individual with one prior strike will receive double the punishment prescribed by law for his present crime. A recidivist with at least two prior serious or violent felony convictions faces a minimum sentence of 25 years. His punishment will be the longer of: (1) three times the prescribed sentence for the current felony conviction or (2) 25 years to life.

Three Strikes also contains several provisions which limit statutory, judicial, and prosecutorial methods to reduce a criminal’s sentence.<sup>58</sup>

As of 2009, more than twenty-five percent of California’s prison population was serving an enhanced sentence as a result of the Three Strikes law.<sup>59</sup> In 2012, California voters decided to curtail the Three Strikes law by restricting its effect to third felony convictions that are “serious or violent.”<sup>60</sup> In cases where the third felony conviction does not involve a serious or violent crime, the Three Strikes law no longer prescribes additional penalties.<sup>61</sup> Instead, the convicted defendant is sentenced as a second-strike offender.<sup>62</sup>

## II. GENERAL SAVING STATUTES

### A. *Differences in Statutory Language*

The federal system<sup>63</sup> and forty-one states<sup>64</sup> have general saving statutes<sup>65</sup> that apply to criminal laws; three additional states have general saving

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<sup>57</sup> Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California’s Three Strikes Law*, 21 STAN. L. & POL’Y REV. 311, 313 (2010) (introducing constitutional issues raised by the stringency of California’s Three Strikes laws under the Eighth Amendment).

<sup>58</sup> Luna, *supra* note 53, at 10-11 (footnotes omitted).

<sup>59</sup> Romano, *supra* note 57, at 313 n.9.

<sup>60</sup> *People v. Yearwood*, 151 Cal. Rptr. 3d 901, 904 (Cal. Ct. App. 2013).

<sup>61</sup> *Id.* (describing the amendment to California’s Three Strikes law mitigating the severity of sentences for certain non-serious, non-violent felonies).

<sup>62</sup> *Id.*

<sup>63</sup> 1 U.S.C. § 109 (2012).

<sup>64</sup> ALASKA STAT. § 01.10.100 (2012); ARIZ. REV. STAT. ANN. §§ 1-246, 1-247, 1-249 (2002 & Supp. 2013); ARK. CODE ANN. § 5-1-103 (2013); CAL. GOV’T CODE § 9608 (West 2005); COLO. REV. STAT. § 2-4-303 (2014); CONN. GEN. STAT. ANN. § 1-1 (West 2007); CONN. GEN. STAT. ANN. § 54-194 (West 2009 & Supp. 2014); GA. CODE ANN. § 16-1-11 (2011); HAW. REV. STAT. §§ 1-10, 1-11 (LexisNexis 2012); IDAHO CODE ANN. 67-513 (2014); 5 ILL. COMP. STAT. 70/4 (West 2013); IND. CODE ANN. § 1-1-5-1 (West 2011 & Supp. 2014); IOWA CODE ANN. § 4.13 (West 2008 & Supp. 2014); KAN. STAT. ANN. § 77-201 (1997 & Supp. 2013); KY. REV. STAT. ANN. § 446.110 (LexisNexis 2010 & Supp.

provisions written into their constitutions.<sup>66</sup> Only six states (Alabama,<sup>67</sup> Delaware, Pennsylvania, Mississippi, North Carolina, and South Carolina) do not have general saving statutes. General saving statutes were first instituted to prevent inadvertent legislative pardons where an enacting legislature forgot to insert an express savings clause each time it passed an amendatory bill.<sup>68</sup> Although general saving statutes are common, there is considerable variation in what the general saving statutes prescribe. Some general saving statutes address only criminal law.<sup>69</sup> Some general saving statutes address both civil

2013); LA. REV. STAT. ANN. § 24:171 (2007); ME. REV. STAT. ANN. tit. 1, § 302 (1989 & Supp. 2013); MD. CODE ANN. §§ 1, 2, 3 (LexisNexis 2011 & Supp. 2014); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006 & Supp. 2014); MICH. COMP. LAWS ANN. § 8.4a (West 2004 & Supp. 2014); MINN. STAT. ANN. § 645.35 (West 1947 & Supp. 2014); MO. ANN. STAT. § 1.160 (West 2000 & Supp. 2014); MONT. CODE ANN. § 1-2-205 (2013); NEB. REV. STAT. § 49-301 (2010); NEV. REV. STAT. §§ 169.235, 193.130 (2013); N.H. REV. STAT. ANN. § 624:5 (2001); N.J. STAT. ANN. § 1:1-15 (West 1992 & Supp. 2014); N.Y. GEN. CONSTR. LAW §§ 93, 94 (McKinney 2003 & Supp. 2014); N.D. CENT. CODE § 1-02-17 (2008); OHIO REV. CODE ANN. § 1.58 (LexisNexis 2009); OR. REV. STAT. ANN. § 161.035 (West 2003 & Supp. 2014); R.I. GEN. LAWS § 43-3-23 (2010); S.D. CODIFIED LAWS § 2-14-18 (2012); TENN. CODE ANN. § 1-3-101 (2014); TEX. GOV'T CODE ANN. § 311.031 (2013 & Supp. 2014); UTAH CODE ANN. § 68-3-5 (LexisNexis 2011); VT. STAT. ANN. tit. 1, § 214 (2010 & Supp. 2013); VA. CODE ANN. § 1-239 (2011 & Supp. 2014); WASH. REV. CODE ANN. § 10.01.040 (West 2002 & Supp. 2014); W. VA. CODE ANN. § 2-2-8 (LexisNexis 2013); WIS. STAT. ANN. § 990.04 (West 2007 & Supp. 2013); WYO. STAT. ANN. § 8-1-107 (2013).

<sup>65</sup> For simplicity, this Note will subsequently refer to both statutory and constitutional saving provisions as “general saving statutes.”

<sup>66</sup> Ruud, *supra* note 15, at 293 (discussing Florida, New Mexico, and Oklahoma); *see* FLA. CONST. art. X, § 9 (“Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.”); N.M. CONST. art. IV, § 33 (“No person shall be exempt from prosecution and punishment for any crime or offenses against any law of this state by reason of the subsequent repeal of such law.”); OKLA. CONST. art. V, § 54 (“The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute.”).

<sup>67</sup> Although Alabama does not have a general saving statute, the Alabama Court of Criminal Appeals recently held that the repeal and simultaneous enactment of similar provisions did not result in an inadvertent pardon. *Burt v. State*, No. CR-11-1500, 2013 WL 5966891, at \*6 (Ala. Crim. App. Nov. 8, 2013) (“Although §§ 15-20A-1 through 15-20A-48 were enacted without a savings clause saving the repealed statute, it is clear that the legislature intended that conduct punishable under the repealed statute was not pardoned.”). The court recognized that the new statute did not contain a savings clause, and Alabama has neither a general saving statute nor a constitutional savings clause. *Id.* at \*3 n.5. The court based its decision on legislative intent. *Id.* at \*6.

<sup>68</sup> Ruud, *supra* note 15, at 298 (discussing *La Porte v. State*, 132 P. 563, 564-65 (Ariz. 1913)).

<sup>69</sup> For example, the savings provisions in Florida and Georgia apply only to criminal laws. *See* Ruud, *supra* note 15, at 294; GA. CODE ANN. § 16-1-11 (2011) (stating the “[e]ffect of repeal or amendment of criminal law on prosecution of prior violations”).

and criminal law in the same provision;<sup>70</sup> others address civil and criminal law separately.<sup>71</sup>

Georgia's saving statute is unique in that it is narrowly tailored only to eliminate the doctrine of abatement.<sup>72</sup> Nine states provide explicitly for retroactive application of ameliorative amendments.<sup>73</sup> Illinois's statute is representative:

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. *If any penalty, forfeiture or punishment be mitigated by any provisions of a new*

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<sup>70</sup> See, e.g., 5 ILL. COMP. STAT. 70/4 (2013) ("No new law shall be construed to repeal a former law . . . [t]his section shall extend to all repeals . . . whether the repeal is in the act making any new provision upon the same subject or in any other act."); N.Y. GEN. CONSTR. LAW §§ 93, 94 (McKinney 2003 & Supp. 2014) (stating the effects of repealing a statute on existing rights and pending actions for "all actions and proceedings, civil or criminal").

<sup>71</sup> See, e.g., ARIZ. REV. STAT. ANN. §§ 1-246, 1-247 (2002 & Supp. 2014) (addressing criminal law); ARIZ. REV. STAT. ANN. § 1-249 (2002 & Supp. 2013) (addressing civil law); R.I. GEN. LAWS § 43-3-22 (2010) (addressing civil law); R.I. GEN. LAWS § 43-3-23 (2010) (addressing criminal law).

<sup>72</sup> GA. CODE ANN. § 16-1-11 (2011) ("The repeal, repeal and reenactment, or amendment of any law of this state which prohibits any act or omission to act and which provides for any criminal penalty therefor, whether misdemeanor, misdemeanor of a high and aggravated nature, or felony, shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment unless the General Assembly expressly declares otherwise in the Act repealing, repealing and reenacting, or amending such law.").

<sup>73</sup> The states are Illinois, Iowa, Kentucky, New Hampshire, Ohio, Texas, Vermont, Virginia, and West Virginia. 5 ILL. COMP. STAT. 70/4 (2013); IOWA CODE § 4.13 (2008 & Supp. 2014); KY. REV. STAT. ANN. § 446.110 (LexisNexis 2010 & Supp. 2013); N.H. REV. STAT. ANN. § 624:5 (2001); OHIO REV. CODE ANN. § 1.58 (LexisNexis 2009); TEX. GOV'T CODE ANN. § 311.031 (West 2013 & Supp. 2014); VT. STAT. ANN. tit. 1, § 214 (2010 & Supp. 2013); VA. CODE ANN. § 1-239 (2011 & Supp. 2013); W. VA. CODE § 2-2-8 (2013); Missouri used to provide for amelioration; in 2005, the legislature struck that section from the code. Compare MO. REV. STAT. § 1.160 (2000) ("[I]f the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law."), with MO. REV. STAT. § 1.160 (2000 & Supp. 2014) ("No offense committed and no fine, penalty or forfeiture incurred . . . shall be affected by the repeal or amendment . . .").

