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SYMPOSIUM ON CRIMINAL JUSTICE REFORM

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INTRODUCTION

In *Hall v. Florida*,¹ the Supreme Court of the United States recently held that the determination of whether a defendant is intellectually disabled—and thus ineligible for the death penalty under *Atkins v. Virginia*²—could not be based on IQ score alone. The Court required courts to look to standards used by the medical community when determining intellectual disability.³ The Court specifically cited to the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) when referencing the standards used by the medical community.⁴ Although intellectual disability is generally defined as having an IQ score of 70 or less,⁵ the DSM-5 accounts for the standard error of measurement (SEM) when measuring IQ scores due to the imprecision of IQ tests.⁶ The Court thus held that the SEM must be accounted for when courts are considering a defendant’s IQ score.⁷

Before either *Atkins* or *Hall* were decided, Gerald Ross Pizzuto, Jr., a man with an IQ of 72, was sentenced to death in Idaho.⁸ His habeas petition is currently under reconsideration due to possible *Hall* violations during his trial.⁹ The Idaho Supreme Court upheld the trial court’s determination that Pizzuto was not intellectually disabled based solely on his IQ score,¹⁰—which would have led to the conclusion that he had intellectual deficits if the SEM had been taken into account, as required by *Hall*.¹¹ The Idaho Supreme Court relied on the requirements set forth in Idaho Code § 19-2515A, which outlines what a defendant must prove in order to be precluded from receiving the death penalty based on intellectual disability.¹² However, Idaho Code § 19-2515A has not been brought into compliance with *Hall*. This is a critical issue, as

¹ *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

² *Atkins v. Virginia*, 536 U.S. 304, 321 (2001) (holding that imposing the death penalty on intellectually disabled defendants constitutes cruel and unusual punishment under the Eighth Amendment).

³ 134 S. Ct. at 1993 (noting “[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.”).

⁴ *Id.* at 1994.

⁵ *Id.* at 1990.

⁶ See, e.g., Leo M. Harvill, *An NCME Module on Standard Error of Measurement*, 10 EDUC. MEASUREMENT: ISSUES AND PRAC. 33 (1991), (finding “[t]he standard error of measurement (SEM) is the standard deviation of errors of measurement that are associated with test scores from a particular group of examinees . . . it can be helpful in expressing the unreliability of individual test scores in an understandable way.” A raw score on a test “is the number of points obtained by the examinee on the test . . . [t]hese scores can be influenced by a number of factors.” A true score “represents that part of an examinee’s score uninfluenced by random events.” The error of measurement is the difference between the obtained score and the theoretical true score.).

⁷ *Hall*, 134 S. Ct. at 2001 (concurring “[t]his Court agrees with the medical experts that when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.”).

⁸ *Pizzuto v. State*, 202 P.3d 642, 651 (Idaho 2008).

⁹ *Pizzuto v. Blades*, 758 F.3d 1178, 1178 (D. Idaho 2014).

¹⁰ *Pizzuto v. State*, 146 Idaho 720, 728–29, 202 P.3d 642, 651 (Idaho 2007) (stating “[t]he alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts. It would be just as reasonable to infer that Pizzuto’s IQ . . . was 77 as it would be to infer that it was 67.”).

¹¹ See *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014) (stating “[a] score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence.”).

¹² *Pizzuto*, 146 Idaho at 728–29, 202 P.3d at 650–51.

Hall makes clear imposing death on an intellectually disabled person not only “contravenes the Eighth Amendment” but also “violates his or her inherent dignity as a human being.”¹³

This article advocates for revision of Idaho Code § 19-2515A in light of *Atkins* and *Hall*. Part I of this article explains why intellectually disabled offenders need certain protections within the criminal justice system.¹⁴ Part I also provides an overview of the Supreme Court’s precedent addressing the imposition of the death penalty on intellectually disabled offenders.¹⁵ Part II provides an overview of *Pizzuto v. Blades*.¹⁶ Part II also includes Idaho Code § 19-2515A’s definition of intellectual disability and explains how the Idaho Supreme Court’s interpretation of that statute was inconsistent with the principles set forth in *Hall*.¹⁷ Part III explains why Idaho Code § 19-2515A should be amended as well as why the DSM-5’s definition should be used.¹⁸ Part III also argues the current requirement that defendants must prove their deficits in intellectual and adaptive functioning developed before the age of eighteen should be eliminated.¹⁹ Part III addresses burden of proof requirements as well. Part III additionally recommends amending the current language in Idaho Code § 19-2515A by changing the term “mentally retarded” to “intellectually disabled”²⁰ because the term “retarded” can be offensive to individuals with intellectual disabilities and their family members.²¹

I. PROTECTIONS FOR THE INTELLECTUALLY DISABLED WITHIN THE CRIMINAL JUSTICE SYSTEM

There are three main rationales justify affording individuals with intellectual disabilities certain leniencies and protections within the criminal justice system. First, individuals with intellectual disabilities are categorically less culpable because of their diminished capacities.²² Second, individuals with intellectual disabilities are less capable of acting in their own best interest throughout criminal proceedings.²³ Third, penological purposes are not served by imposing capital punishment on intellectually disabled offenders.²⁴

Society has traditionally granted leniency towards defendants who were unable to differentiate between right and wrong because these deficiencies diminish their culpability.²⁵ In 1844, Justice Lemuel Shaw reasoned:

[I]n order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers

¹³ *Hall*, 134 S. Ct. at 1992.

¹⁴ *See infra* Part I.

¹⁵ *See infra* Part I.

¹⁶ *See infra* Part II.

¹⁷ *See infra* Part II.

¹⁸ *See infra* Part III.

¹⁹ *See infra* Part III.

²⁰ *See infra* Part III.

²¹ Joanna Lin, ‘Intellectual Disability’ Bill Would Replace the Term ‘Retarded’ in Calif. Regulations and Publications, HUFFINGTON POST, http://www.huffingtonpost.com/2012/08/28/intellectual-disability-bill-replace-retarded_n_1837476.html.

²² *Atkins v. Virginia*, 536 U.S. 304, 318 (2001).

²³ *Id.* at 320–21.

²⁴ *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

²⁵ *See Allison C. Carey, ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH CENTURY AMERICA* 45 (2010).

are either so deficient that he has no will, no conscience, or controlling mental power. . . he is not a responsible moral agent, and is not punishable for criminal acts.²⁶

In *Atkins*, the Supreme Court clarified that individuals with intellectual disabilities are not exempt from criminal sanctions, but their personal culpability is diminished.²⁷ The Court concluded that, based on society's "evolving standards of decency," sentencing an intellectually disabled defendant to death would violate the Eighth Amendment's ban on cruel and unusual punishments.²⁸

Intellectually disabled defendants need protections within the criminal justice system because they "have a diminished ability to understand and process information" and can have problems with impulse control, which inhibits their ability to act in their own best interest.²⁹ Individuals with intellectual disabilities are also more likely to give false confessions and are often unable to provide meaningful assistance to their counsel.³⁰

The recent acquittal of two intellectually disabled men illustrates this point.³¹ Henry Lee McCollum and Leon Brown both spent thirty years on death row for the rape and murder of an eleven-year-old girl before they were exonerated by DNA evidence in 2014.³² The prosecution had no physical evidence tying the two men to the crime.³³ Law enforcement only questioned the two men because "a local teenager cast suspicion on Mr. McCollum."³⁴ Mr. McCollum and Mr. Brown, who were half-brothers, were new to the town and were considered to be "outsiders."³⁵ Both men gave false confessions that appeared to result from coercive police questioning, but each quickly recanted his statement.³⁶

Mr. McCollum and Mr. Brown's lack of understanding about the implications of their false confessions demonstrates the inability of those with intellectual disabilities to act in their own best interest throughout criminal proceedings. Mr. McCollum, who had "the mental age of a nine-year-old," was questioned for five hours with no attorney and he was not allowed to see his mother.³⁷ Mr. McCollum explained "I had never been under so much pressure, with a person hollering at me and threatening me. . . . I just made up a story and gave it to them so they would

²⁶ *Id.*

²⁷ *Atkins*, 536 U.S. at 318 (stating "[t]here is no evidence that [the intellectually disabled] are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.").

²⁸ *Id.* at 321 (concluding that "[c]onstruing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.").

²⁹ *Id.* at 320-21.

³⁰ *Id.* at 320.

³¹ Jonathan M. Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES,

http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html?_r=0.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Katz & Eckholm, *supra* note 31.

let me go home.”³⁸ Similarly, Mr. Brown signed a confession after law enforcement told him that Mr. McCollum had confessed and he could face execution if he did not cooperate.³⁹

Intellectually disabled offenders should receive death penalty exemption because “[n]o legitimate penological purpose is served by executing a person with intellectual disability.”⁴⁰ There are three penological rationales that justify imposing criminal punishment: rehabilitation, deterrence, and retribution.⁴¹ The rehabilitation rationale does not apply in death penalty cases because the defendant will never be released back into society.⁴² The deterrence rationale does not apply because individuals with intellectual disabilities “have a diminished ability to process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . which makes it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”⁴³ Finally, the retributive rationale does not apply because individuals who suffer from intellectual disabilities have “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”⁴⁴ Because having an intellectual disability lessens an individual’s moral culpability, the “retributive value of the punishment” is diminished.⁴⁵

Whether intellectually disabled offenders are subject to the death penalty was first addressed by the Court in *Penry v. Lynaugh*, which was decided in 1989.⁴⁶ In *Penry* the Court held that the Eighth Amendment did not preclude an intellectually disabled defendant from receiving the death penalty “simply by virtue of his or her mental retardation alone.”⁴⁷ States responded to this ruling by enacting laws that expressly exempted intellectually disabled offenders from receiving the death penalty.⁴⁸

Penry was abrogated thirteen years later in *Atkins v. Virginia*.⁴⁹ The Court reasoned that state law exemptions constituted evidence of a “direction of change” in societal views regarding the culpability of intellectually disabled offenders.⁵⁰

³⁸ Katz & Eckholm, *supra* note 31.

³⁹ *Id.*

⁴⁰ Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

⁴¹ *Id.*

⁴² *See id.* at 1993.

⁴³ *Id.*

⁴⁴ *Atkins v. Virginia*, 536 U.S. 304, 318 (2001).

⁴⁵ Hall, 134 S. Ct. at 1993.

⁴⁶ *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989), *superseded by statute*, TENN. CODE ANN. § 39-13-203 (2015), *as recognized in* *Keen v. State*, 398 S.W.3d 594, 601 (Tenn. 2012).

⁴⁷ *Penry* at 340 (holding “[i]n sum, mental retardation is a factor that may well lessen a defendant’s culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry’s ability convicted of a capital offense simply by virtue of his or her mental retardation alone. So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether ‘death is the appropriate punishment’ can be made in each particular case. While a national consensus against execution of the mentally retarded may someday emerge reflecting the ‘evolving standards of decency that mark the progress of a maturing society,’ there is insufficient evidence of such a consensus today.”).

⁴⁸ *Atkins*, 536 U.S. at 314–15.

⁴⁹ *See id.* at 321.

⁵⁰ *Id.* at 315–16.

A. Atkins v. Virginia

On August 16, 1996, Daryl Renard Atkins and his accomplice, William Jones, abducted a man named Eric Nesbitt.⁵¹ Atkins and Jones robbed Nesbitt and drove him to an ATM machine to withdraw money.⁵² Nesbitt was then driven to an isolated location and shot eight times with a semiautomatic handgun.⁵³ Nesbitt died from these injuries.⁵⁴ Both Atkins and Jones testified at Atkins's trial.⁵⁵ Their testimony about the crime was similar. However, each accused the other of Nesbitt's murder.⁵⁶ Jones's testimony was "more coherent and credible than Atkins's,"⁵⁷ which helped the prosecution secure convictions of "abduction, armed robbery, and capital murder" against Atkins.⁵⁸

During the penalty phase of Atkins's trial, a forensic psychologist concluded that Atkins was "mildly mentally retarded."⁵⁹ This conclusion was based on "interviews with people who knew Atkins, a review of school and court records," and Atkins's score of 59 on an IQ test.⁶⁰ Despite this showing of intellectual disability, the jury sentenced Atkins to death.⁶¹ Due to a misleading jury form, Atkins was resentenced. At the resentencing hearing, the State presented a rebuttal witness who testified that Atkins "was of average intelligence, at least, and diagnosable as having antisocial personality disorder."⁶² Atkins was resentenced to death.⁶³ Atkins appealed his sentence to the Virginia Supreme Court, arguing that he could not be sentenced to death because of his intellectual disability, but the Virginia Supreme Court affirmed his sentence.⁶⁴

The United States Supreme Court reversed the ruling of the Virginia Supreme Court, holding that imposing the death penalty on intellectually disabled offenders is an excessive punishment and "that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender."⁶⁵ The Court further noted that whether a punishment was excessive was based on the "evolving standards of decency that mark the progress of a maturing society,"⁶⁶ and laws passed by the nation's legislatures provide the "clearest and most reliable objective evidence" of those standards.⁶⁷ The Court determined that "society views mentally retarded offenders as categorically less culpable than the average criminal" because state legislatures had consistently enacted legislation exempting the intellectually disabled from receiving the death penalty.⁶⁸

⁵¹ *Id.* at 307.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 308.

⁶⁰ *Id.* at 308–09.

⁶¹ *Id.* at 309.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 310.

⁶⁵ *Id.* at 321.

⁶⁶ *Id.* at 311–12.

⁶⁷ *Id.* at 312.

⁶⁸ *Id.* at 315–16.

Chief Justice Rehnquist dissented and was joined by Justices Scalia and Thomas.⁶⁹ According to Chief Justice Rehnquist, it was error for the Court to “place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion.”⁷⁰ Moreover, he cautioned against using the Eighth Amendment to circumvent the legislative process.⁷¹ In his view, the only indicators of contemporary societal values for purposes of the Eighth Amendment should be “the work product of legislatures and sentencing jury determinations.”⁷²

Justice Scalia separately dissented and was joined by Chief Justice Rehnquist and Justice Thomas.⁷³ Justice Scalia criticized the majority’s determination that there was a national consensus against executing the intellectually disabled.⁷⁴ According to Justice Scalia, determinations about society’s evolving standards of decency “should be informed by objective factors to the maximum possible extent and should not be, or appear to be, merely the subjective views of individual Justices.”⁷⁵ Justice Scalia argued that the majority paid “lip service” to this precedent by “miraculously extract[ing] a national consensus” against executing the intellectually disabled simply because eighteen states enacted laws prohibiting the execution of the intellectually disabled.⁷⁶

Notwithstanding the dissenters’ concerns, the majority concluded that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus,” and thus left the task of defining who qualifies as a “mentally retarded offender” to the states.⁷⁷ The Court did not specify whether the states had to rely on a particular clinical definition when defining intellectual disability.⁷⁸ In fact, the Court cited to two similar definitions of intellectual disability: one from the American Association of Mental Retardation (AAMR) and another from the American Psychiatric Association (APA).⁷⁹ When reciting these two definitions, the Court did not mention that courts must account for the SEM.⁸⁰ The states consistently enacted legislation that resembled the definitions from the AAMR and the APA, but the states varied as to whether their legislation accounted for the SEM.⁸¹ For example, legislation in Kentucky and Florida set a fixed cutoff score at 70, thereby not accounting for the SEM.⁸² In contrast, legislation in California, Nevada,

⁶⁹ *Id.* at 321.

⁷⁰ *Id.* at 322.

⁷¹ *Id.* at 323.

⁷² *Id.* at 324.

⁷³ *Id.* at 337.

⁷⁴ *Id.* at 347 (stating “[b]ut the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.”).

⁷⁵ *Id.* at 341.

⁷⁶ *Id.* at 342.

⁷⁷ *See id.* at 317.

⁷⁸ *See Id.* at 317.

⁷⁹ *Id.* at 317, note 3.

⁸⁰ *Id.*

⁸¹ Compare UTAH CODE ANN. § 77-15a-102 (West 2015), with CAL. PENAL CODE ANN. § 1376 (West Supp. 2015).

⁸² See KY. REV. STAT. ANN. § 532.130(2) (West 2015), FLA. STAT. ANN. § 921.37 (West 2015).

and Utah did not set any sort of IQ score cutoff, so courts could have accounted for the SEM.⁸³ According to the Supreme Court, “a significant majority of the States” took the SEM into account.⁸⁴

As demonstrated, the states struggled with the determination of how intellectual disability should be defined for purposes of *Atkins*. However, *Hall v. Florida* addressed the issue of “how intellectual disability must be defined in order to implement. . . the holding of *Atkins*.”⁸⁵

B. *Hall v. Florida*

In 1978, Freddie Lee Hall and an accomplice “kidnap[p]ed, beat, raped, and murdered” a pregnant twenty-one-year-old newlywed.⁸⁶ The two men then drove to a convenience store they intended to rob.⁸⁷ A sheriff’s deputy was killed in the store’s parking lot during an attempt to apprehend Hall and his accomplice.⁸⁸ Hall was originally sentenced to death, but before his execution, the Court held that capital defendants must be permitted to present nonstatutory mitigating evidence in capital punishment proceedings.⁸⁹ At a resentencing hearing, Hall set forth substantial evidence demonstrating that he was intellectually disabled.⁹⁰ This evidence included school records, his lawyer’s testimony, clinical testimony, testimony from his siblings, and evidence of severe physical abuse by his mother due to her frustrations with his mental deficiencies.⁹¹ A jury resentenced Hall to death.⁹²

After *Atkins* was decided, Hall alleged he was ineligible for the death penalty due to his intellectual disability.⁹³ At a hearing on this motion, Hall again presented evidence of intellectual disability, including an IQ test score of 71.⁹⁴ The Florida Supreme Court rejected Hall’s appeal because his failure to show an IQ score below 70 precluded him from “presenting any additional evidence of his intellectual disability.”⁹⁵ The Court disagreed and held that “when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.”⁹⁶

The *Hall* Court reasoned that the medical community’s opinions should be consulted when determining who qualified as intellectually disabled.⁹⁷ The Court turned to the fifth edition

⁸³ CAL. PENAL CODE ANN. § 1376 (West Supp. 2015), NEV. REV. STAT. § 174.098.7 (West 2015), UTAH CODE ANN. § 77-15a-102 (West 2015).

⁸⁴ *Hall v. Florida*, 134 S. Ct. 1986, 1996 (2014).

⁸⁵ *Id.* at 1993.

⁸⁶ *Id.* at 1990.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1990–91.

⁹¹ *Id.*

⁹² *Id.* at 1991.

⁹³ *Id.* at 1991–92.

⁹⁴ *Id.* at 1992.

⁹⁵ *Id.*

⁹⁶ *Id.* at 2001.

⁹⁷ *Id.* at 1993 (stating that “[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.”).

of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5),⁹⁸ which “defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning . . . and onset of these deficits during the developmental period.”⁹⁹ Due to the “inherent imprecision of” IQ tests, the medical community advised that IQ scores be read as a range of scores.¹⁰⁰ In other words, a standard error of measure (SEM) of 5 IQ points should be accounted for when determining IQ scores.¹⁰¹ This means that if an individual scores 71 on an IQ test, his or her true IQ score lies within a range of 66 to 76.¹⁰²

In dissent, Justice Alito, joined with Chief Justice Roberts and Justices Scalia and Thomas, argued that the task of determining who qualifies as intellectually disabled should be left to society rather than the medical community.¹⁰³ According to Justice Alito, when the Court refers to “evolving standards of a maturing ‘society,’ the Court meant the standards of *American society as a whole* . . . [rather than] the evolving standards of *professional societies*, most notably the American Psychiatric Association.”¹⁰⁴ Justice Alito’s solution of leaving the determination of who is intellectually disabled to society as a whole is problematic because society has a “preprogrammed notion of how someone with an intellectual disability looks and acts.”¹⁰⁵ Because of their inherent lack of expertise with diagnosing mental illness, “courts may have a preconceived notion of what intellectual disability looks like that is inconsistent with what mild intellectual disability looks like to professionals with training and experience in the field.”¹⁰⁶ Thus, it is better for legislatures to adopt the medical community’s definition of intellectual disability, which is embodied in the DSM-5. Legislatures are not experts in defining intellectual disability. This lack of expertise could lead to executions of the intellectually disabled if statutes were merely informed by legislators’ stereotypes.

Justice Alito also criticized using the DSM-5 because its definition may change over time.¹⁰⁷ While the medical community may change definitions over time, the overall framework for diagnosing intellectual disability under the DSM has remained constant for decades.¹⁰⁸ Since 1968, “each edition of the DSM has defined intellectual disability as subaverage intellectual functioning that is either ‘associated with,’ ‘resulting in,’ or ‘accompanied by’ impairments in

⁹⁸ American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 33 (5th ed. 2013) [hereinafter *DSM-5*] (pointing out “[a]s the Court noted in *Atkins*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.”), *cited by* *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014).

⁹⁹ *Hall*, 134 S. Ct. at 1994.

¹⁰⁰ *Id.* at 1995.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.* at 2002.

¹⁰⁴ *Id.*

¹⁰⁵ Natalie Cheung, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 *Health Matrix* 317, 342–43 (2013).

¹⁰⁶ *Id.* at 343.

¹⁰⁷ *Hall*, 134 S. Ct. at 2006. (Alito, J., dissenting) (noting “because the views of professional associations often change, tying Eighth Amendment law to these views will lead to instability and continue to fuel protracted litigation.”).

¹⁰⁸ *See* Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 12, *Hall v. Florida*, 134 S. Ct. 1986 (2014) (No. 12-10882) [hereinafter *APA AMICUS BRIEF*].

adaptive behavior.”¹⁰⁹ Moreover, the DSM-IV-TR accounted for a 5-point standard error of measurement for IQ tests, similar to the DSM-5.¹¹⁰ However, there were a few minor changes between the definition of intellectual disability in the DSM-IV-TR and the DSM-5.¹¹¹ The DSM-IV-TR expressly referred to IQ scores in the definition of “significantly subaverage intellectual functioning,” whereas the DSM-5 does not.¹¹² Also, the DSM-IV-TR requires the onset of intellectual disability to be before the age of 18, whereas the DSM-5 requires the onset to be before the end of the developmental period.¹¹³ Thus, statutes that mirror the language of the DSM-5 may need to be amended over time to reflect changes in the DSM-5’s diagnostic framework. However, making these potential amendments would be consistent with one of the key principles set forth in *Atkins* and *Hall*—which is that the Eighth Amendment draws its meaning “from the evolving standards of decency that mark the progress of a maturing society.”¹¹⁴

II. PIZZUTO V. BLADES

Before *Hall*, the Idaho Supreme Court reached a similar conclusion as the Florida Supreme Court in *Pizzuto v. Blades*.¹¹⁵ The Idaho Supreme Court did not account for the SEM when it determined that a defendant with an IQ of 72 did not have a valid *Atkins* claim because “the legislature did not require that the IQ score be within five points of 70 or below . . . [and] the court could just as reasonably have inferred that [the score] was higher.”¹¹⁶

In 1985, Gerald Ross Pizzuto approached Berta Herndon and Del Herndon, Berta’s nephew, as they arrived at their mountain cabin.¹¹⁷ Pizzuto brandished a .22 caliber rifle and forced the Herndons into the cabin.¹¹⁸ Pizzuto tied their wrists behind their backs and bound their legs.¹¹⁹ Berta was bludgeoned to death with a hammer.¹²⁰ Del was bludgeoned with a hammer and shot between the eyes.¹²¹ Pizzuto murdered the Herndons “just for the sake of killing and subsequently joked and bragged about the killings to his associates.”¹²²

A jury convicted Pizzuto of “two counts of murder in the first degree, two counts of felony murder, one count of robbery, and one count of grand theft.”¹²³ Pizzuto was sentenced to death.¹²⁴ After *Atkins*, Pizzuto filed a petition for post-conviction relief, alleging that he was

¹⁰⁹ *Id.*

¹¹⁰ American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., Text Revision 2000) [hereinafter DSM-IV-TR].

¹¹¹ Compare DSM-IV-TR, *supra* note 110, at 49, with DSM-5, *supra* note 98, at 33.

¹¹² Compare DSM-IV-TR, *supra* note 110, at 49, with DSM-5, *supra* note 98, at 33.

¹¹³ Compare DSM-IV-TR, *supra* note 110, at 49, with DSM-5, *supra* note 98, at 33.

¹¹⁴ *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2001); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

¹¹⁵ See 202 P.3d 642, 651 (Idaho 2007).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 745.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Pizzuto v. State*, 202 P.3d 642, 645 (Idaho 2007).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

intellectually disabled and thus ineligible for the death penalty.¹²⁵ After Pizzuto produced evidence of an IQ score of 72, the district court dismissed his petition because he “failed to raise a genuine issue of material fact supporting his claim of mental retardation.”¹²⁶ Idaho Code § 19-2515A governed the determination of whether Pizzuto was intellectually disabled.¹²⁷ Idaho Code § 19-2515A provides, in part:

“Mentally retarded” means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years. “Significantly subaverage general intellectual functioning” means an intelligence quotient of seventy (70) or below.¹²⁸

The Code further provides that “[i]f the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed.”¹²⁹

On review of the lower court’s rejection of Pizzuto’s claim that he was ineligible for death, the Idaho Supreme Court held that Pizzuto had the burden of proof under Section 19-2515A for the following three elements: “(1) an intelligence quotient (IQ) of 70 or below; (2) significant limitations in adaptive functioning in at least two of the ten areas listed; and (3) the onset of [these limitations] . . . must have occurred before the offender turned age eighteen.”¹³⁰ Although this definition seems comparable to that of the DSM-5, the Idaho Supreme Court’s reasoning is in sharp contrast to *Hall*.¹³¹

Pizzuto argued that “an IQ score is only accurate within five points,” and thus his actual IQ score could have been higher or lower than 72.¹³² The Idaho Supreme Court rejected this argument because the court “could just as reasonably have inferred that [Pizzuto’s score] was higher.”¹³³ The Idaho Supreme Court reasoned, “when enacting Idaho Code § 19-2515A, the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below.”¹³⁴ Thus, the Idaho Supreme Court expressly rejected accounting for the SEM when determining a defendant’s intellectual disability.¹³⁵

The Idaho Supreme Court concluded that “[s]ignificant limitations in adaptive functioning alone will not bring an offender within the protection of the statute.”¹³⁶ In contrast, *Hall* noted that, according to the medical community, deficits in adaptive functioning could be

¹²⁵ *Id.*

¹²⁶ *Id.* at 650.

¹²⁷ Pizzuto v. State, 202 P.3d 642, 650 (Idaho 2007).

¹²⁸ IDAHO CODE § 19-2515A(1)(a)–(b) (2015).

¹²⁹ IDAHO CODE § 19-2515A(3) (2015).