*law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.*<sup>74</sup>

The emphasis on pre-sentence amelioration is uniform throughout the nine statutes.<sup>75</sup> These statutes express strong legislative desires for ease of application; ameliorative changes apply only to defendants who have not yet been sentenced.

The majority of states (thirty-one) and the federal statute do not provide for retroactive application of a statute that mitigates a penalty.<sup>76</sup> Massachusetts's general saving statute provides one example:

The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.<sup>77</sup>

Although these statutes do not explicitly allow for the application of the amelioration doctrine and seem in fact to preclude it, differences in judicial

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<sup>74</sup> 5 ILL. COMP. STAT. 70/4 (2013) (emphasis added).

<sup>75</sup> See *supra* note 73.

<sup>76</sup> 1 U.S.C. § 109 (2012) (“The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide . . . .”); ALASKA STAT. § 01.10.100 (2012) (“The repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred or right accruing or accrued under that law, unless the repealing or amending act so provides expressly.”); ARIZ. REV. STAT. ANN. §§ 1-246, 1-247 (2002 & Supp. 2014); ARK. CODE ANN. § 5-1-103 (2014); CAL. GOV’T CODE § 9608 (West 2005); COLO. REV. STAT. § 2-4-303 (2014); CONN. GEN. STAT. ANN. § 1-1 (West 2008); CONN. GEN. STAT. ANN. § 54-194 (West 2009 & Supp. 2014); HAW. REV. STAT. §§ 1-10, 1-11 (2012); IDAHO CODE ANN. § 67-513 (2014); IND. CODE. § 1-1-5-1 (2011 & Supp. 2014); KAN. STAT. ANN. § 77-201 (1998 & Supp. 2012); LA. REV. STAT. ANN. § 24.171 (2007); ME. REV. STAT. tit. 1, § 302 (1989 & Supp. 2013); MD. CODE ANN. art. 1, § 3 (LexisNexis 2011 & Supp. 2014); MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006 & Supp. 2014); MICH. COMP. LAWS § 8.4a (2004); MINN. STAT. § 645.35 (1947 & Supp. 2014); MO. REV. STAT. § 1.160 (2000 & Supp. 2014); MONT. CODE ANN. § 1-2-205 (2013); NEB. REV. STAT. § 49-301 (2010); NEV. REV. STAT. §§ 169.235 (2013); N.J. STAT. ANN. § 1:1-15 (West 1992 & Supp. 2014); N.Y. GEN. CONSTR. LAW §§ 93, 94 (McKinney 2003 & Supp. 2014); N.D. CENT. CODE § 1-02-17 (2008); OR. REV. STAT. ANN. § 161.035 (West 2003 & Supp. 2013); R.I. GEN. LAWS § 43-3-23 (2010); S.D. CODIFIED LAWS § 2-14-18 (2012); TENN. CODE ANN. § 1-3-101 (2003 & Supp. 2014); UTAH CODE ANN. § 68-3-5 (LexisNexis 2011); WASH. REV. CODE ANN § 10.01.040 (West 2002 & Supp. 2014); WIS. STAT. ANN. § 990.04 (West 2007 & Supp. 2013); WYO. STAT. ANN. § 8-1-107 (2013).

<sup>77</sup> MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006 & Supp. 2014).

interpretation have resulted in varying interpretations of similar legislative language.

B. *Differences in Judicial Interpretation*

A general saving statute is a legislatively ratified principle of statutory construction whereby the legislature tells courts to construe legislation prospectively, rather than treating legislation as retrospectively repealing prior, conflicting legislation.<sup>78</sup> As such, general saving statutes are typically found in the section of state codes that address statutory interpretation.<sup>79</sup> Tools of statutory construction are intended to assist courts with deciphering legislative intent.<sup>80</sup> However, the general saving statute is not the only tool of statutory construction at a court's disposal. Theories of punishment also come into play.<sup>81</sup> If the legislature decriminalizes conduct, it would seem that the legislature means to halt all prosecutions for that conduct, justifying the application of the doctrine of abatement.<sup>82</sup> If the legislature mitigates punishment, the legislature has determined that a longer sentence is no longer considered appropriate, justifying the amelioration doctrine.<sup>83</sup> One scholar has

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<sup>78</sup> *Today's Law and Yesterday's Crime*, *supra* note 19, at 127.

<sup>79</sup> For example, Massachusetts's general saving statute is found in volume I, chapter 4, section 6 of the Massachusetts General Laws: Rules for Construction of Statutes. MASS. GEN. LAWS ANN. ch. 4, § 6 (West 2006 & Supp. 2014). Iowa's general saving statute is found in volume 3, chapter 4 of the Iowa Code: Construction of Statutes. IOWA CODE § 4.13 (2008 & Supp. 2014).

<sup>80</sup> See Llewellyn, *supra* note 18, at 400 (discussing methods of statutory interpretation).

<sup>81</sup> See *Today's Law and Yesterday's Crime*, *supra* note 19, at 132 (citing *People v. Harmon*, 351 P.2d 329 (Cal. 1960) (discussing the application of a mitigated punishment in the context of "modern theories of penology"); see also Mitchell, *supra* note 3, at 10-12 (arguing that the two traditional goals of punishment, consequentialist and retributivist, both point in favor of retroactive amelioration).

<sup>82</sup> See *Today's Law and Yesterday's Crime*, *supra* note 19, at 145 ("If a repeal is unqualified, then it is apparent that the legislature no longer views the formerly proscribed conduct as offensive; any punishment would appear contrary to legislative purpose.").

<sup>83</sup> See Dorean M. Koenig, *Advocating Consistent Sentencing of Prisoners: Deconstructing the Michigan Myth that Retroactive Application of Lesser Penalties for Crimes Violates the Governor's Power of Commutation*, 16 T.M. COOLEY L. REV. 61, 65 (1999) (citing David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 586) (arguing that the notion of parsimony guides that "unnecessary punishment and suffering should be avoided"); *cf.* *United States v. Douglas*, 644 F.3d 39, 43-44 (1st Cir. 2011) (construing the Fair Sentencing Act's ameliorative sentencing structure as a condemnation of prior penalties as "too harsh"); *United States v. Goncalves*, 642 F.3d 245, 253 (1st Cir. 2011) ("Congress did think that the superseded law was too harsh, so that it will be too harsh for Goncalves just as much as for those who committed the same offense after the [Fair Sentencing Act] went into effect."); *In re Estrada*, 408 P.2d 948, 951 (Cal. 1965); *People v. Schultz*, 460 N.W.2d 505, 512 (Mich. 1990); *State v. Cummings*, 386 N.W.2d 468, 472 (N.D. 1986); *Today's Law and Yesterday's Crime*, *supra* note 19, at 132.

forcefully argued that even retributive theories support the application of the amelioration doctrine because the legislature has re-evaluated offenders' blameworthiness and the former, more excessive penalty is now morally unjustified.<sup>84</sup>

The majority of general saving statutes do not account explicitly for ameliorative changes.<sup>85</sup> Most courts have interpreted this omission to eliminate the common law amelioration doctrine. The federal courts have long followed the federal general saving statute to the letter, barring the application of the amelioration doctrine<sup>86</sup>—albeit not uniformly.<sup>87</sup> In 1888, sixteen years after the federal general saving statute's enactment, the Supreme Court held that the saving statute did not allow for retroactive amelioration of criminal penalties.<sup>88</sup> The majority of federal courts have interpreted the saving statute to sustain an entire prosecution, including the pre-amendment sentence, unless the repealing statute expressly provided otherwise.<sup>89</sup>

However, not all courts have interpreted similar general saving statutes to eliminate the amelioration doctrine.<sup>90</sup> Even some federal courts have recently applied the amelioration doctrine in spite of the federal general saving statute.<sup>91</sup> New York, California, Minnesota, and Michigan have taken a more holistic view of the tools at their disposal to glean a legislative intent to apply ameliorative changes retroactively.

In 1956, New York was the first state to find that the general saving statute did not prevent retroactive ameliorative changes in *People v. Oliver*.<sup>92</sup> The *Oliver* court emphasized that the general saving clause “provide[s] merely a

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<sup>84</sup> Mitchell, *supra* note 3, at 16-18 (“To continue to apply the former, more severe punishment following an ameliorative change is a repudiation of the proportionality principle and undermines the retributivist goal of punishment.”).

<sup>85</sup> See *supra* note 76.

<sup>86</sup> *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661 (1974) (“[T]he saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense.” (citations omitted)).

<sup>87</sup> See *infra* Part IV.A. (discussing federal courts' varying applications of the general saving statute in the context of the Fair Sentencing Act).

<sup>88</sup> *United States v. Reisinger*, 128 U.S. 398, 40 (1888) (holding that the use of the terms “penalty,” “liability,” and “forfeiture,” in the federal saving statute limited its application to “all forms of punishment for crime” (citation omitted)).

<sup>89</sup> *United States v. Santana*, 761 F. Supp. 2d 131, 150 (S.D.N.Y. 2011) (“[T]here is no basis to argue that while the Saving Statute might prevent the abatement of a *prosecution* against a defendant, it would not cover the *sentence* that is a part of that prosecution.”).

<sup>90</sup> Mitchell, *supra* note 3, at 7-10 (discussing the minority's reasoning to apply the amelioration doctrine and stating that the majority position is inconsistent with both retributivist and utilitarian theories of punishment).

<sup>91</sup> An example of this lack of uniformity will be examined in detail in the context of the Fair Sentencing Act, *infra* Part IV. See, e.g., *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011).