¹³⁰ Pizzuto v. State, 202 P.3d 642, 651 (Idaho 2007).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

“probative of intellectual disability.”¹³⁷ This includes individuals who have an IQ score above 70.¹³⁸ Moreover, IQ scores are “less valid in the lower end of the IQ range.”¹³⁹ Therefore, the levels of severity of intellectual disability are based solely on adaptive functioning levels, not IQ scores.¹⁴⁰

In addition, the Idaho Supreme Court concluded that Pizzuto had to prove he was intellectually disabled at the time of the murders and that his intellectual disability developed before he turned eighteen.¹⁴¹ However, the court’s rationale for this requirement seemed to focus primarily on the defendant’s intellectual functioning at the time of the crimes.¹⁴² The court reasoned:

The rationale for exempting mentally retarded murderers from the death penalty is based upon their mental impairments at the time they committed the killings and, to a lesser extent, during their criminal trials and sentencing hearings. The exemption should be no broader than its supporting rationale. Thus, an offender would not be entitled to relief based upon *Atkins v. Virginia* if he was mentally impaired at the time of his crime, and possibly through his sentencing, but it was not until later that his mental condition deteriorated to the point of becoming mentally retarded.¹⁴³

The court was seemingly concerned that defendants may try to seek *Atkins* protection by showing their intellectual functioning deteriorated after they committed their crimes.¹⁴⁴ The court did not provide any rationale for why the age of onset requirement should prevent defendants from bringing *Atkins* claims based on an intellectual impairment that developed after the crimes were committed.¹⁴⁵

The Ninth Circuit relied heavily on the Idaho Supreme Court’s reasoning when it affirmed the United States District Court’s denial of Pizzuto’s habeas petition.¹⁴⁶ Pizzuto argued that the Idaho Supreme Court unreasonably applied *Atkins* and unreasonably determined the facts.¹⁴⁷ The Ninth Circuit noted, “the Supreme Court gave some leeway to state legislators to craft their own standard for what constitutes mental retardation.”¹⁴⁸ According to the Ninth Circuit, the Idaho Supreme Court did not have to account for the standard error of measurement and the strict 70-point cutoff sufficiently protected the *Atkins* class.¹⁴⁹ The Ninth Circuit held that

¹³⁷ Hall, 134 S. Ct. at 1994.

¹³⁸ DSM-5, *supra* note 98, at 37 (stating “[t]he relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist.”), *cited by* Hall v. Florida, 134 S. Ct. 1986, 1994-95 (2014).

¹³⁹ DSM-5, *supra* note 98, at 33.

¹⁴⁰ *Id.*

¹⁴¹ Pizzuto v. State, 146 Idaho 720, 733, 202 P.3d 642, 655 (2007).

¹⁴² *Id.* at 732.

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See generally id.* at 731–33.

¹⁴⁶ Pizzuto v. Blades, 729 F.3d 1211, 1224 (9th Cir. 2013).

¹⁴⁷ *Id.* at 1216.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1218 (stating “*Atkins* does not mandate any particular form of calculating IQ’s, including the use of . . . SEM”).

the Idaho Supreme Court's treatment of statistical adjustments in determining whether Pizzuto was intellectually disabled was not unreasonable.¹⁵⁰ Despite its agreement with the Idaho Supreme Court, the Ninth Circuit remanded Pizzuto's case to the United States District Court for the District of Idaho for reconsideration in light of *Hall*.¹⁵¹

III. WHY IDAHO CODE § 19-2515A SHOULD BE AMENDED

Atkins left the responsibility of defining intellectual disability to the States.¹⁵² However, *Atkins* “did not give the States unfettered discretion to define the full scope of the constitutional protection.”¹⁵³ The Court later explained in *Hall* that “[i]f the States were to have complete autonomy to define intellectual disability as they wished . . . *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.”¹⁵⁴ *Hall* read *Atkins* to provide “substantial guidance on the definition of intellectual disability” because *Atkins* cited the DSM-IV's definition of intellectual disability and further acknowledged “the inherent error in IQ testing.”¹⁵⁵ The *Hall* Court relied on the DSM-5's definition of “intellectual disability.”¹⁵⁶

The Idaho legislature has not adopted the DSM-5's definition of intellectual disability that was relied upon in *Hall*.¹⁵⁷ In recent years, the DSM has “effectively become the ‘bible of psychiatry,’” with “[p]ractically every court decision relating to mental health” looking to the DSM for explanation.¹⁵⁸ “This increased reliance on the DSM is likely due to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which held that expert testimony may only be admissible within the bounds of Federal Rule of Evidence 702 if the theory upon which the testimony is based is generally accepted in the scientific community, has been subjected to peer review and publication, has been tested or can be tested, and the potential rate of error for the theory is known and within reasonable bounds.”¹⁵⁹ The DSM meets all the requirements set forth in *Daubert*, and reliance on the DSM is so prevalent that “failure to refer to and comply with the DSM may provide the basis for a *Daubert* challenge to admissibility of expert mental health testimony.”¹⁶⁰ Thus, the DSM, “along with [its] most recent revisions, reflect[s] the professional consensus regarding the diagnosis of intellectual disability.”¹⁶¹

The Idaho Supreme Court has relied on the DSM to determine mental health issues in the past.¹⁶² For example, in 2013, the Idaho Supreme Court held that an employee did not “suffer a compensable psychological injury,” and was thus ineligible for worker's compensation, because

¹⁵⁰ *Id.* at 1223.

¹⁵¹ *Pizzuto v. Blades*, 758 F.3d 1178, 1178 (D. Idaho 2014).

¹⁵² *See Atkins v. Virginia*, 536 U.S. 304, 317 (2001).

¹⁵³ *Hall v. Florida*, 134 S. Ct. 1986, 1998.

¹⁵⁴ *Id.* at 1999.

¹⁵⁵ *Id.* at 1998–99.

¹⁵⁶ *Id.* at 1994.

¹⁵⁷ *Id.*

¹⁵⁸ *See Kate Janse Van Rensburg, The DSM-5 and Its Potential Effects on Atkins v. Virginia*, 3 U. MEMPHIS SCHOOL OF L. MENTAL HEALTH L. & POL'Y J. 90 (2013).

¹⁵⁹ *Id.* at 91–92.

¹⁶⁰ *Id.* at 92.

¹⁶¹ *See APA AMICUS BRIEF, supra* note 108, at 8.

¹⁶² *See Mazzone v. Tex. Roadhouse, Inc.*, 302 P.3d 718, 727, 730 (Idaho 2013).

a physician's professional opinion was "insufficient to establish a DSM-IV-TR diagnosis of PTSD."¹⁶³

The American Psychiatric Association (APA) publishes the DSM.¹⁶⁴ The APA is the "world's largest psychiatric organization representing more than 36,000 psychiatric physicians from the United States and around the world."¹⁶⁵ The DSM-5 was published in 2013¹⁶⁶ and is "the handbook used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders."¹⁶⁷ It defines and classifies mental disorders, including intellectual disability.¹⁶⁸ The DSM-5 defines intellectual disability as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.¹⁶⁹

According to the DSM-5, individuals with intellectual disability have IQ scores that are "approximately two standard deviations or more below the population mean."¹⁷⁰ The DSM-5 requires that the SEM be accounted for when assessing these scores.¹⁷¹

Standard deviation is a measurement that is used for determining the normal distribution of a data set.¹⁷² Standard deviation "is a measure of how far away individual measurements tend to be from the mean value of a data set."¹⁷³ Within a normally distributed set of scores, 68 percent of the scores "should fall within one standard deviation of the mean," 95 percent of scores should fall "within two standard deviations of the mean," and 99.7 percent of the scores

¹⁶³ *Id.* at 724.

¹⁶⁴ Cheung, *supra* note 105, at 321.

¹⁶⁵ *Id.*

¹⁶⁶ *See generally* DSM-5, *supra* note 98.

¹⁶⁷ *Frequently Asked Questions*, AMERICAN PSYCHIATRIC ASSOCIATION, <http://www.dsm5.org/about/Pages/faq.aspx>, (last visited Mar. 26, 2016).

¹⁶⁸ *See* DSM-5, *supra* note 98, at 33.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 37.

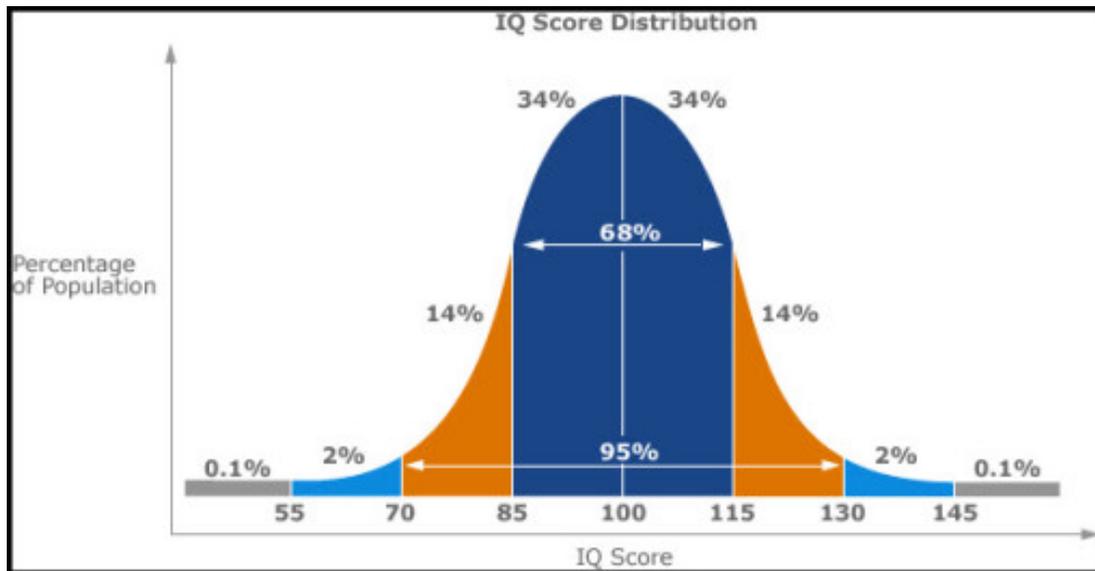
¹⁷¹ *See id.*

¹⁷² Andy Kiersz, *Here's What Nerds Mean When They Say 'Standard Deviation,'* BUS. INSIDER, (Dec. 2, 2014, 1:17 PM), <http://www.businessinsider.com/standard-deviation-2014-12>.

¹⁷³ *Id.*

should fall “within three standard deviations of the mean.”¹⁷⁴ In the context of IQ scores, the average score is 100, with a standard deviation of 15 points.¹⁷⁵ This means that approximately 68 percent of the population has an IQ between 85 and 115, and 95 percent of the population has an IQ between 70 and 130.¹⁷⁶ Figure 1 illustrates this distribution.¹⁷⁷

Figure 1



People with intellectual disabilities, “have scores of approximately two standard deviations or more below the population mean, including a margin for measurement of error.”¹⁷⁸ This “margin for measurement of error” means that the SEM must be accounted for when assessing IQ scores for purposes of determining intellectual disability.¹⁷⁹ The *Hall* Court described the SEM as “a statistical fact, a reflection of the inherent imprecision of the test itself.”¹⁸⁰ The SEM can also be described as “a determination of the amount of variation or spread in the measurement of errors for a test.”¹⁸¹ The SEM is essentially the standard deviation of the measurement errors associated with test scores.¹⁸² A measurement of error, “is the difference between an examinee’s actual or obtained score and the theoretical true score counterpart.”¹⁸³ A raw score is the number of points obtained by an individual on a test.¹⁸⁴ Raw scores can be influenced by a number of factors such as fatigue, ambiguous questions, or disinterest in taking the test.¹⁸⁵ A true score represents the part of an individual’s “observed score

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ DSM-5, *supra* note 98, at 37.

¹⁷⁹ *See* DSM-5, *supra* note 98, at 37.

¹⁸⁰ *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014).

¹⁸¹ Leo M. Harvill, *An NCME Instructional Module on Standard Error of Measurement*, 10 EDUC. MEASUREMENT: ISSUES AND PRAC. 33 (1991).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

uninfluenced by random events.”¹⁸⁶ The SEM is used to determine the variation between an individual’s raw score and his or her theoretical true score.¹⁸⁷ Thus, the SEM can be “helpful in expressing the unreliability of individual test scores in an understandable way.”¹⁸⁸

In the context of IQ scores, the SEM ranges between 2.16 and 2.30 IQ points, depending on the test.¹⁸⁹ Accounting for one SEM “equates to a confidence of 68% that the measured score falls within a given score range,” and accounting for two SEM “provides a 95% confidence level that the measured score is within a broader range.”¹⁹⁰ For example, if an individual scores 70 points on an IQ test and the SEM for that test is 2.30 IQ points, then there is a 68% confidence level that the individual’s true score is somewhere between 67.70 and 72.30 IQ points.¹⁹¹ Moreover, there is a 95% confidence level that the individual’s true score is between 65.40 and 74.60 IQ points.¹⁹²

According to the APA, the “margin for measurement of error” is 5 IQ points.¹⁹³ In *Hall*, the Court agreed, “with the medical experts that when a defendant’s IQ score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability.”¹⁹⁴ Since the test’s margin of error is 5 points, any defendant who scores 75 or below on an IQ test must be allowed to present further evidence of intellectual disability if the court is assessing his or her eligibility for the death penalty.¹⁹⁵

Thus, Idaho Code § 19-2515A should be amended to achieve greater consistency with the DSM-5, which would include taking into account the SEM. The Court in *Hall* stated, “it is proper to consult the medical community’s opinions” when defining intellectual disability.¹⁹⁶ *Hall* also explained that the medical community uses the criteria set forth in the DSM-5 for determining intellectual disability.¹⁹⁷ This article proposes language similar to the DSM-5, with the exception of eliminating the age of onset requirement for reasons discussed below. The proposed language is as follows:

¹⁸⁶ *Id.*

¹⁸⁷ Harvill, *supra* note 181, at 35. (Assuming that an individual’s raw scores will vary if given multiple similar versions of a test, and assuming these raw scores are normally distributed, then the average raw score should be a good measure of the individual’s true score. This means that the SEM is the standard deviation of the distribution of raw scores.)

¹⁸⁸ Harvill, *supra* note 181, at 33.

¹⁸⁹ See APA AMICUS BRIEF, *supra* note 108, at 23 (noting “the average SEM for the WAIS-IV is 2.16 IQ test points and the average SEM for the Stanford-Binet 5 is 2.30 IQ test points.”).

¹⁹⁰ See APA AMICUS BRIEF, *supra* note 108, at 1.

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ DSM-5, *supra* note 98, at 37. This “margin for measurement of error” seems to reflect an SEM of 2.5 at a confidence level of 95%. For example, in *Hall* the Court stated “[a] score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence . . .” *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014).

¹⁹⁴ *Hall*, 134 S. Ct. at 2001.