<sup>92</sup> 134 N.E.2d 197 (N.Y. 1956).

principle of construction'[] which governs '[i]n the absence of . . . contrary intent.'"<sup>93</sup> *Oliver* dealt with a change in the definition of a juvenile; the defendant was fourteen when he committed the crime.<sup>94</sup> The defendant was accused of committing first degree murder in 1945.<sup>95</sup> However, he was mentally incompetent to stand trial until 1954.<sup>96</sup> In the interim, the New York Legislature passed a juvenile reform bill, raising the age for juvenile delinquency from seven to fourteen.<sup>97</sup> The *Oliver* court found that the state could no longer prosecute the defendant; it was limited to instituting juvenile delinquency proceedings against him.<sup>98</sup> The *Oliver* court's reasons for finding that the ameliorative change applied retroactively mirrored the reasoning behind the Act. The court quoted Governor Dewey: "If in 1948 it was 'a shocking thought' that a child between 7 and 15 'may be guilty of crime and conceivably . . . electrocuted for the crime of murder' . . . it was no less shocking to try this defendant for murder in 1955, simply because his childhood offense occurred before the legislative change."<sup>99</sup>

The California Supreme Court followed New York's lead nine years later. In *In re Estrada*,<sup>100</sup> the California Supreme Court reconsidered its rejection of the amelioration doctrine in *People v. Harmon*.<sup>101</sup> The court stated that the defendant presented a more factually compelling case because the defendant in *Harmon* had already been tried, convicted, and sentenced by the time the amendatory act became effective,<sup>102</sup> whereas the defendant in *Estrada* had not yet been convicted when the amendment took effect.<sup>103</sup> The court emphasized, however, that the legal question was the same—"the key date is the date of final judgment."<sup>104</sup> The *Estrada* court adopted a far more lenient version of the amelioration doctrine than the nine states that recognize ameliorative changes before sentencing.<sup>105</sup> In California, a convicted offender may take advantage of ameliorative changes until he has exhausted his opportunity for appeal.<sup>106</sup> As a

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<sup>93</sup> *Id.* at 201 (quoting *People v. Roper*, 182 N.E. 213 (N.Y. 1932)).

<sup>94</sup> *Id.* at 198.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 199.

<sup>98</sup> *Id.* at 203 ("The 1948 amendment . . . narrows the area of a child's criminal responsibility, and there is every reason to give it similar effect in all cases thereafter tried, even for offenses previously committed.").

<sup>99</sup> *Id.* at 203 (citation omitted).

<sup>100</sup> 408 P.2d 948, 950 (Cal. 1965).

<sup>101</sup> 351 P.2d 329, 338 (Cal. 1960).

<sup>102</sup> *Estrada*, 408 P.2d at 951.

<sup>103</sup> *Id.* at 951 ("In the instant case the amendatory act, although passed after the criminal act was committed, became effective before trial, conviction or sentence.").

<sup>104</sup> *Id.* at 950.

<sup>105</sup> See *supra* note 73 and accompanying text (discussing the statutes of the nine states).

<sup>106</sup> Cf. *People v. Yearwood*, 151 Cal. Rptr. 3d 901, 907 (Cal. Ct. App. 2013) ("Cases in



court recently noted, *Estrada* does not alter the default rule of statutory construction that changes should apply prospectively, but it instead informs that rule's application in the specific context of mitigating punishments.<sup>107</sup> *Estrada* articulates a "reasonable presumption" that legislatures intend ameliorative changes to apply retroactively to all non-final judgments.<sup>108</sup>

In *State v. Coolidge*,<sup>109</sup> the Supreme Court of Minnesota relied on the common law amelioration doctrine as well as practical considerations of legislative intent to apply mitigation retroactively.<sup>110</sup> The facts of the case were particularly compelling—the maximum punishment had been changed from ten years to one year.<sup>111</sup> In line with *Estrada*, the *Coolidge* court found that a mitigating statute should be applied as long as a final judgment had not been reached.<sup>112</sup>

The Supreme Court of Michigan reviewed the history of the amelioration doctrine and the purpose of general saving statutes and came to the same conclusion.<sup>113</sup> In *People v. Schultz*,<sup>114</sup> defendant Schultz was convicted of possession of cocaine and sentenced to a mandatory minimum of twenty years' imprisonment.<sup>115</sup> Ten months after he was sentenced, the legislature reduced the mandatory minimum to ten years.<sup>116</sup> The court asserted that "[t]o conclude [that ameliorative changes are not retroactive] would be inconsistent with the underlying purpose of the general saving statute and the sentencing policies of this state."<sup>117</sup> The court recognized that the general saving statute was intended only to address technical abatement, which resulted from the interplay between the common law doctrine of abatement and the constitutional prohibition against ex post facto laws.<sup>118</sup> The *Schultz* court emphasized, "[o]ur general

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which judgment is not yet final include those in which a conviction has been entered and sentence imposed but an appeal is pending when the amendment becomes effective." (citations omitted).

<sup>107</sup> *Id.* at 909 (citing *People v. Brown*, 278 P.3d 1182, 1188 (Cal. 2012)).

<sup>108</sup> *Id.* (citing *Brown*, 278 P.3d at 1188).

<sup>109</sup> 282 N.W.2d 511 (Minn. 1979).

<sup>110</sup> *Id.* at 514.

<sup>111</sup> *Id.* ("[I]t would be harsh for defendant to receive a 10-year sentence in the spring of 1977, when the legislature was repealing the statute under which defendant was convicted and changed the maximum punishment for his act from 10 years to 1 year.").

<sup>112</sup> *Id.*

<sup>113</sup> *People v. Schultz*, 460 N.W.2d 505, 509-11, 511 n.16 (Mich. 1990) (citing *Estrada*, *Oliver*, and *Coolidge*) ("It should likewise be the rule in Michigan . . .").

<sup>114</sup> *Id.* at 507.

<sup>115</sup> *Id.* The court consolidated Schultz's case with another defendant's, Sand. Sand had an even more compelling case—the mandatory minimum for his offense was reduced prior to sentencing. *Id.* at 508-09.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 509 (emphasis added).

<sup>118</sup> *Id.* at 510 ("By enacting § 8.4a, the Legislature has expressed its intent that conduct remains subject to punishment whenever a statute imposing criminal liability either is

saving statute was adopted to amend a technically correct but logically absurd result that arose from a legislative oversight. To ignore the plain intent of the Legislature in this case would lead to an equally anomalous result.”<sup>119</sup>

### III. MASSACHUSETTS CASE STUDY

#### A. *The Longstanding History of the Amelioration Doctrine in Massachusetts*

*Commonwealth v. Marshall*<sup>120</sup> was the first in a long line of Massachusetts cases dealing with the questions of abatement and amelioration. *Marshall* implicated the doctrine of abatement. The defendants disinterred a body while the 1814 statute was in place.<sup>121</sup> They were indicted; a few days later, the legislature passed a superseding statute (the statute of 1830), which resulted in a repeal by implication.<sup>122</sup> The *Marshall* court explained that it was usual for repealing laws to contain savings clauses; the statute of 1830 did not contain a savings clause.<sup>123</sup> The court held that the defendants could not be convicted under the 1814 statute because it was repealed without a saving clause, and the defendants also could not be convicted under the 1830 statute because the defendants committed their offenses before the legislature passed the 1830 statute (and any prosecution under the 1830 statute would violate the ex post facto clause).<sup>124</sup> Therefore, neither statute covered their offenses; the court could not render a judgment.<sup>125</sup>

An inadvertent pardon occurred again in *Commonwealth v. Kimball*<sup>126</sup> when the court, following the common law doctrine of abatement, held that the defendant could not be charged with selling liquor without a license.<sup>127</sup> Before the judgment, the legislature mitigated the statutory penalties for the offense.<sup>128</sup>

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repealed outright or reenacted with modification, even though a specific saving clause has not been adopted.”)

<sup>119</sup> *Id.* at 512.

<sup>120</sup> 28 Mass. (11 Pick.) 350, 351 (1831).

<sup>121</sup> *Id.* at 351.

<sup>122</sup> *Id.* at 350-51.

<sup>123</sup> *Id.* at 351 (“Hence, it is usual in every repealing law, to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force, as to all pending prosecutions, and often as to all violations of the existing law already committed.”).

<sup>124</sup> *Id.* (“It is clear, that there can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment.”).

<sup>125</sup> *Id.*

<sup>126</sup> 38 Mass. (21 Pick.) 373 (1838).

<sup>127</sup> *Id.* (holding that “every statute is a repeal of all former ones by implication . . . without a repealing clause”).

<sup>128</sup> *Id.* at 375.

Although only the penalty was changed,<sup>129</sup> the *Kimball* court reasoned from “known rules of construction” that the judgment could not lie.<sup>130</sup> Without a saving clause, the latter statute repealed the former statute, and the prosecution failed.<sup>131</sup>

Fifteen years later, the Massachusetts Supreme Judicial Court again confronted the question of an ameliorative statute in *Commonwealth v. Wyman*,<sup>132</sup> which concerned a woman who was convicted of arson.<sup>133</sup> At the time Wyman committed the offense, the punishment for arson was death.<sup>134</sup> Before her trial, the legislature amended the statute and prescribed a punishment of life imprisonment.<sup>135</sup> The *Wyman* court chose to address the question of construction with an eye to the intention of the legislature instead of strictly following the doctrine of abatement, as the court had in *Marshall* and *Kimball*.<sup>136</sup> The *Wyman* court recognized that the change in punishment was a repeal by implication—a conclusion that was “unavoidably necessary.”<sup>137</sup> However, the repugnancy lay in the punishment—not in the criminalization of the act itself.<sup>138</sup> Therefore, the defendant could still be convicted of arson, defeating the doctrine of abatement.<sup>139</sup> The defendant could not be sentenced to death because the legislature repealed that punishment, in line with the doctrine of abatement.<sup>140</sup> The new punishment scheme did not violate the protection against ex post facto laws, because mitigation of punishment was an act of clemency.<sup>141</sup>

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<sup>129</sup> The case did not address the other changes in the statute because the defendant’s actions were covered equally under the former statute and the amended statute. *Id.* at 376 (“Upon this comparison, it is manifest, that the facts charged in this case, would bring the offender under both the one and the other of these statutes, inasmuch as they both agree in this, that they prohibit any person, not licensed, from selling rum, brandy or other spirituous liquor, in a less quantity than fifteen gallons.”).