¹⁹⁵ *See id.*

¹⁹⁶ *Id.* at 1993.

¹⁹⁷ *Id.* at 1994.

1. A defendant shall not be sentenced to death if, at the time of the offense, the defendant had significant limitations in both intellectual and adaptive functioning.¹⁹⁸
2. Intellectual functioning: The court shall take into account the standard error of measurement by subtracting five points from the defendant's lowest recorded IQ score. "If the defendant has previously taken an IQ test and the defendant's score was above 70 (after subtracting five points from the defendant's IQ score), the court shall not preclude the defendant from claiming an intellectual disability or introducing evidence of the defendant's intellectual disability at trial. The defendant may not automatically be deemed not intellectually disabled, and the court shall consider additional evidence in determining limited intellectual functioning. . . . The court shall recognize that any defendant with an IQ of [75] or below. . . automatically satisfies the required showing of limited intellectual functioning."¹⁹⁹
3. Adaptive functioning: The defendant must show deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility.²⁰⁰ "Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community."²⁰¹ Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures.²⁰² Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible.²⁰³ Additional sources of information include educational, developmental, medical, and mental health evaluations.²⁰⁴ Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.²⁰⁵
4. A disorder "attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute [an intellectual disability] for purposes of this provision."²⁰⁶

The following sections provide reasons for why the Idaho legislature should adopt this language.

¹⁹⁸ American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 668 (2006).

¹⁹⁹ Cheung, *supra* note 105, at 346.

²⁰⁰ DSM-5, *supra* note 98, at 33.

²⁰¹ *Id.*

²⁰² *Id.* at 37.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 38.

²⁰⁶ See American Bar Association, *supra* note 198, at 669.

A. Amendments to “Deficits in Intellectual Functioning” Requirement

Idaho Code § 19-2515A should be amended so it expressly states that a defendant with an IQ score of 75 or below cannot receive the death penalty. This would account for the SEM, and thus ensure that nobody in the class protected by the decision in *Hall* could receive the death penalty.²⁰⁷ Moreover, the statute should be amended so as to not set a fixed cutoff score that would preclude a defendant from offering additional evidence of an intellectual disability.²⁰⁸ According to the APA, “it is improper clinical practice to use only an IQ test score cutoff. . .to make a determination that a person does not have an intellectual disability.”²⁰⁹

The APA further explained that there has been a shift in the medical community towards a reduced reliance on IQ tests.²¹⁰ This reduced reliance on IQ tests is reflected in changes between the DSM-IV-TR and the DSM-5.²¹¹ The diagnostic features section in the DSM-5, “takes a much stronger tone than the DSM-IV-TR in cautioning against relying on IQ scores alone.”²¹² Moreover, there are a number of different IQ tests, including the Wechsler Adult Intelligence Scale, the Kaufman Adolescent and Adult Intelligence Test, the Stanford-Binet Intelligence Scale, and the Cognitive Assessment System.²¹³ “[O]ne test might highlight an individual’s strengths, whereas another test might highlight that individual’s weaknesses and therefore provide a vastly different score.”²¹⁴

In light of the medical community’s reduced reliance on IQ test scores, courts should give greater weight to other measures of intellectual functioning. According to the DSM-5, “[i]ndividual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score.”²¹⁵ This clinical evaluation of intellectual functioning is “rooted in objective criteria and multiple sources of data, including school records and behavioral rating scales.”²¹⁶

Further, the APA seems to address the reduced reliance on IQ tests by placing greater weight on deficits in adaptive functioning.²¹⁷ According to the DSM-5:

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.²¹⁸

²⁰⁷ See *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

²⁰⁸ See Cheung, *supra* note 105, at 346.

²⁰⁹ APA AMICUS BRIEF, *supra* note 108, at 6.

²¹⁰ *Id.* at 13 (noting there has been “a steady trend towards emphasizing the importance of clinical assessment of intellectual and adaptive functioning and decreasing reliance on IQ tests.”).

²¹¹ See Van Rensburg, *supra* note 158, at 88.

²¹² *Id.*

²¹³ Kathryn Raffensperger, *Atkins v. Virginia: The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENV. U. L. REV. 739, 746 (2012).

²¹⁴ *Id.*

²¹⁵ DSM-5, *supra* note 98, at 37.

²¹⁶ APA AMICUS BRIEF, *supra* note 108, at 10.

²¹⁷ See DSM-5, *supra* note 98, at 37.

²¹⁸ *Id.*

Because of the case-by-case variations in performance on IQ scores, coupled with the fact that individuals may score over 70, “but have such significant limitations in adaptive functioning that a combination of the two elements clearly show him as intellectually disabled,”²¹⁹ the Idaho legislature should adopt language that does not set a strict cutoff score of 75 when defining “deficits in intellectual functioning” for purposes of Idaho Code § 19-2515A.

B. Amendments to “Deficits in Adaptive Functioning” Requirement

Adaptive functioning refers to, “how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.”²²⁰ Idaho Code § 19-2515A is inconsistent with the DSM-5 because it requires deficits in two of the following areas: “communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.”²²¹ Under the DSM-5, an individual has deficits in adaptive functioning, “when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.”²²²

The conceptual (academic) domain involves competence in memory, language, reading, writing, math, reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The social domain involves awareness of others’ thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendships abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.²²³

Whether an individual has deficits in any of these three domains must be evaluated by using “both clinical evaluation and individualized, culturally appropriate, and psychometrically sound measures.”²²⁴

The DMS-5 modified the DSM-IV-TR’s definition so as to place a greater emphasis on deficits in adaptive functioning for the diagnosis of intellectual disability.²²⁵ This emphasis on adaptive functioning is especially important in the context of *Atkins* claims.²²⁶ According to the APA,

[B]ecause deficits in adaptive functioning—such as the ability to engage in logical reasoning, control impulses, understand and process information, and abstract from mistakes and learn from experience—contribute significantly to the

²¹⁹ Van Rensburg, *supra* note 158, at 65.

²²⁰ DSM-5, *supra* note 98, at 37.

²²¹ IDAHO CODE § 19-2515A (2015).

²²² DSM-5, *supra* note 98, at 38.

²²³ *Id.* at 37.

²²⁴ *Id.*

²²⁵ Van Rensburg, *supra* note 158, at 88.

²²⁶ See APA AMICUS BRIEF, *supra* note 108, at 6.

rationales of reduced culpability and risk of wrongful execution that support the *Atkins* decision, their evaluation must be a part of any reliable diagnosis in a capital case.²²⁷

In addition, IQ scores that are at the lower end of the IQ range are less reliable.²²⁸ Because these low IQ scores are less valid, the various levels of severity (i.e. whether an individual has mild, moderate, severe, or profound intellectual disability) are based solely on the individual's level of adaptive functioning.²²⁹

Finally, the APA claims that “[i]ntellectual disability cannot be reliably or accurately diagnosed without an evaluation of an individual’s adaptive functioning in conjunction with the individual’s general intellectual functioning and age of onset.”²³⁰ Thus, the language of Idaho Code § 19-2515A should be amended to ensure that courts understand that a defendant’s level of adaptive functioning is critical to the court’s assessment of his or her intellectual disability.

C. Amendments to the “Age of Onset” Requirement

Idaho Code § 19-2515A should eliminate the current “age of onset” requirement because it could preclude an individual with significant limitations in intellectual and adaptive functioning from pursuing an otherwise valid *Atkins* claim simply because these limitations developed after his or her eighteenth birthday. The “age of onset” requirement was not at issue in *Hall*.²³¹ However, both the American Bar Association (ABA) and the APA are in favor of eliminating “age of onset” requirements.²³² Idaho Code § 19-2515A currently requires a defendant to prove that “[t]he onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning” occurred before the defendant reached the age of eighteen.²³³ In contrast, the DSM-5 requires the “[o]nset of intellectual and adaptive deficits during the developmental period.”²³⁴

Section 19-2515A’s current strict age of eighteen cutoff could lead to the arbitrary denial of legitimate *Atkins* claims because this cutoff “requires different punishments for similarly impaired offenders based solely on the legally insignificant question of when their [intellectual disability] began.”²³⁵ For example, a defendant could have normal intellectual functioning at the time of his eighteenth birthday but then suffer a head injury at age nineteen. The defendant could then have deficits in intellectual and adaptive functioning, but he would not be protected by *Atkins* if the statute had a strict eighteen-year cutoff.²³⁶ The same individual would be protected by *Atkins* if the statute did not require the onset to be prior to the defendant reaching the age of eighteen.²³⁷

²²⁷ See APA AMICUS BRIEF, *supra* note 108, at 6.

²²⁸ DSM-5, *supra* note 98, at 33.

²²⁹ *Id.*

²³⁰ APA AMICUS BRIEF, *supra* note 108, at 7.

²³¹ *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014).

²³² See American Bar Association, *supra* note 198, at 668.

²³³ IDAHO CODE § 19-2515A (2015).

²³⁴ DSM-5, *supra* note 98, at 33.

²³⁵ Van Rensburg, *supra* note 158, at 90.

²³⁶ See generally *id.*

²³⁷ See generally *id.*

A strict eighteen-year cutoff is also inconsistent with the DSM-5. The DSM-5’s “onset during the developmental period” standard is broader than section 19-2515A because “a person who has not shown any symptoms before his eighteenth birthday but shows symptoms beginning at the age of nineteen and through the early adult years may still be in a developmental period in his life.”²³⁸ However, this standard could be problematic for courts to administer because it is more ambiguous than a bright-line, age of eighteen standard.²³⁹ Most importantly, an “onset during the developmental period” requirement is problematic because, much like a strict eighteen-year cutoff, it could still lead to the arbitrary denial of legitimate *Atkins* claims. The developmental period is typically considered to end around the age of twenty-two.²⁴⁰ Therefore, a defendant who was impaired by significant limitations in intellectual and adaptive functioning that developed at the age of twenty-five could still receive the death penalty under the “onset during the developmental period” standard. Thus, the best solution would be to eliminate the age of onset requirement rather than leaving the statute as it is or adopting the DSM-5’s language regarding the age of onset.

After *Atkins*, a task force from the ABA’s Section of Individual Rights and Responsibilities issued a Recommendation regarding how states should address the age of onset requirement.²⁴¹ The Recommendation was adopted by the ABA, the APA, the American Psychological Association, and the National Alliance of the Mentally Ill.²⁴² According to the Task Force, defendants “should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior.”²⁴³ Notably absent from this policy was a requirement that these limitations needed to develop before the defendant reached a certain age.²⁴⁴ The Recommendation intended to “encompass dementia and traumatic brain injury” because both these disabilities were similar to intellectual disability in their impact on intellectual and adaptive functioning—the only difference being that individuals with dementia or traumatic head injury typically manifest these limitations after the age of eighteen.²⁴⁵

The Task Force considered the policy rationale behind *Atkins* in concluding that individuals with traumatic brain injury and dementia should receive protection under *Atkins*.²⁴⁶ In *Atkins*, the Court “emphasized that execution of people with mental retardation is inconsistent with both the retributive and deterrent functions of the death penalty.”²⁴⁷ The retributive and deterrent functions of the death penalty are not served when individuals with intellectual disability are executed because of their “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”²⁴⁸ Individuals

²³⁸ Cheung, *supra* note 105, at 326.

²³⁹ *Id.* at 344.

²⁴⁰ *Id.*, at 345.

²⁴¹ American Bar Association, *supra* note 198, at 668.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 669.

²⁴⁶ *Id.* at 670.

²⁴⁷ *Id.* at 670.

²⁴⁸ *Atkins v. Virginia*, 536 U.S. 304, 318 (2001).

who suffer from dementia or traumatic brain injury have similar diminished capacities.²⁴⁹ Thus, *Atkins* protection should apply to individuals with traumatic brain injury or dementia “because the only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset.”²⁵⁰

Idaho Code § 19-2515A also does not take into account that defendants may not have taken an IQ test prior to their eighteenth birthday.²⁵¹ This issue faced the Idaho Supreme Court in *Pizzuto v. State* because Pizzuto took his first IQ test when he was nearly twenty-nine-years-old.²⁵² The Idaho Supreme Court noted that Pizzuto could have resolved this issue by providing “expert testimony opining what Pizzuto’s IQ probably would have been eleven years earlier.”²⁵³ Amending Idaho Code § 19-2515A to eliminate the “age of onset” requirement would be a simpler solution. This would also prevent defendants from having to face the additional hurdle of finding an expert to speculate as to what their IQ might have been prior to their eighteenth birthday.

Another potential issue that could arise is that a defendant may argue that, due to alcohol or drug use, he had significant limitations in his intellectual and adaptive functioning at the time of the offense, and therefore is entitled to *Atkins* protection. The Task Force accounted for this scenario by including the following language in its policy: “A disorder . . . attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.”²⁵⁴ Thus, Idaho Code § 19-2515A should be amended to include a provision explaining that a person does not have significant limitations in intellectual and adaptive functioning simply because of drug or alcohol use.

D. Burden of Proof Requirements

Idaho Code § 19-2515A does not expressly state which party has the burden of proving that the defendant is intellectually disabled.²⁵⁵ In *Pizzuto*, the Idaho Supreme Court concluded that Pizzuto had the burden of proving he was intellectually disabled.²⁵⁶ Many state statutes do not address which party bears the burden of proof.²⁵⁷ However, all statutes addressing this issue place the burden of proving intellectual disability on the defendant.²⁵⁸ Including a provision addressing which party has the burden of proof would make Idaho Code § 19-2515A less ambiguous. Thus, Idaho Code § 19-2515A should be amended so as to include a provision stating that the defendant has the burden of proving he or she was intellectually disabled at the time the offense was committed.

²⁴⁹ See American Bar Association, *supra* note 198, at 670.

²⁵⁰ See *id.*

²⁵¹ *Pizzuto v. State*, 146 Idaho 720, 729, 202 P.3d 642, 651 (2007).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See American Bar Association, *supra* note 198, at 669.

²⁵⁵ See generally Idaho Code § 19-2515A (2015).