<sup>130</sup> *Id.* at 377.

<sup>131</sup> *Id.*

<sup>132</sup> 66 Mass. (12 Cush.) 237, 238 (1853).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 238.

<sup>135</sup> *Id.*

<sup>136</sup> See *Kimball*, 38 Mass. at 373; *Commonwealth v. Marshall*, 28 Mass. (11 Pick.) 350, 357-58 (1831).

<sup>137</sup> *Wyman*, 66 Mass. at 239.

<sup>138</sup> *Id.* (“Between these two legal enactments there is no such repugnancy. Each declares arson punishable. Two acts *in pari materia*, each declaring a certain act to be a crime, may well stand and be enforced at the same time. The repugnancy is in the provision for the punishment; therefore, the law declaring the punishment of death for the offence was repealed by an implication unavoidably necessary.”).

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> *Id.* (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) and *Commonwealth v. Mott*, 38 Mass. (21 Pick.) 492 (1839)).

*Wyman* was not a solitary case. The court extended this reasoning in other cases, including *Commonwealth v. Gardner*,<sup>142</sup> *Commonwealth v. McKenney*,<sup>143</sup> and *Dolan v. Thomas*.<sup>144</sup> The Massachusetts legislature then enacted a general saving statute in 1869, two years before the federal government enacted its general saving statute.<sup>145</sup> The statute currently reads:

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute . . . .

The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.<sup>146</sup>

The federal general saving statute is similar, but not identical:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.<sup>147</sup>

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<sup>142</sup> 77 Mass. (11 Gray) 438, 447 (1858) (“[W]here a law uses the same words as an old law, the second is declaratory, and not repugnant, and the party may still be punished for an offence alleged to have been committed prior to the passage of the last act.”).

<sup>143</sup> 80 Mass. (14 Gray) 1, 3 (1859) (“[T]his change in the law affords no ground for arresting the judgment; first, because it merely affects the mode of taxing the costs; and secondly, because a diminution of the punishment, after the act done and before conviction, does not prevent a judgment for the milder punishment.”).

<sup>144</sup> 94 Mass. (12 Allen) 421, 424 (1866) (“[The statute] does not inflict any greater punishment than was before prescribed; it is not therefore *ex post facto*; it only authorizes a mitigation of a penalty; it is therefore an act of clemency, which violates no right, but grants a privilege to a convicted party.”).

<sup>145</sup> An Act to Establish Certain Rules for the Construction of Repealing Statutes, ch. 410, 1869 Mass. Acts 704.

<sup>146</sup> MASS. GEN. LAWS ch. 4, § 6 (2013).

<sup>147</sup> 1 U.S.C. § 109 (2012).

An important difference between the two statutes regards the underlying presumption. The Massachusetts statute announces that “the following rules shall be observed, *unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute.*”<sup>148</sup> Many courts have found that ameliorative changes manifest legislative intent that the changes be applied retroactively.<sup>149</sup> The federal statute requires that the repealing act “expressly provide” for retroactivity.<sup>150</sup> However, the Supreme Court stated that even this narrow requirement can be met “either by express declaration or *necessary implication.*”<sup>151</sup>

B. *Massachusetts’s Shift away from the Amelioration Doctrine*

Even after the Massachusetts legislature enacted the general saving statute, the court continued to follow the amelioration doctrine. In *Commonwealth v. Vaughn*,<sup>152</sup> the defendant challenged his sentence of life without parole after a conviction for first degree murder.<sup>153</sup> The defendant argued that his permanent ineligibility for parole was an ex post facto punishment.<sup>154</sup> However, the court explained that at the time of the murder, the statute mandated a sentence of death for a first degree murder conviction.<sup>155</sup> The court reasoned that the defendant benefited from the change in penalty from death to life

<sup>148</sup> MASS. GEN. LAWS ch. 4, § 6 (emphasis added).

<sup>149</sup> *In re Estrada*, 408 P.2d 948, 951 (Cal. 1965) (“When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act.”); *State v. Coolidge*, 282 N.W.2d 511, at 514-15 (Minn. 1979) (“The rationale for [the amelioration doctrine] is that the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient. Nothing would be accomplished by imposing a harsher punishment, in light of the legislative pronouncement, other than vengeance.” (citations omitted)); *People v. Oliver*, 134 N.E.2d 197, 202 (N.Y. 1956) (“A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.”); *Today’s Law and Yesterday’s Crime*, *supra* note 19, at 145 (“If a repeal is unqualified, then it is apparent that the legislature no longer views the formerly proscribed conduct as offensive; any punishment would appear contrary to legislative purpose.”).

<sup>150</sup> 1 U.S.C. § 109 (2012).

<sup>151</sup> *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (emphasis added).

<sup>152</sup> 108 N.E.2d 559 (Mass. 1952).

<sup>153</sup> *Id.* at 562.

<sup>154</sup> *Id.* at 562-63.

<sup>155</sup> *Id.* at 563.

imprisonment, and the defendant could not complain that he did not receive an even greater benefit (the possibility of parole).<sup>156</sup> The court cited *Wyman* to support the notion that the statutory change was an act of clemency, and the defendant was a beneficiary of the statute.<sup>157</sup>

The Supreme Judicial Court also cited *Wyman* positively in 1961 in *Nassar v. Commonwealth*,<sup>158</sup> while distinguishing *Nassar* on its facts.<sup>159</sup> *Nassar* involved two defendants who pleaded guilty to second degree murder.<sup>160</sup> They were sixteen years old; at the time of the murder, the law allowed for capital prosecutions against children.<sup>161</sup> Just before the defendants entered their guilty pleas, the legislature amended the juvenile delinquency statute to prohibit such prosecutions.<sup>162</sup> The defendants challenged their sentences in 1960, nearly twelve years after they pleaded guilty.<sup>163</sup> The defendants were in their late twenties at the time.<sup>164</sup> It seems likely that these unique circumstances drove the court to distinguish this case from *Wyman* in order to avoid the application of the amelioration doctrine. Practically speaking, what remedy could the court offer to these defendants other than abatement? As the *Nassar* court reasoned, “the changes are sufficiently substantive, and affect so much more than . . . the amount of punishment.”<sup>165</sup>

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (“But an act plainly mitigating the punishment of an offence is not ex post facto; on the contrary, it is an act of clemency.” (citing *Commonwealth v. Wyman*, 66 Mass. (12 Cush.) 237, 239 (1853))).

<sup>158</sup> 171 N.E.2d 157 (Mass. 1961).

<sup>159</sup> *Id.* at 161 (“The 1948 amendments were not so wholly procedural in character as to make applicable any general rule of construction that statutory changes, merely procedural in character, should be given retroactive effect, or that the punishment alone was affected.” (citation omitted)).

<sup>160</sup> *Id.* at 158.

<sup>161</sup> *Id.* at 158-59. A capital sentence includes life imprisonment. *Id.* at 160 (“Even after the effective date, the language of § 74, read literally, would not prohibit the Superior Court from completing proceedings pursuant to earlier indictments for first degree murder, a charge which included the lesser offence of second degree murder (an offence ‘punishable by death or imprisonment for life’ excepted from the prohibition of § 74 prior to January 1, 1949).”). “Children” is the court’s wording. *Id.* at 159 (asserting that the case turns on whether the legislature intended the statute to mean that “the children could no longer be prosecuted for the capital offence”).

<sup>162</sup> *Id.* at 158-59 (“On January 17, 1949, each petitioner . . . pleaded guilty to murder in the second degree . . . . On January 17, 1949, the relevant statutes in effect were those considered in *Metcalf v. Commonwealth* . . . .”). The legislature passed the amendment on May 13, 1948; the provisions went into effect on January 1, 1949. *Id.* at 159.

<sup>163</sup> *Id.* at 158-59.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 161. However, scholars and other courts have found that the amelioration doctrine includes redefining criminal responsibility (removing adult responsibility from minors). See *supra* notes 21, 25; *supra* notes 92-99 (discussing *People v. Oliver*, 134 N.E.2d

The court's analysis of the impact of the general saving statute is instructive. The court stated that the question of retroactive application had to be "considered in the light of the general rule of construction" embodied in the general saving statute.<sup>166</sup> While the court noted that the statute may have rendered cases prior to its enactment in 1869 irrelevant, the court cited only *Marshall* and *Kimball*—two cases that dealt with the doctrine of abatement, not amelioration.<sup>167</sup>

In *Commonwealth v. Benoit*,<sup>168</sup> the defendants were charged with bribery under a statute that had been repealed before the indictment.<sup>169</sup> Therefore, *Benoit* addresses the doctrine of abatement, not amelioration; the *Nassar* court had already recognized that the general saving statute abolished the doctrine of amelioration.<sup>170</sup> Addressing the general saving statute, the *Benoit* court stated, "[w]e recognize, as the defendants contend, that the words 'punishment . . . incurred' are not precisely the equivalent of 'liability for punishment incurred.' But we think they were so intended."<sup>171</sup> Subsequent decisions have failed to limit *Benoit*'s holding regarding the general saving statute to the abatement context, and have used it to justify the elimination of the amelioration doctrine.<sup>172</sup>

In *Patrick v. Commissioner of Correction*,<sup>173</sup> Patrick petitioned for a writ of mandamus to compel the Commissioner of Correction to apply good conduct deductions to his term of imprisonment.<sup>174</sup> The prior statute required prisoners to forfeit good conduct time already accrued if they committed a crime while incarcerated.<sup>175</sup> Patrick attempted to escape from prison; after this attempt but before his sentencing, the statute was amended such that accrued good conduct time was not forfeited, but a prisoner was not able to earn any deductions for his new sentence.<sup>176</sup> The court found that the general saving statute guided the

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197 (N.Y. 1956)).

<sup>166</sup> *Nassar*, 171 N.E.2d at 160 ("The question whether the 1948 amendments may be applied retroactively must be considered in the light of the general rule of construction found in G.L. c. 4, § 6, Second.").

<sup>167</sup> *Id.*

<sup>168</sup> 191 N.E.2d 749 (Mass. 1963).

<sup>169</sup> *Id.* at 749-50.

<sup>170</sup> *Nassar*, 171 N.E.2d at 160.

<sup>171</sup> *Benoit*, 191 N.E.2d at 752.

<sup>172</sup> See, e.g., *Commonwealth v. Dotson*, 966 N.E.2d 811, 815 (Mass. 2012) (citing *Benoit*, 191 N.E.2d at 750) ("Further, we have decided that 'a "punishment, penalty, or forfeiture" is "incurred," within the meaning of [G.L. c. 4.] § 6, Second, at the time of the offence for which punishment is imposed is committed."').

<sup>173</sup> 227 N.E.2d 348 (Mass. 1967).

<sup>174</sup> *Id.* at 350.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

court to apply the prior statute.<sup>177</sup> However, the court noted that although applying the amendment retroactively would be advantageous to Patrick, the amendment would disadvantage prisoners whose new sentences were longer than their original sentences.<sup>178</sup> Therefore, the court recognized that the amendment was not strictly ameliorative.<sup>179</sup>

The *Patrick* court's emphasis on the intention of the legislature is illuminating. The court stated, in line with chapter 4, section 6, that "the forfeiture was governed by the . . . [prior] amendment, unless such a construction, as stated in s[ection] 6, would be 'inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same statute.'"<sup>180</sup> This sentiment calls for a change in the baseline assumptions of legislative amendments. Although it is true that "[i]t is settled that 'legislation commonly looks to the future, not to the past,'"<sup>181</sup> considerations of fairness should prevail over tools of statutory construction.<sup>182</sup> The baseline understandings of our criminal justice system guide courts to apply ameliorative changes retroactively. Furthermore, since ameliorative changes mean that the legislature has determined lesser penalties are appropriate for punishment, no appropriate purpose is served by enforcing greater penalties.<sup>183</sup>

In 2011, the Massachusetts Appeals Court articulated its understanding of the amelioration doctrine in *Commonwealth v. Hill*.<sup>184</sup> In 1998, Hill was convicted of various crimes including armed home invasion.<sup>185</sup> While his appeal was pending, the legislature amended the home invasion statute.<sup>186</sup> However, he did not raise this claim on direct appeal.<sup>187</sup> Twelve years after his conviction became final, Hill sought to correct his sentence pursuant to Massachusetts Rule of Criminal Procedure 30(a), which provides for post-conviction relief "upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the

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<sup>177</sup> *Id.* at 351 n.2 ("We need not, and do not, consider whether a retrospective operation of the 1963 amendment, if clearly intended by the Legislature, would have been permissible." (citations omitted)).

<sup>178</sup> *Id.* at 351.

<sup>179</sup> *Id.* at 350.

<sup>180</sup> *Id.* at 351 (quoting MASS. GEN. LAWS ch. 4, § 6 (2012)).

<sup>181</sup> *Id.* (emphasis added) (quoting *Hanscom v. Malden & Melrose Gaslight Co.*, 107 N.E. 426, 427-28 (Mass. 1914)).

<sup>182</sup> *Cf. id.* ("Considerations of fairness do not lead to a different conclusion.").

<sup>183</sup> *See supra* notes 81-84 and accompanying text (explaining how the theories of punishment affect judicial interpretation).

<sup>184</sup> 950 N.E.2d 458, 461 n.3 (Mass. App. Ct. 2011) ("The text of the amendment is clear in creating a new, lesser punishment for a certain class of individuals convicted of 'said crime.' It cannot be read to create a new, lesser crime or to repeal the existing statute, but only to impose a new, lesser sentence.").

<sup>185</sup> *Id.* at 459.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 460.



Commonwealth of Massachusetts.”<sup>188</sup> The court found that Massachusetts General Laws chapter 278, section 28B limits appellate court jurisdiction to impose only those sentences that could have been imposed at the time of sentencing.<sup>189</sup> This is in line with the traditional amelioration doctrine, which applies to lessened penalties in force at the time of sentencing, not on appeal.<sup>190</sup> While this foreclosed the applicability of the amelioration doctrine to *Hill*, the court rejected the Commonwealth’s argument that a reduction in penalty would implicate the general saving statute.<sup>191</sup> The court reasoned that a legislative ameliorative change was not a repeal, and thus it did not invoke the general saving statute.<sup>192</sup>

As the law stood after *Hill*, the amelioration doctrine survived the Massachusetts legislature’s enactment of the general saving statute in 1869.<sup>193</sup> *Benoit* made it clear that the doctrine of abatement, as articulated in *Marshall* and *Kimball*, did not survive the general saving statute.<sup>194</sup> This makes sense—after all, the general saving statutes were originally intended precisely to do away with the doctrine of abatement.<sup>195</sup> However, neither *Vaughn*, *Nassar*, nor *Patrick* overturned *Wyman* in light of the general saving statute.<sup>196</sup> As confirmed by the *Hill* court, *Wyman* stood for the proposition that ameliorative changes in effect at the time of sentencing should be applied.<sup>197</sup> The *Hill* court

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<sup>188</sup> *Id.* (quoting MASS. R. CRIM. P. 30(a)).

<sup>189</sup> *Id.* at 461.

<sup>190</sup> See *supra* notes 16-19 and accompanying text (discussing the traditional amelioration doctrine).

<sup>191</sup> *Hill*, 950 N.E.2d at 461 n.3 (“[The statutory amendment in this case] cannot be read to create a new, lesser crime or to repeal the existing statute, but only to impose a new, lesser sentence.”).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Commonwealth v. Benoit*, 191 N.E.2d 749, 752 (Mass. 1963) (“We recognize . . . that the words ‘punishment . . . incurred’ are not precisely the equivalent of ‘liability for punishment incurred.’ But we think they were so intended.”). In *Commonwealth v. Yee*, 281 N.E.2d 248 (Mass. 1972), the court cited *Benoit* in a case which held, in the alternative, that the general saving statute eliminated the doctrine of abatement. *Yee*, 281 N.E.2d at 252-53.

<sup>195</sup> See *supra* notes 40-41 and accompanying text (discussing the purpose of general saving statutes).

<sup>196</sup> *Patrick v. Commissioner of Correction*, 227 N.E.2d 348, 351 n.2 (Mass. 1967) (“We need not, and do not, consider whether a retrospective operation of the 1963 amendment, if clearly intended by the Legislature, would have been permissible.”); *Nassar v. Commonwealth*, 171 N.E.2d 157, 161 (Mass. 1961) (“The 1948 amendments were not so wholly procedural in character as to make applicable any general rule of construction that statutory changes, merely procedural in character, should be given retroactive effect . . . .”); *Commonwealth v. Vaughn*, 108 N.E.2d 559, 563 (Mass. 1952) (“But an act plainly mitigating the punishment of an offence is not ex post facto; on the contrary, it is an act of clemency.” (citing *Commonwealth v. Wyman*, 66 Mass. (12 Cush.) 237, 239 (1853))).

<sup>197</sup> *Hill*, 950 N.E.2d at 461 n.3; *Wyman*, 66 Mass. (12 Cush.) at 238 (recognizing that the

also confirmed that lesser sentences would still be applied despite the general saving statute; the general saving statute only saved repealed penalties, and ameliorative changes were not repeals.<sup>198</sup>

Just one year later in *Commonwealth v. Dotson*,<sup>199</sup> the Massachusetts Supreme Judicial Court manipulated the holdings in *Nassar*, *Benoit*, and *Patrick*, and did not recognize that it was overruling *Wyman* and 159 years of consistent case law in spite of the general saving statute.<sup>200</sup> In *Dotson*, the defendant committed disorderly conduct prior to the statute's amendment, but was not convicted until after the amendment.<sup>201</sup> The reduction in penalty was drastic—from up to six months' imprisonment to a fine of not more than \$150.<sup>202</sup> *Dotson* was sentenced to two years of probation.<sup>203</sup> Although *Dotson's* probation had terminated and the case was moot,<sup>204</sup> the Supreme Judicial Court decided to hear the case and held that the general saving statute required courts to impose sentences in effect on the date that the offense was committed.<sup>205</sup> Although the court acknowledged that this might be viewed as an "unfair consequence" of the general saving statute, it found that this unfairness did not lead the court to believe that the legislature intended the court to impose the lesser penalty.<sup>206</sup> The Supreme Judicial Court admitted that:

It is conceivable, as the defendant contends, that by reducing the penalty for a first offense of disorderly conduct from the possibility of incarceration to merely a fine, the Legislature intended to confer a benefit on those defendants subject to impending prosecutions . . . . However, it is well settled that "legislation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms."<sup>207</sup>

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legislature amended the penalty before the defendant's trial).

<sup>198</sup> *Hill*, 950 N.E.2d at 461 n.3.

<sup>199</sup> 966 N.E.2d 811 (Mass. 2012).

<sup>200</sup> *Id.* at 815.

<sup>201</sup> *Id.* at 813.

<sup>202</sup> *Id.* at 813-14 (citing Act effective July 1, 2009, ch. 27, 2009 Mass. Acts 518 (codified as amended at MASS. GEN. LAWS ch. 272, § 53(b) (2012))) (discussing the penalties prescribed for first-time offenders).

<sup>203</sup> *Id.* at 813.

<sup>204</sup> *Id.* at 814.

<sup>205</sup> *Id.* at 815 ("Here, we see no clearly expressed intention by the Legislature to have the 2009 amendment to G.L. c. 272, § 53, applied retroactively.").