²⁵⁶ *Pizzuto*, 146 Idaho at 728.

²⁵⁷ *The Avoidance of Death: Read the Statutes and Compare*, 4 No. 5 CRIM. PRAC. GUIDE 11 (2003).

²⁵⁸ *Id.*

E. “Mental Retardation” Should Be Changed to “Intellectually Disabled”

As a final matter, Idaho Code § 19-2515A uses the term “mental retardation” rather than “intellectual disability.”²⁵⁹ Intellectual disability has been “the preferred term among people with disabilities, their families and advocates for years.”²⁶⁰ According to the DSM-5, intellectual disability “is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups.”²⁶¹ Moreover, the term “mental retardation” is very offensive and has developed negative connotations over the years.²⁶²

A major shift in legal terminology occurred when Congress passed Rosa’s Law in 2010.²⁶³ Rosa’s Law changed “references in Federal law to mental retardation to references to an intellectual disability.”²⁶⁴ Rosa’s Law is named after Rosa Marcellino, a young girl from Maryland who has Down syndrome.²⁶⁵ Rosa’s family was greatly offended when Rosa’s school labeled her as being “mentally retarded” because the term “retarded” was insulting.²⁶⁶ Rosa’s family had petitions signed, met with a U.S. senator, and spoke before Maryland’s General Assembly in order to pass a law that would prohibit schools from using the term “mentally retarded” on records.²⁶⁷ At the law signing ceremony, President Obama stated: “What you call people is how you treat them. . . . If we change the words, maybe it will be the start of a new attitude toward people with disabilities.”²⁶⁸

As of 2012, forty-two states had removed the term “retarded” from state regulations.²⁶⁹ The Court also recently adopted this shift in terminology.²⁷⁰ In *Hall*, Justice Kennedy stated: “Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.”²⁷¹ Thus, Idaho Code § 19-2515A should be amended so that “mentally retarded” is changed to “intellectually disabled” to ensure that the statute uses terminology that is not offensive and outdated.

IV. CONCLUSION

The Idaho legislature should amend Idaho Code § 19-2515A to comport with the requirements set forth in the DSM-5, with the exception of the age of onset requirement. These amendments are warranted in light of *Atkins* and *Hall*, which require courts to look to the medical community when defining the term “intellectual disability.”²⁷² The Court also reasoned

²⁵⁹ IDAHO CODE § 19-2515A (2015).

²⁶⁰ Lin, *supra* note 21.

²⁶¹ DSM-5, *supra* note 98, at 33.

²⁶² Lin, *supra* note 21.

²⁶³ Tony Mauro, *Court Throws Out ‘Mental Retardation’*: Column, USA TODAY (June 1, 2014, 8:19 PM), <http://usat.ly/1gVeuNd>.

²⁶⁴ Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010), <http://npl.ly.gov.tw/pdf/7322.pdf>.

²⁶⁵ *A Girl and a Word*, TEACHING TOLERANCE (Spring 2011), <http://www.tolerance.org/magazine/number-39-spring-2011/feature/girl-and-word>.

²⁶⁶ *See id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Lin, *supra* note 21.

²⁷⁰ Mauro, *supra* note 263.

²⁷¹ *Hall v. Florida*, 134 S. Ct. 1986, 1990; Mauro, *supra* note 263.

²⁷² *Hall*, 134 S. Ct. at 1993.

that the medical community looks to the criteria set out in the DSM-5 when defining intellectual disability.²⁷³ Idaho's statute should be amended so that the "deficits in intellectual functioning" component expressly states that a defendant with an IQ score of 75 or below is exempt from the death penalty in order to account for the SEM.²⁷⁴ In addition, the legislature should not adopt a fixed IQ cutoff score that would preclude the defendant from presenting additional evidence of intellectual disability.²⁷⁵ The "deficits in adaptive functioning" component should be amended so that the defendant is required to show limited functioning "in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community."²⁷⁶ Idaho should also eliminate the "age of onset" requirement to ensure that valid *Atkins* claims are not denied simply because the defendant developed his or her deficits after the age of eighteen.²⁷⁷ Finally, Idaho should change the term "mentally retarded" to "intellectually disabled" because the term "mentally retarded" is outdated and offensive.²⁷⁸

²⁷³ *Id.* at 1994.

²⁷⁴ *See supra* Part III.

²⁷⁵ *See id.*

²⁷⁶ *See supra* Part III; DSM-5, *supra* note 98, at 33.

²⁷⁷ *See supra* Part III.

²⁷⁸ *See id.*

**THE UNCERTAIN BOUNDARIES OF CONSPIRACY
UNDER THE HOBBS ACT, 18 U.S.C. § 1951(a):
IS PROOF OF AN OVERT ACT REQUIRED?
By Pat Fackrell***

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* Judicial law clerk to Idaho Supreme Court Chief Justice Roger S. Burdick. 2016 graduate of the University of Idaho, College of Law. Special thanks to Professor of Law Wendy Gerwick Couture for her continued insights.

I. INTRODUCTION

In the world of white collar crime, criminal convictions are often obtained through a “complex web of inferential proof.”¹ Given their complexity, white collar crimes routinely involve multiple parties and high stakes, making white collar crime and conspiracy a near perfect match.² Because conspiracy requires at least two parties and tends to thrive on complexity, it is no surprise that conspiracy charges are commonplace in the world of white collar crime.³

The Hobbs Act, 18 U.S.C. § 1951 *et seq.*, represents one federal state under which the government can prosecute conspiracy in the world of white collar crime. The Hobbs Act outlaws “actual or attempted robbery or extortion affecting interstate or foreign commerce.”⁴ Congress enacted the Hobbs Act in 1946 to combat racketeering in labor disputes.⁵ Since then, the government’s use of the Hobbs Act has broadened.⁶ Now, the government frequently uses the Hobbs Act to prosecute public corruption and commercial disputes.⁷

Section 1951(a) of the Hobbs Act outlaws conspiracy. However, the plain language of § 1951(a) is silent as to whether an overt act in furtherance of the conspiracy need be proven to convict. Absent binding precedent from the Supreme Court, § 1951(a)’s textual silence has created a split among the federal courts of appeal as to whether an overt act is required.⁸

¹ *United States v. Ashfield*, 735 F.2d 101, 103 (3d Cir. 1984), *cert. denied*, 469 U.S. 858 (1984) (conducting a “careful examination” of the record and concluding that the jury’s verdict, although based solely on inferential proof, was nevertheless supported by the evidence).

² J. KELLY STRADER, *UNDERSTANDING WHITE COLLAR CRIME* 33 (3d ed. 2011) (articulating three reasons why conspiracy charges are common in the white collar crime context: (1) “[A]s is often true with crimes charged in the white collar context, the boundaries of conspiracy are inherently uncertain”; (2) “because of this vagueness and expansiveness, the government can often use conspiracy both to criminalize conduct that otherwise would not be subject to prosecution and to gain increased penalties for minor crimes”; and (3) “given the amorphous nature of the crime, it provides prosecutors with an enormous amount of discretion in deciding when, and when not, to bring a criminal case.”).

³ *See id.*; *see also* David Marusz, *Never Hanging Defendants Out to Dry: Preserving the Policy Behind the Statute of Limitations in Money Laundering Conspiracies*, 45 VAL. U. L. REV. 253, 266–72 (2010).

⁴ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-131.010 (2011), *available at* <http://www.justice.gov/usam/usam-9-131000-hobbs-act-18-usc-1951>; *see also* 18 U.S.C. § 1951(a).

⁵ Act of July 3, 1946, Pub L. No. 79-486, 69 Stat. 420; *see also* *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 402–03 (2003) (discussing Congress’s enactment of the Hobbs Act).

⁶ Thomas Regan McCartney, *McCormick v. United States: The Supreme Court Endorses Implicit Extortion by Elected Government Officials*, 37 ST. LOUIS U. L.J. 181, 181 (1992).

⁷ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-131.010 (2011), *available at* <http://www.justice.gov/usam/usam-9-131000-hobbs-act-18-usc-1951>.

⁸ *See infra* Part VI.

This Article argues that § 1951(a) should require an overt act, notwithstanding that § 1951(a)'s legislative history and relevant Supreme Court precedent suggest that no overt act need be shown. Part II explores the background of the crime of conspiracy, discussing conspiracy's vague contours and acknowledging the government's advantage when it prosecutes conspiracy. Next, Part III discusses Congress's enactment and the government's use of the Hobbs Act. Part IV analyzes § 1951(a)'s plain language and legislative history, concluding that § 1951(a) requires no overt act as currently drafted. Part V explains that Supreme Court precedent likewise suggests that § 1951(a) requires no overt act. Part VI analyzes the split among the federal courts of appeal as to whether § 1951(a) requires an overt act. Then, despite having concluded that § 1951(a) does not require an overt act, Part VII argues that Congress should amend § 1951(a) with an express overt act requirement because it would resolve statute of limitations problems, ensure proof of guilt beyond a reasonable doubt, and protect First Amendment rights. Finally, Part VIII briefly concludes.

II. THE CRIME OF CONSPIRACY

Although the crime of conspiracy is commonplace in the modern world of crime,⁹ conspiracy initially did not exist at common law.¹⁰ Conspiracy did not emerge as a criminal offense until Edward I of England's reign during the thirteenth century.¹¹ During Edward I's reign, conspiracy emerged to "correct the abuses of ancient criminal proceedings."¹² Convictions only existed for procuring false indictments, bringing false appeals, or maintaining "vexatious suits."¹³ Hence, conspiracy initially sought to combat overzealous prosecution.

Modern courts and legislatures have since restyled conspiracy's underpinnings to expand the crime's reach.¹⁴ In the seventeenth century, common law courts broadened conspiracy's scope to outlaw "an agreement to commit *any* offense," not just those limited to abuses of criminal proceedings.¹⁵ As a result, in 1832, Chief Justice Lord Denman famously articulated that conspiracy outlaws an agreement to commit "an unlawful act or a lawful act by unlawful means."¹⁶ Most jurisdictions still adhere to that definition of conspiracy.¹⁷ Thus, modern courts

⁹ See WAYNE R. LAFAYE, *CRIMINAL LAW* 614 (4th ed. 2003).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (quoting Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 396 (1922)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (emphasis added).

¹⁶ *Id.* (quoting *Rex v. Jones*, 4 B. & Ad. 345, 110 Eng. Rep. 485 (1832)).

¹⁷ *Id.* at 614–15; see also *Spear v. Fenkell*, No. CV 13-02391, 2015 WL 5005117, at *4 (E.D. Pa. Aug. 20, 2015) (defining civil conspiracy as an agreement to commit "an unlawful act or a lawful act by unlawful means"); *Brown v. Virginia*, No. 1984-09-1, 2010 WL 2898979, at *2 (Va. Ct. App. July 27, 2010) (defining criminal conspiracy as an agreement to commit "an unlawful act or a lawful act by unlawful means").

have construed Chief Justice Lord Denman’s definition of conspiracy as generally requiring (1) an agreement to commit a crime; (2) an overt act in furtherance of the conspiracy—the crime’s *actus reus* element; and (3) a mental state—the crime’s *mens rea* element.¹⁸ In some instances, conspiracy’s agreement may serve as the crime’s *actus reus* element.¹⁹

The elements of conspiracy, albeit simple, are vague. Indeed, the expansion of conspiracy since its founding in the thirteenth century has created uncertainty as to what exactly it outlaws. Additionally, it has created uncertainty as to what precise form its agreement must take.²⁰ Acknowledging these uncertainties, Justice Robert Jackson posited as follows:

The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always “predominantly mental in composition” because it consists primarily of a meeting of minds and an intent.²¹

Perhaps Justice Jackson recognized the inherent difficulties of “find[ing] an antidote for the poison you cannot identify.”²² Sharing similar concerns, Professor Francis Sayre argued that conspiracy should not be criminalized, emphasizing that a “doctrine so vague in its outlines and uncertain in its fundamental nature . . . lends no strength or glory to the law.”²³

Despite these concerns, conspiracy is alive and well under modern law. In 2012, the government obtained 2,129 conspiracy convictions under title 18 of the United States Code alone.²⁴ The high number of conspiracy convictions may stem from the fact that conspiracy’s uncertain contours allow the government to enjoy evidentiary advantages when prosecuting.²⁵ The Supreme Court has stated that “[s]ecrecy and concealment are essential features of successful conspiracy.”²⁶ Consequently, the government proves some conspiracies solely by circumstantial evidence, whereby it receives “wide latitude . . . in presenting evidence . . . which even remotely tends to establish the conspiracy charged.”²⁷ In addition to a broad relevance

¹⁸ LAFAVE, *supra* note 9, at 615.

¹⁹ *Id.*

²⁰ See generally Martin H. Redish and Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 701 (2012) (acknowledging conspiracy’s lengthy history but vague definition); see also LAFAVE, *supra* note 9, at 616.

²¹ *Krulewitch v. United States*, 336 U.S. 440, 446–48 (1949) (Jackson, J., concurring).

²² LAFAVE, *supra* note 9, at 616 (quoting J. MITFORD, *THE TRIAL OF DR. SPOCK* 61 (1969)).

²³ Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922).

²⁴ U.S. DEP’T OF JUSTICE, 2012 BUREAU OF JUSTICE STATISTICS, available at <http://www.bjs.gov/fjsrc/> (last visited Dec. 3, 2015).

²⁵ LAFAVE, *supra* note 9, at 615–20; see also STRADER, *supra* note 2, at 33 (discussing the government’s advantage).

²⁶ LAFAVE, *supra* note 9, at 619 (quoting *Blumenthal v. United States*, 332 U.S. 539, 557 (1947)).