<sup>206</sup> *Id.* ("The fact that a defendant who committed the offense of disorderly conduct before July 1, 2009, is not entitled to benefit from the 2009 amendment may be, in the defendant's view, an unfair consequence of G.L. c. 4, § 6, Second, but it does not rise to the level of repugnancy.").

<sup>207</sup> *Id.* (quoting *Patrick v. Commissioner of Corr.*, 227 N.E.2d 348, 351 (Mass. 1967)).

Although it is true that “legislation commonly looks into the future,” canons of statutory construction are notoriously contradictory.<sup>208</sup> The amelioration doctrine, as articulated in *Wyman* in 1853, rebuts the presumption of prospectivity.<sup>209</sup>

One year after *Dotson*, the Massachusetts Appeals Court was faced with a defendant in a similar situation. In *Commonwealth v. Gardner*,<sup>210</sup> the defendant was convicted under the same statute.<sup>211</sup> Similar to *Dotson*, Gardner’s actions occurred prior to the ameliorative change in penalty, but her arraignment and conviction occurred after the change.<sup>212</sup> Gardner’s punishment was much more severe than *Dotson*’s sentence to mere probation; Gardner was sentenced to six months, fifteen days to serve.<sup>213</sup> Interestingly, even the prosecution in *Gardner* acknowledged that the “ameliorative principle” might apply to Gardner’s case.<sup>214</sup> Ultimately, the Appeals Court did not reach this issue as they reversed the defendant’s conviction.<sup>215</sup>

#### IV. THE FAIR SENTENCING ACT AND PROPOSITION 36 AS CALLS FOR REFORM

Recent discussion around harsh mandatory minimum sentences, prison reform, and drug sentencing reform<sup>216</sup> should be an impetus for changing

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<sup>208</sup> See Llewellyn, *supra* note 18, at 401-06 (parsing the various conflicting canons of statutory construction).

<sup>209</sup> *Commonwealth v. Wyman*, 66 Mass. (12 Cush.) 237, 238 (1853) (“Where a subsequent act is not in terms repealed, the question, whether the prior act is repealed by implication, depends upon the point whether they are repugnant, or whether they may both well stand, and have their proper application. If they are repugnant, the former must yield . . .”).

<sup>210</sup> No. 11-P-1770, 2013 WL 3306328 (Mass. App. Ct. July 2, 2013).

<sup>211</sup> *Id.* at \*1.

<sup>212</sup> Commonwealth’s Brief at 2, 14, *Gardner*, 989 N.E.2d 934 (Mass. App. Ct. 2013), 2012 WL 933663 (explaining that the statutory amendment went into effect on July 1, 2009; the defendant was charged on August 17, 2009; and the defendant was found guilty and sentenced on October 15, 2010).

<sup>213</sup> *Gardner*, No. 11-P-1770, 2013 WL 3306328 at \*1.

<sup>214</sup> Commonwealth’s Brief, *supra* note 212, at 18 The Supreme Judicial Court’s subsequent decision in *Dotson* foreclosed this opportunity. *Commonwealth v. Dotson*, 966 N.E.2d 811, 813 (Mass. 2012) (holding that the general saving statute required courts to impose sentences that were in effect on the date that the offense was committed).

<sup>215</sup> *Gardner*, No. 11-P-1770, 2013 WL 3306328 at \*2 n.2 (“This disposition makes it unnecessary for us to consider the applicability of *Commonwealth v. Dotson*, 462 Mass. 96 (2012), and what remains of the doctrine of amelioration.”).

<sup>216</sup> See, e.g., Ryan J. Reilly, *Bernard Kerik Criticizes “Insane” Mandatory Minimum Sentences*, HUFFINGTON POST POL. (Nov. 3, 2013, 12:18 PM), [http://www.huffingtonpost.com/2013/11/03/bernard-kerik-prison-reform\\_n\\_4208504.html](http://www.huffingtonpost.com/2013/11/03/bernard-kerik-prison-reform_n_4208504.html), archived at <http://perma.cc/ZV6Z-DKZG> (“David Axelrod, a former senior adviser to President Barack Obama, said on ‘Meet the Press’ that there was a ‘growing consensus’ on the issue of prison reform, citing comments from Sen. Rand Paul (R-Ky.).”).

general saving statutes. As shown by the cases construing the Fair Sentencing Act of 2010 and California's Proposition 36, new general saving statutes also need to be clear regarding which defendants may benefit from retroactive amelioration.

A. *The Fair Sentencing Act*

A national media frenzy about crack cocaine led Congress to enact the Anti-Drug Abuse Act of 1986,<sup>217</sup> punishing crack cocaine trafficking 100 times more harshly than powder cocaine trafficking.<sup>218</sup> It was not until 2010 that Congress reduced the disparity to 18-to-1 with the Fair Sentencing Act.<sup>219</sup> The courts struggled to reconcile the drastic reduction in penalties, which suggest retroactivity,<sup>220</sup> with the federal general saving statute and the fact that the Fair Sentencing Act did not include an explicit provision recognizing retroactive intent.<sup>221</sup>

In *United States v. Goncalves*,<sup>222</sup> the First Circuit refused to apply the Fair Sentencing Act retroactively when the defendant was sentenced before the Fair Sentencing Act's enactment and sought amelioration upon appeal.<sup>223</sup> In construing the federal general saving statute, the *Goncalves* court held that the use of the word "incurred" (rather than "already imposed") made it clear that the time of the conduct, rather than the time of the sentence, was the determinative factor.<sup>224</sup> The *Goncalves* court also noted that other circuits

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<sup>217</sup> DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW i (2006), available at [https://www.aclu.org/files/pdfs/drugpolicy/cracksinsystem\\_20061025.pdf](https://www.aclu.org/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf), archived at <http://perma.cc/8SDQ-38CH>; Brungard, *supra* note 16, at 745-46.

<sup>218</sup> Brungard, *supra* note 16, at 746.

<sup>219</sup> The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). Ryan Brungard aptly summarized the Act as "reducing the cocaine sentencing disparity by amending provisions of 21 U.S.C. § 841 (b)(1), and eliminating the mandatory minimum for simple possession required by 21 U.S.C. § 844 (2012)." Brungard, *supra* note 16, at 746 n.20.

<sup>220</sup> *Dorsey v. United States*, 132 S. Ct. 2321, 2330 (2012) ("The Courts of Appeals have come to different conclusions as to whether the Fair Sentencing Act's more lenient mandatory minimums apply to offenders whose unlawful conduct took place before, but whose sentencing took place after, the date that Act took effect, namely, August 3, 2010.").

<sup>221</sup> *United States v. Brewer*, 624 F.3d 900, 909 n.7 (8th Cir. 2010) ("[T]he Fair Sentencing Act contains no express statement that it is retroactive, and thus the 'general savings statute,' 1 U.S.C. § 109, requires us to apply the penalties in place at the time the crime was committed.").

<sup>222</sup> 642 F.3d 245 (1st Cir. 2011).

<sup>223</sup> *Id.* at 252, 254-55 (holding that the Fair Sentencing Act does not apply retroactively). More recently, the same result was reached in *United States v. Hughes*, 733 F.3d 642, 645 (6th Cir. 2013), and in *United States v. Blewett*, 746 F.3d 647, 660 (6th Cir. 2013).

<sup>224</sup> *Goncalves*, 642 F.3d at 252 (citing *United States v. Reisinger*, 128 U.S. 398, 401 (1888)) (finding that liability attaches at the time of conduct, rather than sentencing; "[t]hus,

previously held that the Fair Sentencing Act was not retroactive.<sup>225</sup> The *Goncalves* court refused to find legislative intent to apply the ameliorative changes retroactively, stating that “[Congress] could sensibly amend section 109 so that *reductions in penalties* for a pre-existing crime presumptively applied upon the enactment (or effective date) of the statute to anyone not yet sentenced or otherwise still on direct appeal.”<sup>226</sup>

In *United States v. Douglas*,<sup>227</sup> the First Circuit applied the Fair Sentencing Act retroactively to a defendant sentenced after the Act’s effective date.<sup>228</sup> Procedurally, *Douglas* is an interesting case in the amelioration context because the trial court imposed the ameliorative changes retroactively, and the government appealed.<sup>229</sup> In line with the reasoning in *Goncalves* regarding the use of the word “incurred” in the general saving statute, the *Douglas* court stated that the defendant became liable to the sentencing structure in effect at the time of his crimes “unless in some fashion the [Fair Sentencing Act] itself altered the calculus.”<sup>230</sup> The court then explained that although there was uniformity in the federal circuits regarding *Goncalves*’s claim, *Douglas*’s claim presented a different issue, which had split the federal district courts.<sup>231</sup> *Goncalves* was sentenced before the Fair Sentencing Act’s effective date and sought amelioration on appeal.<sup>232</sup> *Douglas* sought amelioration at sentencing, which took place after the Fair Sentencing Act went into effect.<sup>233</sup> The court found that the Fair Sentencing Act was ambiguous as to cases like *Douglas*’s

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if a new criminal statute supersedes an older one, conduct occurring under the superseded version can still be punished under the older version.”).

<sup>225</sup> *Id.* at 253 n.8 (listing cases).

<sup>226</sup> *Id.* at 255.

<sup>227</sup> 644 F.3d 39 (1st Cir. 2011). *Douglas* was pending when *Goncalves* was decided. *Goncalves*, 642 F.3d at 252 n.5.

<sup>228</sup> *Douglas*, 644 F.3d at 42 (finding that where a defendant had pleaded guilty before the enactment of the Fair Sentencing Act, and the Fair Sentencing Act took effect prior to sentencing, the Act could be applied at sentencing). The Fair Sentencing Act’s changes became effective in practice when the Sentencing Commission revised the sentencing guidelines on November 1, 2010; the district court applied the revised guidelines even though the defendant had pleaded guilty in January 2010. *Id.* at 40-42.