²⁷ *Id.* (quoting *Nye & Nissen v. United States*, 168 F.2d 846, 857 (9th Cir. 1948)).

standard, the government also enjoys an evidentiary advantage with respect to hearsay. Notwithstanding hearsay's general inadmissibility, courts have long held that co-conspirator hearsay may be admitted.²⁸ The Federal Rules of Evidence admit co-conspirator hearsay so long as the co-conspirator made the statements during and in furtherance of the conspiracy.²⁹ Despite its unreliability,³⁰ co-conspirator hearsay poses no Confrontation Clause issue.³¹

Perhaps the high number of conspiracy convictions may instead stem from the fact that the government enjoys broad latitude when choosing where to hold trial and may select a venue that inconveniences an accused without violating the Sixth Amendment.³² The Sixth Amendment grants an accused "the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"³³ The Sixth Amendment's venue safeguard seeks to protect "against the unfairness and hardship involved when an accused is prosecuted in a remote place."³⁴ Yet, when prosecuting conspiracy, the government can hold trial in any district where conspirators formed their agreement.³⁵ The government can also hold trial in any district where *any* overt act undertaken by *any* of the conspirators took place.³⁶ Thus, the government may, "and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district."³⁷ Perhaps it is for these reasons Judge Learned Hand described conspiracy as "that darling of the modern prosecutor's nursery."³⁸

In sum, even with conspiracy's long history, its contours are overwhelmingly vague, causing it to be the subject of significant criticism. When conspiracy emerged, it sought to combat abuses of criminal proceedings and overzealous prosecution.³⁹ But now, conspiracy's rationale extends to punishing for manifesting a disposition to crime and protecting against the dangers of group crime.⁴⁰ Modern conspiracy's broad scope, in addition to the government's advantages, both indicate that conspiracy may have evolved only to undermine a key purpose it initially sought to prevent—overzealous prosecution.

²⁸ See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (holding that co-conspirator hearsay's admissibility is "firmly enough rooted in [the Court's] jurisprudence").

²⁹ Fed. R. Evid. 801(d)(2)(E).

³⁰ Kevin Jon Heller, *Whatever Happened to Proof Beyond A Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and United States v. Shabani*, 49 STAN. L. REV. 111, 133–34 (1996).

³¹ *Bourjaily*, 483 U.S. at 182–83 (holding that co-conspirator hearsay poses no Confrontation Clause issue).

³² LAFAVE, *supra* note 9, at 617.

³³ U.S. CONST. amend. VI.

³⁴ LAFAVE, *supra* note 9, at 616 (quoting *United States v. Cores*, 356 U.S. 405, 407 (1958)).

³⁵ *Id.* at 617.

³⁶ *Id.*

³⁷ *Id.* (quoting *Krulewitch v. United States*, 336 U.S. 440, 452–53 (1949) (Jackson, J., concurring)).

³⁸ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

³⁹ LAFAVE, *supra* note 9, at 614.

⁴⁰ *Id.* at 620–21.

III. THE HOBBS ACT

Congress enacted the Hobbs Act in 1946 to combat robbery or extortion affecting interstate commerce.⁴¹ The Hobbs Act is a successor to the Anti-Racketeering Act of 1934,⁴² which outlawed affecting interstate trade or commerce by using “force, violence, or coercion,” to obtain “the payment of money or other valuable considerations, or the purchase or rental of property or protective services”⁴³ However, the Anti-Racketeering Act did not outlaw using “force, violence, or coercion” to obtain “the payment of wages by a bona fide employer to a bona fide employee.”⁴⁴ In short, while the Anti-Racketeering Act prohibited using self-help to obtain money or items of value, that prohibition did not apply to using self-help to obtain wages due and owing.

In 1942, the Supreme Court broadly interpreted the Anti-Racketeering Act’s exception for “the payment of wages by a bona fide employer to a bona fide employee.”⁴⁵ In *United States v. Local 807 International Brotherhood of Teamsters*, members of the New York chapter of the Teamsters Union refused to let out-of-state truckers enter New York City unless the out-of-state truckers paid the union members money.⁴⁶ The union members demanded the money because they believed the out-of-state truckers were marketing to and infringing on their customer base.⁴⁷ In some instances, the union members took the money and performed the out-of-state truckers’ deliveries.⁴⁸ When the out-of-state truckers refused to let the union members perform the deliveries, the union members simply took the money.⁴⁹ The government charged the union members with extortion under the Anti-Racketeering Act.⁵⁰ Although the union members had indeed committed extortion, the Court affirmed the reversal of the union members’ convictions.⁵¹

⁴¹ Act of July 3, 1946, Pub L. No. 79-486, 69 Stat. 420 (1946); 92 CONG. REC. 7265, 7308–09 (1946) (Senate passage of the Hobbs Act); 91 CONG. REC. 11, 11899–915 (1945) (House debate and passage of the Hobbs Act); *see also* Scheidler v. Nat’l Org. for Women, Inc., 537 U.S. 393, 402 (2003) (explaining that “[i]n 1946, Congress enacted the Hobbs Act”).

⁴² Steven C. Yarbrough, *The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials*, 31 TULSA L.J. 781, 783–84 (1996).

⁴³ 18 U.S.C. § 420a(a) (1934), *superseded by* 18 U.S.C. § 1951(a).

⁴⁴ *Id.*

⁴⁵ *United States v. Local 807 Int’l Brotherhood of Teamsters*, 315 U.S. 521, 526–38 (1942).

⁴⁶ 315 U.S. at 525–26.

⁴⁷ *Id.* at 526.

⁴⁸ *Id.* at 525–26.

⁴⁹ *Id.*

⁵⁰ *Id.* at 525.

⁵¹ *Id.* at 535.

The Court held that the out-of-state truckers' payments to the union members fell under Anti-Racketeering Act's exception for "the payment of wages by a bona fide employer to a bona fide employee."⁵²

The Court's 1942 decision in *Local 807* outraged Congress, prompting it to enact the Hobbs Act in 1946.⁵³ Given *Local 807*, Congress's chief initial aim with the Hobbs Act was to combat unlawful labor practices and racketeering in labor disputes.⁵⁴ And indeed, until the early 1960s, every reported case decided under the Hobbs Act concerned labor unions.⁵⁵ At that time, the government began expanding its use of the Hobbs Act, seeking to reach public corruption and commercial disputes.⁵⁶ The government has continued its expanded use of the Hobbs Act over time.⁵⁷ As a result, the Hobbs Act is now the government's "primary tool" to prosecute the misuse of political office for personal gain.⁵⁸

IV. INTERPRETATION OF § 1951(a)'S STATUTORY TEXT

Section 1951(a) provides as follows:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

⁵² *Id.* The Court reasoned that the out-of-state truckers' payments to the union members fell under the Anti-Racketeering Act's exception because (1) Congress "intended to leave unaffected the ordinary activities of labor unions" when it enacted the Anti-Racketeering Act; and (2) "[a]ccepting payments even where services are refused is such an [ordinary] activity." *Id.*

⁵³ Yarbrough, *supra* note 42, at 784.

⁵⁴ Francis N. MacDonald, *Federal Jurisdiction and the Hobbs Act: United States v. Stillo and the Depletion of Assets Theory*, 72 CHI.-KENT L. REV. 1389, 1394, 1402–03 (1997) (noting that the Hobbs Act's legislative history focuses on price fixing, extortion, and illegal labor practices, showing that "protection of interstate commerce was the goal of the Act's sponsors") (citing 91 CONG. REC. 11, 11899–912 (1945)).

⁵⁵ Yarbrough, *supra* note 42, at 785.

⁵⁶ *Id.*

⁵⁷ Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1172 (1977) (explaining that prosecution of public officials increased 500% from 1970 to 1976, largely due to the Hobbs Act).

⁵⁸ McCartney, *supra* note 6, at 181.

Thus, § 1951(a) creates a conspiracy offense by the words “conspires so to do.”⁵⁹ Congress defined “robbery,” “extortion,” and “commerce” as it used those terms in § 1951(a).⁶⁰ But Congress did not define “conspires,”⁶¹ notwithstanding that § 1951(a)’s potential to impose 20 years imprisonment is the most extreme punishment of all the major federal corruption statutes.⁶² The Supreme Court has not addressed conspiracy under § 1951(a).⁶³ With the lack of guidance, the federal circuit courts have split as to whether § 1951(a) requires an overt act.⁶⁴

As explained below, the canons of statutory construction do not resolve whether § 1951(a) requires an overt act; instead, the canons only suggest that § 1951(a) is ambiguous. Nonetheless, § 1951(a)’s legislative history resolves that ambiguity by showing that Congress did not intend for § 1951(a) to require an overt act.

A. The canons of statutory construction do not resolve whether § 1951(a)’s plain language requires an overt act.

Interpretation of a criminal statute begins with the statute’s text, and all words must receive their plain, ordinary meaning unless Congress otherwise specifies.⁶⁵ The canons of statutory construction, which represent “rules of thumb that help courts determine the meaning of legislation,”⁶⁶ should be used to analyze a statute’s text. The canons do not resolve whether § 1951(a) requires an overt act because the canons lend support in both directions.

1. The canons of construction weighing against an overt act.

Three canons of construction suggest that § 1951(a) does not require an overt act. First, § 1951(a) contains no express language stating that an overt act is an element of a conspiracy offense. Thus, the canon of *expressio unius*, which rests on the premise that Congress’s express

⁵⁹ See Petition for Cert., *United States v. Salahuddin*, 135 S. Ct. 2309 (2015) (No. 14-654), 2014 WL 6807600, at *13 [hereinafter “Petition for Cert.”] (noting that § 1951(a) “creates a conspiracy offense through the inclusion of a two-word phrase (‘or conspires’) in the sentence that establishes the substantive offense”) (petition denied May 18, 2015).

⁶⁰ 18 U.S.C. § 1951(b)(1)–(3).

⁶¹ See *id.*

⁶² *McCartney*, *supra* note 6, at 181 n.3. For example, the general federal conspiracy statute, 18 U.S.C. § 371, offers a possible punishment of five years imprisonment. Compare 18 U.S.C. § 1951(a) with 18 U.S.C. § 371.

⁶³ See *infra* Part V.

⁶⁴ See *infra* Part VI.

⁶⁵ See, e.g., *Smith v. United States*, 508 U.S. 223, 228 (1993); *Dowling v. United States*, 473 U.S. 207, 214 (1985).

⁶⁶ YULE KIM, CONG. RESEARCH SERV., RL 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2008) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

inclusion of one thing implies the exclusion of that which is absent,⁶⁷ suggests that § 1951(a) requires no overt act. Likewise, because Congress drafted § 1951(a) without any mention of an overt act requirement but drafted the general federal conspiracy statute, 18 U.S.C. § 371, with an express overt act requirement,⁶⁸ *expressio unius* further suggests that § 1951(a) requires no overt act. However, *expressio unius* has its limits. The Supreme Court has acknowledged that, while “often a valuable servant,” *expressio unius* is “a dangerous master to follow in the construction of statutes.”⁶⁹ *Expressio unius* falsely assumes that all of Congress’s drafting omissions are deliberate.⁷⁰ Nonetheless, *expressio unius* suggests that § 1951(a) requires no overt act.

The principle that statutes in derogation of the common law should be narrowly construed⁷¹ further suggests that § 1951(a) does not require an overt act. It is a “settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms.”⁷² At common law, conspiracy did not require the government to prove an overt act to convict.⁷³ Instead, the government could establish conspiracy’s *actus reus* element by proving conspiracy’s agreement element.⁷⁴ Because Congress did not provide otherwise, Congress is therefore presumed to have adopted the common law definition of conspiracy under § 1951(a), suggesting that no overt act need be shown.⁷⁵

Finally, it is uncertain as to whether § 1951(a) triggers the rule of lenity. When a criminal statute is ambiguous, the rule of lenity requires that any ambiguity must be resolved in an accused’s favor.⁷⁶ The Supreme Court has instructed that this “venerable rule . . . vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute

⁶⁷ See, e.g., *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

⁶⁸ 18 U.S.C. § 371 provides as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

⁶⁹ *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotation marks and citation omitted).

⁷⁰ *Custis v. United States*, 511 U.S. 485, 501–02 (1994).

⁷¹ *Badaracco v. C.I.R.*, 464 U.S. 386, 403 n.3 (1984) (“It is axiomatic that statutes in derogation of the common law should be narrowly construed . . .”).

⁷² *United States v. Shabani*, 513 U.S. 10, 13 (1994).

⁷³ Reply to Petition for Cert., *United States v. Salahuddin*, 765 F.3d 329 135 S. Ct. 2309 (2015) (No. 14-654), 2015 WL 1534352, at *7–8 [hereinafter “Reply to Petition for Cert.”] (citations omitted); see also *Shabani*, 513 U.S. at 13–14 (“We have consistently held that the common law understanding of conspiracy ‘does not make the doing of any act other than the act of conspiring a condition of liability.’”); *Bannon v. United States*, 156 U.S. 464, 468 (1895) (“At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy.”).

⁷⁴ LAFAVE, *supra* note 9, at 614–15.

⁷⁵ Reply to Petition for Cert., *supra* note 73, at *8.

⁷⁶ *United States v. Bass*, 404 U.S. 336, 347 (1971).

whose commands are uncertain, or subjected to punishment that is not clearly prescribed.”⁷⁷ But the rule of lenity “is not applicable unless there is a *grievous* ambiguity or uncertainty in the language and structure of [a statute], such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute.”⁷⁸ Thus, as demonstrated by the foregoing, two key principles of statutory construction—*expressio unius* and narrowly construing statutes in derogation of the common law—both demonstrate that § 1951(a) could reasonably be interpreted to not require an overt act.⁷⁹ For that reason, the rule of lenity’s application to § 1951(a) is uncertain.⁸⁰

2. The canons of construction supporting an overt act.

In contrast, four canons of construction suggest that § 1951(a) requires an overt act. First, the canon of *noscitur a sociis*, which represents the underlying principle that words appearing together in a list should be given similar meanings,⁸¹ suggests that § 1951(a) requires an overt act. In § 1951(a), “conspires” appears in a list with “obstructs, delays, or affects commerce . . . by robbery or extortion.” Applying *noscitur a sociis* to § 1951(a) instructs that “conspires” should be given a meaning that is similar to its surrounding words. Because “obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery or extortion” all require an overt act, *noscitur a sociis* suggests that “conspires” should likewise require an overt act.

The canon of *ejusdem generis* lends further support for requiring an overt act under § 1951(a). *Ejusdem generis* instructs that “where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated.”⁸² Section 1951(a) places “conspires” behind specific conduct requiring an overt act, to wit: “obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery or extortion.” With conspiracy’s uncertain contours,⁸³ *ejusdem generis* suggests that “conspires” should be limited by the more specific words preceding it and, therefore, to require an overt act.

Moreover, the canon of *in pari materia* suggests that § 1951(a) requires an overt act. *In pari materia* rests on the premise that “a legislative body generally uses a particular word with a consistent meaning in a given context.”⁸⁴ When Congress enacted § 1951(a), the general federal

⁷⁷ Petition for Cert., *supra* note 59, at *15 (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008)).

⁷⁸ Reply to Petition for Cert., *supra* note 73, at *13 (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991)).

⁷⁹ *See id.*

⁸⁰ *United States v. Salahuddin*, 765 F.3d 329, 339–40 (3d Cir. 2014) (concluding that § 1951(a) is not sufficiently ambiguous to trigger the rule of lenity).

⁸¹ *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114–15 (1989)).

⁸² *KIM*, *supra* note 66, at 14 (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980)).

⁸³ *See supra* Part II.

⁸⁴ *See Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972).

conspiracy statute, 18 U.S.C. § 371, required the government to prove an overt act to convict.⁸⁵ Because Congress enacted § 1951(a) against a legislative scheme that already required proof of an overt act to convict for conspiracy, *in pari materia* suggests that “Congress intended to incorporate the then-existing requirements of the general federal conspiracy standard, including proof of an overt act.”⁸⁶ Consequently, *in pari materia* suggests that “conspires” in § 1951(a) should be interpreted to require an overt act because “it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.”⁸⁷

Finally, the rule of lenity may suggest that § 1951(a) requires an overt act. Although the rule of lenity’s application to § 1951(a) is questionable,⁸⁸ § 1951(a) the statute may be sufficiently ambiguous to trigger the rule of lenity for three reasons.⁸⁹ First, the canons of construction do not resolve whether § 1951(a) requires an overt act but instead only show that § 1951(a) is ambiguous. Second, the federal courts of appeal have split as to whether § 1951(a) requires an overt act, further illustrating § 1951(a)’s ambiguity.⁹⁰ Third, conspiracy is an “elastic, sprawling, and pervasive” crime that “constitutes a serious threat to fairness in our administration of justice,” as Justice Robert Jackson noted.⁹¹ Section 1951(a) amplifies these concerns by offering the most extreme punishment of all the major federal corruption statutes.⁹² Thus, the rule of lenity’s application to § 1951(a) may warrant special consideration to ensure that an accused has fair notice of § 1951(a)’s reach.⁹³ Accordingly, applying the rule of lenity to § 1951(a) and resolving all ambiguity an accused’s favor suggests that § 1951(a) requires an overt act.

The canons of construction lend support in both directions, illustrating § 1951(a)’s ambiguity. Therefore, the canons do not resolve whether § 1951(a) requires an overt act.

B. Section 1951(a)’s legislative history shows that no overt act is required.

⁸⁵ Petition for Cert., *supra* note 59, at *11 (citing An Act: To Codify, Revise, and Amend the Penal Laws of the United States, Pub. L. No. 60-350, 35 Stat. 1096 (1909)).

⁸⁶ *Id.*

⁸⁷ *Id.* at *12 (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)); *see also* *Pistone v. United States*, 177 F.3d 957, 960 (11th Cir. 1999) (acknowledging the defendant’s argument that § 1951(a) should be construed in light of § 371 but rejecting the argument).

⁸⁸ *See infra* Part VI.A.1.

⁸⁹ *See* Petition for Cert., *supra* note 59, at *15–16 (arguing that the rule of lenity should be triggered to require an overt act under § 1951(a)). *Contra* *United States v. Salahuddin*, 765 F.3d 329, 339–40 (3d Cir. 2014) (concluding that § 1951(a) is not sufficiently ambiguous to trigger the rule of lenity).

⁹⁰ *See infra* Part VI.

⁹¹ Petition for Cert., *supra* note 59, at *15–16 (quoting *Krulewitch v. United States*, 336 U.S. 440, 445–46 (1949) (Jackson, J., concurring)).

⁹² *McCartney*, *supra* note 6, at 181 n.3.

⁹³ *See* *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (discussing the rule of lenity’s fair notice rationale).

If a statute is ambiguous, the statute's legislative history may be analyzed to resolve the ambiguity.⁹⁴ Although Congress was silent as to whether § 1951(a) requires an overt act when it enacted § 1951(a),⁹⁵ the sources on which Congress relied when drafting § 1951(a) and § 1951(a)'s subsequent legislative history both indicate that Congress did not intend for § 1951(a) to require an overt act.

First, the sources on which Congress relied when drafting § 1951(a) suggest that no overt act is required. Congress modeled § 1951(a) on two primary sources, the New York Penal Code and the Field Code, which is a nineteenth century model penal code that gave rise to the New York Penal Code.⁹⁶ The New York Penal and Field Codes both outlawed conspiracy.⁹⁷ However, in contrast to § 1951(a), the New York Penal and Field Codes shared an identical express overt act requirement, which provided as follows:

No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, *unless some act besides such agreement be done to effect the object thereof*, by one or more of the parties to such agreement.⁹⁸

The New York Penal and Field Codes sought to narrow the common law definition of conspiracy by expressly requiring an overt act.⁹⁹ In fact, the government could not meet the New York Penal and Field Codes' overt act requirement merely by proving an overt act that "cement[ed] the agreement or secur[ed] the participation of a person in the agreement."¹⁰⁰ Instead, the government needed to prove "a subsequent, independent act following the conspiracy and done to further the object thereof."¹⁰¹ This standard acknowledged the purpose of the New York Penal and Field Codes' overt act requirement, which was to "corroborat[e] the existence of the agreement and indicate[] that the agreement ha[d] reached a point where it pose[d] a sufficient

⁹⁴ See, e.g., *Intercnty. Constr. Corp. v. Walter*, 422 U.S. 1, 8 (1975).

⁹⁵ 92 CONG. REC. 7265, 7308–09 (1946) (Senate passage of the Hobbs Act with no discussion of an overt act requirement for conspiracy); 91 CONG. REC. 11, 11899–915 (1945) (House debate and passage of the Hobbs Act with no discussion of an overt act requirement for conspiracy).

⁹⁶ *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003).

⁹⁷ *Gottlieb v. Garfield*, 181 N.Y.S.2d 972, 973 (N.Y. Sup. Ct. 1958); COMMISSIONERS OF THE CODE, PROPOSED MODEL PENAL CODE OF THE STATE OF NEW YORK 75–78 (1864) [hereinafter COMMISSIONERS], available at

<http://ida.lib.uidaho.edu:2735/cgi/pt?id=hvd.32044097758478;view=1up;seq=11>.

⁹⁸ *Gottlieb*, 181 N.Y.S.2d at 973 (quoting N.Y. PENAL LAW § 583); COMMISSIONERS, *supra* note 97, at 78 (setting forth THE FIELD CODE § 226).

⁹⁹ See *People v. Ortiz*, 473 N.Y.S.2d 288, 289, 291–93 (N.Y. App. Div. 4th 1984); COMMISSIONERS, *supra* note 97, at 76 (stating that the "common law definitions of conspiracy are broader than that given in our Revised Statutes").

¹⁰⁰ *Id.* at 290.

¹⁰¹ *People v. De Cabia*, 172 N.Y.S.2d 1004, 1006 (Nassau Cnty. Ct. 1958).

threat to society to impose sanctions.”¹⁰² Thus, by omitting an express overt act requirement in § 1951(a), Congress distinguished § 1951(a) from the New York Penal and Field Codes.¹⁰³

In addition, subsequent legislative history also shows that Congress did not intend for § 1951(a) to require an overt act. During the late 1970s, Congress found that the federal criminal code contained “numerous provisions proscribing what is essentially the same conduct” and began debating whether to recodify the federal criminal laws.¹⁰⁴ To that end, the Senate passed Senate Bill 1437—the Criminal Code Reform Act of 1978—which, in part, sought to narrow federal conspiracy offenses by requiring, “with reference to all conspiracies under [f]ederal law, . . . an overt act taken by a member of the conspiracy in order for them to be criminally liable.”¹⁰⁵

The House of Representatives did not pass Senate Bill 1437.¹⁰⁶ Indeed, when the House Committee on the Judiciary addressed Senate Bill 1437, Arthur L. Burnett, Chairman of the Criminal Law Committee, found flaws with Senate Bill 1437, stating as follows:

While section 371 of title 18 of the United States Code specifically requires an overt act to complete the offense, there are many other conspiracy provisions written in with the substantive law, such as conspiracy in civil rights matters and in the Hobbs Act, where the agreement alone under current law is sufficient without overt acts. This conspiracy provision would *eliminate that theory*¹⁰⁷

Chairman Burnett’s statements demonstrate Congress knew that § 1951(a) did not require an overt act, unlike 18 U.S.C. § 371. Hence, if § 1951(a)’s lack of an overt act requirement bothered Congress, it likely would have passed Senate Bill 1437 or remedied the problem with other

¹⁰² *Ortiz*, 473 N.Y.S.2d at 292 (quoting *People v. McGee*, 399 N.E.2d 1177, 1182 (N.Y. Ct. App.1979)).

¹⁰³ *Compare* 18 U.S.C. § 1951(a) with *Gottlieb v. Garfield*, 181 N.Y.S.2d 972, 973 (N.Y. Sup. Ct. 1958) (quoting N.Y. Penal Law § 583) and COMMISSIONERS, *supra* note 97, at 78 (setting forth THE FIELD CODE § 226).

¹⁰⁴ *Federal Criminal Laws, Hearings before the Subcommittee on Criminal Justice, Judiciary Committee on H.R. 6869*, 95th Cong. 1 (1977) (statement of James R. Mann, Member, H. Comm. on the Judiciary), available at

[http://ida.lib.uidaho.edu:3862/HOL/Page?handle=hein.leghis/cricrecom0014&start_page=\[v\]&id=17](http://ida.lib.uidaho.edu:3862/HOL/Page?handle=hein.leghis/cricrecom0014&start_page=[v]&id=17).

¹⁰⁵ *Legislation to Revise and Recodify Federal Criminal Laws: Hearing before the H. Subcommittee on Criminal Justice*, 95th Cong. 1097 (1978) (statement of Chairman Arthur L. Burnett, Member, H. Comm. on the Judiciary) [hereinafter *Legislation to Revise and Recodify*], available at

http://ida.lib.uidaho.edu:3862/HOL/Page?men_tab=srchresults&handle=hein.leghis/cricrecom0015&size=2&id=217&collection=leghis.

¹⁰⁶ *United States v. Belgard*, 694 F. Supp. 1488, 1512 (D. Or. 1988) (“S. 1437 passed the Senate on January 30, 1978 but was never passed by the House of Representatives.”).

¹⁰⁷ *Legislation to Revise and Recodify*, *supra* note 105, at 1097 (statement of Chairman Arthur L. Burnett, Member, H. Comm. on the Judiciary) (emphasis added).

legislation. Although subsequent legislative history is often unpersuasive, it is entitled to deference in some circumstances, “particularly so when the precise intent of the enacting Congress is obscure.”¹⁰⁸ Thus, given that the enacting Congress was silent as to whether § 1951(a) requires an overt act, Congress’s subsequent statements are entitled to deference.

In sum, the canons of construction do not illustrate whether § 1951(a) requires an overt act, as the canons lend support in both directions. Even so, the sources on which Congress relied when it enacted § 1951(a) and § 1951(a)’s subsequent legislative history both resolve the statute’s ambiguous plain language by showing that Congress did not intend for § 1951(a) to require an overt act.

V. SUPREME COURT PRECEDENT SUGGESTS THAT NO OVERT ACT IS REQUIRED

Although the Supreme Court has not addressed conspiracy under § 1951(a), the Court’s conspiracy jurisprudence suggests that § 1951(a) does not require an overt act. As a general rule, the Court has not required the government to prove an overt act to convict for conspiracy when a conspiracy statute does not “expressly make the commission of an overt act an element of the conspiracy offense.”¹⁰⁹ The Court has adhered to this rule since its 1913 decision in *Nash v. United States*.¹¹⁰ In *Nash*, the Court held that conspiracy under the Sherman Act, 15 U.S.C. § 1 *et seq.*, does not require an overt act because the statute makes no express mention of an overt act.¹¹¹ Justice Oliver Wendell Holmes, Jr. explained for the majority that the Sherman Act “punishes the conspiracies at which it is aimed on the common-law footing, [. . .] that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.”¹¹² Although it acknowledged that the general federal conspiracy statute, now enacted at 18 U.S.C. § 371, featured an express overt act requirement, the Court saw “no reason for reading [that requirement] into the Sherman Act, [and the Court found] it unnecessary to offer arguments against doing so.”¹¹³

Similarly, in 1994, in *United States v. Shabani*,¹¹⁴ the Court held that the federal drug conspiracy statute, 21 U.S.C. § 846, does not require an overt act based on § 846’s textual silence.¹¹⁵ Justice Sandra Day O’Connor, writing for a unanimous Court, instructed that Congress makes a deliberate choice when drafting conspiracy statutes: “[B]y choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman

¹⁰⁸ William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640 (1990).

¹⁰⁹ *Whitfield v. United States*, 543 U.S. 209, 214 (2005).

¹¹⁰ 229 U.S. 373 (1913).

¹¹¹ *Id.* at 378.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *United States v. Shabani*, 513 U.S. 10 (1994).

¹¹⁵ *Id.* at 13–17.