<sup>229</sup> *Id.* at 40. (“Over the government’s objection, the district court ruled in substance that the reduced mandatory minimums adopted by the Fair Sentencing Act . . . governed *Douglas*’ sentence, and the government now appeals.”). *Id.* at 40. Similarly, the trial court in *Commonwealth v. Hill* applied ameliorative changes, sentencing the defendant to life in prison without parole rather than death. *See Commonwealth v. Hill*, 950 N.E.2d 458, 461 (Mass. App. Ct. 2011).

<sup>230</sup> *Douglas*, 644 F.3d at 42.

<sup>231</sup> *Id.* at 42 n.3 (discussing *Goncalves*, 642 F.3d at 253 n.8).

<sup>232</sup> *Id.* at 40.

<sup>233</sup> *Id.*

and that the rule of lenity applied.<sup>234</sup> The First Circuit affirmed the district court's application of ameliorative changes.<sup>235</sup>

In *Dorsey v. United States*,<sup>236</sup> the U.S. Supreme Court sided with the First Circuit's opinion in *Douglas* and concluded that Congress intended that the Fair Sentencing Act be applied retroactively.<sup>237</sup> The Court acknowledged that the federal general saving statute uses the terms "expressly provide,"<sup>238</sup> but stated that the statute permits Congress to enact ameliorative changes that can be applied retroactively without expressly stating this intent.<sup>239</sup> Then, the Court found that Congress was legislating with the Sentencing Reform Act of 1984 in mind as a background principle.<sup>240</sup> The Sentencing Reform Act states, in relevant part: "The court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . that . . . are in effect *on the date the defendant is sentenced* . . ."<sup>241</sup>

The Court recognized that the general saving statute and the Sentencing Reform Act point "in opposite directions."<sup>242</sup> The four dissenting Justices admitted that "our cases have not spoken with the utmost clarity on this point."<sup>243</sup> The dissent would have applied the Sentencing Reform Act only to Guidelines amendments, and the general saving statute to statutory amendments.<sup>244</sup> Although there is no requirement that Congress legislate in a

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<sup>234</sup> *Id.* at 44 ("[T]he rule of lenity, applicable to penalties as well as the definition of crimes, adds a measure of further support to *Douglas*.").

<sup>235</sup> *Id.* at 46.

<sup>236</sup> 132 S. Ct. 2321 (2012).

<sup>237</sup> *Id.* at 2326. Although the Fair Sentencing Act's effective date was August 3, 2010, the Fair Sentencing Act did not amend the guidelines directly. *Douglas*, 644 F.3d at 41. Rather, the Act directed the U.S. Sentencing Commission "to adopt new guidelines in accordance with the [Act]." *Id.* These new guidelines did not take effect until November 1, 2010. *Id.* Strikingly, the Court decided to apply the ameliorative changes even before their effective date. *Dorsey*, 132 S. Ct. at 2335-36 ("Our reason is that the statute simply instructs the Commission to promulgate new Guidelines 'as soon as practicable' (but no later than 90 days after the Act took effect).").

<sup>238</sup> *Dorsey*, 132 S. Ct. at 2331 (citing 1 U.S.C. § 109 (2012)) (explaining the interplay of ameliorative amendments and § 109).

<sup>239</sup> *Id.* ("It is true that the 1871 Act uses the words 'expressly provide.' But the Court has long recognized that this saving statute creates what is in effect a less demanding interpretive requirement." (citing 1 U.S.C. § 109 (2012))).

<sup>240</sup> *Id.* at 2332 ("[T]he Court has treated the 1871 Act as setting forth an important background principle of interpretation. The Court has also assumed Congress is well aware of the background principle when it enacts new criminal statutes.").

<sup>241</sup> 18 U.S.C. § 3553(a)(4)(A)(ii) (2012) (emphasis added).

<sup>242</sup> *Dorsey*, 132 S. Ct. at 2330.

<sup>243</sup> *Id.* at 2339.

<sup>244</sup> *Id.* at 2340 ("We may readily do so here by holding that § 3553(a)(4)(A)(ii) applies to

logical fashion, this interpretative dissonance is starkly at odds with our criminal justice system's broad protections provided to defendants. The conflict between the Sentencing Reform Act and the general saving statute points only more strongly to the need for clarification regarding statutory construction of ameliorative changes.<sup>245</sup>

B. *Proposition 36*

In 2012, California voters approved Proposition 36, "The Three Strikes Reform Act," by a wide margin.<sup>246</sup> Reasons cited for the reform included relieving prison overcrowding and saving taxpayer funds.<sup>247</sup> The original Three Strikes law subjected defendants who received their third conviction to a sentence of twenty-five years to life.<sup>248</sup> With Proposition 36, voters reserved life sentences for cases where the defendant's third conviction was a serious or violent felony.<sup>249</sup> Proposition 36 amended California Code sections 667 and 1170.12 and added section 1170.126.<sup>250</sup> The amended sections 667 and 1170.12 prescribe when a recidivist may be sentenced as a third-strike offender.<sup>251</sup> Section 1170.126 creates a post-conviction release proceeding for prisoners "presently serving" a life sentence to petition for resentencing as a

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Guidelines amendments, and § 109 to statutory ones.").

<sup>245</sup> *See id.* at 2344 (Scalia, J. dissenting) ("Are we to conclude that, after the Sentencing Reform Act, § 109 has no further application to criminal penalties, at least when statutory amendments lead to modification of the Guidelines? Portions of the Court's opinion could be understood to suggest that result, but the Court leaves us in suspense. That is most unfortunate, because the whole point of § 109, as well as other provisions of the Dictionary Act, and the definitional provisions of the federal criminal law, is to provide a stable set of background principles that will promote effective communication between Congress and the courts." (citations omitted)).

<sup>246</sup> CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 6, 2012 GENERAL ELECTION 13 (2012), available at <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>, archived at <http://perma.cc/DJS3-CCB2> (showing that Proposition 36 passed with 69.3% in favor and 30.7% against).

<sup>247</sup> STEVE COOLEY, GEORGE GASCON & DAVID MILLS, ARGUMENT IN FAVOR OF PROPOSITION 36, in PROP 36: THREE STRIKES LAW. REPEAT FELONY OFFENDERS. PENALTIES. INITIATIVE STATUTE, (Nov. 2012), <http://www.voterguide.sos.ca.gov/past/2012/general/propositions/36/arguments-rebuttals.htm>, archived at <http://perma.cc/W49F-6B3U>.

<sup>248</sup> KEITH ROYAL, CARL ADAMS & HARRIET SALERNO, ARGUMENT AGAINST PROPOSITION 36, in PROP 36: THREE STRIKES LAW. REPEAT FELONY OFFENDERS. PENALTIES. INITIATIVE STATUTE, (Nov. 2012), <http://www.voterguide.sos.ca.gov/past/2012/general/propositions/36/arguments-rebuttals.htm>, archived at <http://perma.cc/W49F-6B3U>.

<sup>249</sup> *Id.*

<sup>250</sup> *People v. Yearwood*, 151 Cal. Rptr. 3d 901, 904 (Cal. Ct. App. 2013).

<sup>251</sup> *Id.* at 905-06 (finding that the Act applies to offenders with two prior convictions, where the new offense is not a violent or serious felony).

second-strike offender.<sup>252</sup> Under section 1170.126, a judge has discretion to reject a post-conviction offender's petition for resentencing even if the defendant meets the section's objective criteria.<sup>253</sup> Conversely, if a pre-conviction defendant meets the objective criteria, sentencing under amended sections 667 and 1170.12 is mandatory.<sup>254</sup> Therefore, if a pre-conviction offender meets the statutory criteria for a second-strike offender under sections 667 and 1170.12, the judge does not have discretion to refuse to sentence the defendant as a second-strike offender.<sup>255</sup>

*People v. Yearwood*<sup>256</sup> involved an appellant who had been convicted and sentenced before the Act's effective date, but his conviction was not yet final.<sup>257</sup> The Court of Appeal, Fifth District of California found that the amelioration doctrine articulated in *Estrada* did not apply in the context of Proposition 36.<sup>258</sup> The court reasoned that the post-conviction release proceeding<sup>259</sup> included in the Act was the "functional equivalent of a saving clause."<sup>260</sup> The court found that section 1170.126 unambiguously required defendants who had been sentenced under the former three strikes law to use the discretionary post-conviction release proceedings rather than to benefit from the ameliorative mandatory sentencing provisions under sections 667 and 1170.12.<sup>261</sup> The court stated that this interpretation was "consistent with the voters' intent," drawing upon arguments in the ballot pamphlets.<sup>262</sup> The supporters of the initiative emphasized that the post-conviction release procedure would "keep dangerous criminals off the streets" because of the procedure's discretionary nature.<sup>263</sup> The court was concerned that dangerous

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<sup>252</sup> *People v. Lewis*, 156 Cal. Rptr. 3d 747, 750 (Cal. Ct. App. 2013) (adding that the court may resentence the prisoner "if the current offense is not a serious or violent felony and the person is not otherwise disqualified").

<sup>253</sup> *Id.* ("The trial court may deny the petition even if those criteria are met, if the court determines that resentencing would pose an unreasonable risk of danger to public safety.").

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> 151 Cal. Rptr. 3d 901.

<sup>257</sup> *Id.* at 905.

<sup>258</sup> *Id.* at 907 ("The *Estrada* rule does not apply to the Act because section 1170.126 operates as the functional equivalent of a saving clause."). The court also found that the rule of lenity did not apply, as the statute was unambiguous. *Id.* at 911.

<sup>259</sup> The post-conviction release proceeding is set out in section 1170.126. *Id.* at 910.

<sup>260</sup> *Id.*

<sup>261</sup> *See id.* ("The quoted phrase is not ambiguous. Section 1170.126 could have been, but was not, drafted so that it applied only to prisoners whose judgments were final before the effective date. We believe that Section 1170.126 is correctly interpreted to apply to all prisoners serving an indeterminate life sentence imposed under the former three strikes law.").

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* (stating that Proposition 36's proponents asserted that the post-conviction release procedure was a "hidden provision" that would release "thousands of dangerous criminals").



defendants who had been convicted but whose judgments were not yet finalized would automatically receive a downgraded second-offense penalty.<sup>264</sup> The decisions of the judge and prosecutor might have been different if Proposition 36 had been in effect at the time of the trial.<sup>265</sup>

Merely four months later, the same court held that *Estrada* allowed appellant Lewis to petition for resentencing.<sup>266</sup> The appellant's case was pending before the Fifth District when the Act was passed by voters with Proposition 36.<sup>267</sup> The court looked to the reasons expressed by the initiative's supporters—namely, to reduce prison overcrowding and save taxpayers "\$100 million every year"—to find the necessary intent to apply the ameliorative change retroactively.<sup>268</sup> The court addressed *Yearwood* specifically, stating that there was a sufficient logical basis to infer that the electorate intended defendants with non-final judgments to benefit from changes to sections 667 and 1170.12.<sup>269</sup> Although section 1170.126's post-conviction release proceeding "applies 'exclusively to persons presently serving' a third-strike sentence," this wording does not unambiguously clarify which defendants are "presently serving."<sup>270</sup> The court queried, "does it refer only to prisoners serving sentences which are final, or does it include those whose judgments are

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<sup>264</sup> *Id.* at 911 ("If amended sections 667 and 1170.12 are given retroactive application, prisoners in appellant's procedural posture would be entitled to automatic resentencing as second strike offenders without any judicial review to ensure they do not currently pose an unreasonable risk of danger to public safety.").

<sup>265</sup> *Id.* at 910-11 ("During the pretrial, trial and sentencing phases of the criminal justice system, various discretionary decisions are available to the prosecutor and the trial court that can result in a shorter or longer term of imprisonment (e.g., selection of the appropriate base term, concurrent/consecutive sentencing, dismissal of a strike in the interests of justice).").

<sup>266</sup> *People v. Lewis*, 156 Cal. Rptr. 3d 747, 755 (Cal. Ct. App. 2013) (holding that Proposition 36, under the *Estrada* doctrine, applied to "qualifying defendants whose judgments were not yet final on the effective date of the act"). Another case, *People v. Conley*, was decided in favor of the defendant with reasoning similar to *Yearwood*. *Conley*, 156 Cal. Rptr. 3d 508 (Cal. Ct. App. 2013) (holding that prisoners sentenced under the Three Strikes law could petition for review of their sentence under 1170.12 and 1170.126). The *Lewis* court also found the *Conley* court's reasoning unpersuasive. *Lewis*, 156 Cal. Rptr. 3d at 754 ("Conley's [sic] reasoning is similar to *Yearwood's* and we find it unpersuasive as well."). Both *Conley* and *Lewis* are awaiting rehearing before the California Supreme Court. *Conley*, 156 Cal. Rptr. 3d 508, *appeal docketed*, No. S211275 (Cal. Aug. 14, 2013); *Lewis*, 156 Cal. Rptr. 3d 747, *appeal docketed*, No. S211949 (Cal. Aug. 14, 2013).

<sup>267</sup> *Lewis*, 156 Cal. Rptr. 3d at 748.

<sup>268</sup> *Id.* at 752.

<sup>269</sup> *Id.* at 752-53 (stating that *Yearwood* was the first published opinion on point and that retroactive application is consistent with voter intent).

<sup>270</sup> *Id.*

not final?”<sup>271</sup> Thus, the court found that section 1170.126 did not act as a saving clause.<sup>272</sup>

These cases illustrate the need for clear guidance for courts in construing ameliorative penal statutes. The defendants in *Yearwood* and *Lewis* received disparate treatment under the same set of laws, which suggests fundamental unfairness. Legislatures and courts must agree on a concrete set of rules to govern the application of the amelioration doctrine to ensure that similarly situated defendants receive identical ameliorative benefits.

#### V. RESURRECTING THE AMELIORATION DOCTRINE

In line with the numerous protections afforded to the accused in criminal trials, states and the federal government should return to the common law amelioration doctrine. The first question that arises from this proposal is: To which defendants should amelioration apply? The nine states that provide for an ameliorative exception in their general saving statutes allow ameliorative changes up to the date of sentencing.<sup>273</sup> The amelioration doctrine has traditionally applied

[w]hen, between the time a person commits a criminal act and the time of sentencing, a criminal statute is repealed or a penalty reduced because of a changed view regarding the gravity of the crime, the amelioration doctrine dictates that the punishment standard at the *time of sentencing* should guide the sentence.<sup>274</sup>

Therefore, this position is the most doctrinally consistent. In addition, this position is the simplest to execute in practice. However, that does not mean that this stance is free from opposition. In *United States v. Douglas*, the First

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 754 (“It is certainly not so clear as to qualify as the functional equivalent of a savings clause.”).

<sup>273</sup> See, e.g., *State v. Chrisman*, 514 N.W.2d 57, 61 (Iowa 1994) (discussing Iowa’s general saving statute, embodied in Iowa Code section 4.13, which requires courts to apply ameliorative amendments at the time of sentencing). The statute’s ameliorative amendment clause states: “If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment if not already imposed shall be imposed according to the statute as amended.” IOWA CODE § 4.13 (2008 & Supp. 2013). The *Chrisman* court reiterated that “a penalty is ‘imposed’ at the time of sentencing.” *Chrisman*, 514 N.W.2d at 61 (citing *State v. Marvin*, 307 N.W.2d 10, 12 (Iowa 1981)). A convicted offender cannot benefit from an ameliorative change after sentencing. *State v. Hofmann*, 705 N.W.2d 506, 506 (Iowa Ct. App. 2005) (“*Chrisman* is distinguishable. In *Chrisman*, the defendant’s sentence was not imposed before the effective date of the amendment to the theft and burglary statutes. Here the amendments to Iowa Code section 903A.5 were effective after Hofmann’s sentence was imposed.”).

<sup>274</sup> *People v. Walker*, 623 N.E.2d 1, 4-5 (N.Y. 1993) (emphasis added) (quoting *People v. Oliver*, 134 N.E.2d 197, 197 (N.Y. 1956)).

Circuit discussed some of the problems associated with ameliorating penalties even for defendants who have pleaded guilty but have not yet been sentenced:

In some . . . plea agreements, the government may in exchange for the plea make concessions to the defendant such as the dismissal of other pending charges, promises as to recommended sentences and the like. To the extent that Congress thereafter reduces the penalties, the government in such a case may be deprived of the benefit of its bargain.<sup>275</sup>

At the opposite extreme, David Mitchell argues that amelioration should be applied to post-final judgment defendants.<sup>276</sup> This poses doctrinal as well as practical problems. There would be difficult procedural questions regarding the adjudication process. Application of the amelioration doctrine to post-judgment defendants would best be left to statute-by-statute discretion. Proposition 36 may serve as a model for legislating a process for adjudicating post-conviction claims.

Although doctrine and practicality are important, concerns of fairness and rationality should guide courts and legislatures to take an intermediate position. Ameliorative changes should apply to all defendants who have not yet received a finalized conviction—that is, to any defendant who has not yet been sentenced or whose appeal is pending.<sup>277</sup> This can be accomplished in either of two ways: legislatures can amend their general saving statutes,<sup>278</sup> or courts can adopt the reasoning of the California, Michigan, Minnesota, and New York courts, which interpret their states' general saving statutes to allow for mitigations in penalties for non-final conviction defendants. In line with those courts, other state courts should recognize that general saving statutes are merely a tool of statutory construction and ameliorative changes are an expression of contrary legislative intent. Legislatures should adopt modified versions of their general saving statutes to account for the doctrine of amelioration. While general saving statutes have a purpose in civil cases

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<sup>275</sup> 644 F.3d 39, 45 (1st Cir. 2011).

<sup>276</sup> Mitchell, *supra* note 3, at 20 (“The proposed retroactive amelioration statute provides a post-final judgment provision where individuals with finalized convictions can seek to have an ameliorative sentencing change applied to them through a sentence readjustment hearing.”).

<sup>277</sup> See Ann N. Bosse, *Retroactivity and the Supreme Court*, 41 Md. B.J. 30, 32 (2008) (“Under *Teague*, [a] state conviction and sentence become final for purposes of [the Supreme Court’s] retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari [in the United States Supreme Court] has elapsed or a timely petition has been finally denied.”).

<sup>278</sup> The three states with general saving provisions embodied in their constitutions (Florida, Oklahoma, and New Mexico) present a more difficult problem because these provisions have removed legislative discretion; these states’ constitutions must be amended. Cf. Ruud, *supra* note 15, at 298-99 (“Only a constitutional savings clause can eliminate discretion to destroy or save the rights, privileges, penalties and liabilities recognizable when a law is repealed.”).

because of reliance concerns, the legislature should make it explicit that the general saving statute does not apply to ameliorative changes in criminal penalties.<sup>279</sup>

#### CONCLUSION

There is a growing recognition that many criminal laws in the United States prescribe penalties that are too harsh. Legislatures and the public have started to reduce these penalties; the Fair Sentencing Act and Proposition 36 are two examples of recent ameliorative changes. Courts have struggled to adjudicate cases in which defendants committed crimes prior to the enactment of the Fair Sentencing Act and Proposition 36, but their convictions were not final at the time of enactment. Most general saving statutes require a court to impose the sentence in effect at the time the crime was committed; the common law amelioration doctrine guides courts to allow defendants to benefit from a sentence reduction. Furthermore, the Sentencing Reform Act also instructs courts to apply the Sentencing Guidelines in effect at the time of sentencing. As reform policies move through legislatures and referendum ballot boxes, courts will continue to be faced with the conflicting guidance of general saving statutes and the amelioration doctrine. At the very least, legislatures should act swiftly to amend their general saving statutes to clarify that defendants benefit from reductions in penalties in place at the time of sentencing. Legislatures should also consider drafting policies to account for defendants challenging their sentence on appeal and for post-final conviction defendants.

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<sup>279</sup> See Ruud, *supra* note 15, at 285-86.