Act, 15 U.S.C. § 1, it dispenses with such a requirement.”¹¹⁶ The Court further emphasized that it had “not inferred [an overt act] requirement from congressional silence in other conspiracy statutes” and faulted the Ninth Circuit for interpreting § 846 to require the same elements as § 371 while ignoring key differences between the two statutes.¹¹⁷

Finally, in 2005, in *Whitfield v. United States*,¹¹⁸ the Court followed the “governing rule for conspiracy statutes” previously articulated in *Shabani*: If “the text of [the statute] does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction.”¹¹⁹ Justice O’Connor, writing for another unanimous Court, further explained that:

Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so. Where Congress has chosen *not* to do so, we will not override that choice based on vague and ambiguous signals from legislative history.¹²⁰

The Court’s conspiracy jurisprudence is clear. A conspiracy offense requires the government to prove an overt act if Congress expressly included an overt act requirement by statute. Applying that rule to § 1951(a) suggests that no overt act is required. It follows, then, that both the Court’s conspiracy jurisprudence and § 1951(a)’s legislative history, as discussed in Part IV, both resolve § 1951(a)’s ambiguous plain language by indicating that § 1951(a) does not require an overt act.

VI. SECTION 1951(a)’S CIRCUIT SPLIT

Despite the Supreme Court’s conspiracy jurisprudence and § 1951(a)’s legislative history, § 1951(a)’s ambiguous plain language has caused the federal courts of appeal to split as to whether § 1951(a) requires an overt act.¹²¹ While the majority of circuits do not require an overt act, the minority of circuits do require an overt act. This split illustrates the effect of § 1951(a)’s ambiguous plain language and is explored below.

¹¹⁶ *Id.* at 14 (quoting *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992)). Of note is that Counsel for the United States was Richard H. Seamon, Associate Dean for Faculty Affairs and Professor of Law at the University of Idaho, College of Law.

¹¹⁷ *Id.* at 15.

¹¹⁸ 543 U.S. 209 (2005).

¹¹⁹ *Id.* at 214.

¹²⁰ *Id.* at 216–17 (internal citations omitted).

¹²¹ Compare *United States v. Salahuddin*, 765 F.3d 329, 337–40 (3d Cir. 2014) (no overt act required) with *United States v. Box*, 50 F.3d 345, 349 (5th Cir. 1995) (overt act required).

A. The majority of circuits do not require an overt act.

The majority of circuits—the First, Second, Third, Fourth, and Eleventh—have held that § 1951(a) does not require an overt act.¹²² The Third Circuit’s decision in *United States v. Salahuddin*¹²³ is the most illustrative case representing the majority of circuits’ position. In *Salahuddin*, a jury convicted the defendant, Newark’s Deputy Mayor for Public Safety, of conspiracy to commit extortion under § 1951(a).¹²⁴ The government’s primary allegations centered on the defendant having been a “silent partner” in the Mayor’s demolition business.¹²⁵ Specifically, the government alleged that the defendant had exploited his official role by exerting political influence to improperly steer demolition work to certain companies, which would then distribute the demolition work to the Mayor’s demolition business.¹²⁶ In return, the defendant extracted political and charitable kickbacks from the demolition companies to which he had steered business.¹²⁷ Additionally, the Mayor gave kickbacks to the defendant, which came from profits the Mayor’s demolition business earned from the defendant’s efforts.¹²⁸

When the defendant appealed his conspiracy conviction under § 1951(a), the Third Circuit affirmed.¹²⁹ The defendant argued that the district court erred by omitting an overt act requirement from the jury instructions.¹³⁰ But the *Salahuddin* court rejected that argument.¹³¹ Relying on two Supreme Court cases, *United States v. Shabani*¹³² and *Whitfield v. United States*,¹³³ the *Salahuddin* court reasoned that if Congress had intended for § 1951(a) to require an overt act, Congress would have included the requirement in § 1951(a)’s plain language.¹³⁴

The *Salahuddin* court conceded that the Third Circuit had previously stated that for the government to obtain a conspiracy conviction under § 1951(a), “[a]ll that was necessary, in

¹²² See *United States v. Ocasio*, 750 F.3d 399, 409 n.12 (4th Cir. 2014) (noting that § 1951(a) does not require an overt act); *United States v. Monserrate-Valentin*, 729 F.3d 31, 62 (1st Cir. 2013) (“[A] Hobbs Act conspiracy does not require proof of an overt act.”); *United States v. Pistone*, 177 F.3d 957, 960 (11th Cir. 1999) (“[T]he government is not required to allege and prove an overt act in a prosecution for conspiracy to obstruct commerce in violation of 18 U.S.C. § 1951.”); *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994) (“In order to establish a Hobbs Act conspiracy, the government does not have to prove any overt act.”).

¹²³ 765 F.3d 329, 333 (3d Cir. 2014).

¹²⁴ *Id.*

¹²⁵ *Id.* at 334.

¹²⁶ *Id.*

¹²⁷ *Id.* at 335.

¹²⁸ *Id.*

¹²⁹ *Id.* at 350.

¹³⁰ *Id.* at 337.

¹³¹ *Id.* at 340.

¹³² 513 U.S. 10 (1994). See *supra* Part V for a further discussion of *Shabani*.

¹³³ 543 U.S. 209 (2005). See *supra* Part V for a further discussion of *Whitfield*.

¹³⁴ 765 F.3d at 337–38.

addition to an overt act, was that the intended future conduct [the conspirators] had agreed upon include[d] all the elements of the substantive crime.”¹³⁵ That prior statement, however, originated in a Seventh Circuit case addressing a burglary conspiracy, not § 1951(a).¹³⁶ Hence, the court rejected to find that statement binding and elaborated as follows:

We, perhaps carelessly, allowed this language to creep in through a citation to *Rose* in the context of considering issues wholly unrelated to whether an overt act is required for Hobbs Act conspiracy. The statements in these cases regarding an overt act were dicta, as they did not consider the issue of whether an overt act is required for Hobbs Act conspiracy, discuss it at any length, or hold that it was required.¹³⁷

Finally, the *Salahuddin* court rejected the defendant’s rule of lenity argument.¹³⁸ Stating that the rule of lenity does not apply unless there is a “grievous ambiguity or uncertainty in the statute,” the court reasoned that “the language of the statute plainly indicates that an overt act is not required for a Hobbs Act conspiracy.”¹³⁹ Thus, as *Salahuddin* shows, the majority of circuits hold that § 1951(a) does not require an overt act because § 1951(a) provides no textual support for an overt act.

B. The minority of circuits require an overt act.

In contrast to the majority of circuits, the Fifth, Sixth, and Seventh Circuits have held that § 1951(a) requires an overt act.¹⁴⁰ Unlike the Third Circuit’s analysis in *Salahuddin*, no court requiring an overt act under § 1951(a) has provided a meaningful discussion as to why the government must prove an overt act. These courts have instead concluded, without analysis, that § 1951(a) requires an overt act to convict for conspiracy.¹⁴¹

To illustrate, the Fifth Circuit put it simply in *United States v. Stephens*.¹⁴² The *Stephens* court stated that to “convict for criminal conspiracy under 18 U.S.C. § 1951, the jury must find an agreement between two or more persons to commit a crime, and an overt act by one of the

¹³⁵ *Id.* at 339 (emphasis added) (quoting *United States v. Manzo*, 636 F.3d 56, 68 (3d Cir. 2011); *United States v. Janotti*, 673 F.2d 578, 593 (3d Cir. 2011); *United States v. Rose*, 590 F.2d 232, 235 (7th Cir. 1978)).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 340.

¹³⁹ *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)).

¹⁴⁰ *See, e.g.*, *United States v. Box*, 50 F.3d 345, 349 (5th Cir. 1995); *United States v. Uselton*, No. 91-6020, 1992 WL 204351, at *1–3 (6th Cir. 1992); *United States v. Tuchow*, 768 F.2d 855, 869 (7th Cir. 1985); *United States v. Butler*, 618 F.2d 411, 414 (6th Cir. 1980).

¹⁴¹ *See, e.g.*, *Tuchow*, 768 F.2d at 869; *Butler*, 618 F.2d at 414.

¹⁴² 964 F.2d 424 (5th Cir. 1992).

conspirators to further the conspiracy.”¹⁴³ In *Stephens*, the government alleged that the defendant, a bail bondsman, had conspired with local police officers to extort money from travelers arrested for driving under the influence (DUI).¹⁴⁴ The travelers’ money represented a kickback in exchange for (1) the dismissal or reduction of DUI charges; (2) having their drivers’ licenses returned; (3) gaining release of their vehicles from impoundment; and (4) obtaining bond without serving jail time.¹⁴⁵ In determining whether the government satisfied § 1951(a)’s overt act requirement, the *Stephens* court turned to several overt acts committed in furtherance of the conspiracy.¹⁴⁶ The overt acts included officers making a minimum number of agreed on DUI stops and the defendant’s failure to accurately report bail charges to his supervisor.¹⁴⁷ Thus, the court concluded that the evidence “amply indicat[e]d the existence of a conspiracy” and affirmed the defendant’s conviction.¹⁴⁸ The *Stephens* court did not, however, articulate any reason as to why § 1951(a) requires an overt act.¹⁴⁹

Although the Fifth, Sixth, and Seventh Circuits have indeed held that § 1951(a) requires an overt act, many of these decisions pre-date the Supreme Court’s decisions in *Shabani*¹⁵⁰ and *Whitfield*.¹⁵¹ In fact, while the Seventh Circuit held that § 1951(a) required an overt act in its 1985 decision in *United States v. Tuchow*,¹⁵² that holding may now be questionable. In 2009, in *United States v. Corson*,¹⁵³ the Seventh Circuit simply observed § 1951(a)’s circuit split but found it unnecessary to decide whether § 1951(a) requires an overt act.¹⁵⁴ The court in *Corson* acknowledged that “some of [its] decisions list[ed] an overt act as an element, without discussion of the issue,” but the court provided no further guidance.¹⁵⁵ Because the Court in 2005 affirmed the “governing rule for conspiracy statutes,”¹⁵⁶ which is difficult to reconcile with the minority of circuits’ position, the precedential value of the minority of circuits’ position is uncertain.

VII SECTION 1951(a) SHOULD REQUIRE PROOF OF AN OVERT ACT

¹⁴³ *Id.* at 427.

¹⁴⁴ *Id.* at 426.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 428.

¹⁴⁷ *Id.* at 428, 436.

¹⁴⁸ *Id.* at 428.

¹⁴⁹ *See id.* at 426–28.

¹⁵⁰ 513 U.S. 10 (1994).

¹⁵¹ 543 U.S. 209 (2005).

¹⁵² 768 F.2d 855, 869 (7th Cir. 1985).

¹⁵³ 579 F.3d 804 (7th Cir. 2009).

¹⁵⁴ *Id.* at 810 n.†.

¹⁵⁵ *Id.*

¹⁵⁶ *Whitfield*, 543 U.S. at 214. *See supra* Part V for a further discussion of *Whitfield*.

Notwithstanding that § 1951(a) likely does not require an overt act as currently drafted, Congress should amend § 1951(a) with an express overt act requirement. At a basic level, by amending § 1951(a) to require an overt act, Congress would honor the purpose of criminal law's *actus reus* element, which ensures that “the individual thinking evil thoughts [remains] protected from a state which may class him as a threat to its security.”¹⁵⁷

Granted, where the government is required to prove an overt act to convict for conspiracy, almost any act, even a trivial one, can fulfill the requirement.¹⁵⁸ The overt act need not be illegal,¹⁵⁹ nor must it even be “reasonably calculated to effect the specific object of the conspiracy.”¹⁶⁰ Despite any apparent shortcomings, § 1951(a) should require an overt act because it would provide “added protection” to an accused.¹⁶¹ Specifically, by amending § 1951(a) to require an overt act, Congress would resolve statute of limitations problems, ensure that guilt is proven beyond a reasonable doubt, and protect First Amendment rights. These added protections are critical under § 1951(a) because § 1951(a) offers up to 20 years imprisonment—a more severe punishment than any other major federal corruption statute offers.¹⁶²

A. Requiring an overt act would resolve statute of limitations problems.

First, by amending § 1951(a) to require an overt act, Congress would establish a clear, workable standard for calculating § 1951(a)'s statute of limitations. Conspiracy under the Hobbs Act is subject to a five-year statute of limitations.¹⁶³ The Hobbs Act does not provide its own statute of limitations but instead relies on the general federal statute of limitations for non-capital crimes, 18 U.S.C. § 3282(a).¹⁶⁴ Section 3282(a) provides that no person “shall be prosecuted, tried, or punished . . . unless the indictment is found or the information is instituted within five years next after such offense *shall have been committed*.”

¹⁵⁷ Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405 (1959).

¹⁵⁸ Kaitlin Ek, *Conspiracy and the Fantasy Defense: The Strange Case of the Cannibal Cop*, 64 DUKE L.J. 901, 933 (2015) (citing *Yates v. United States*, 354 U.S. 298, 334 (1957) (finding that attending a lawful meeting was an overt act in furtherance of conspiring to overthrow the government), *overruled on other grounds* by *Burks v. United States*, 437 U.S. 1 (1978)).

¹⁵⁹ *Id.* at 933–34 (quoting *Yates v. United States*, 354 U.S. 298, 334 (1957) (“Nor, indeed, need such an act, taken by itself, even be criminal in character.”), *overruled on other grounds* by *Burks v. United States*, 437 U.S. 1 (1978)).

¹⁶⁰ *Id.* (quoting *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 947 (1959)).

¹⁶¹ *Id.* at 933 (citing *United States v. Gigante*, 982 F. Supp. 140, 169 (E.D.N.Y. 1997) (“As an added protection to defendants against punishment for mere talk, in some instances an overt act must take place in furtherance of the conspiracy.”)).

¹⁶² McCartney, *supra* note 6, at 181 n.3.

¹⁶³ 18 U.S.C. § 3282(a).

¹⁶⁴ *United States v. Borden*, 10 F.3d 1058, 1060 (4th Cir. 1993) (coining § 3282(a) as the general federal “catchall” statute of limitations for non-capital crimes).

Thus, § 3282(a) raises the question: In the absence of an overt act, when is conspiracy under § 1951(a) deemed “committed” so that § 3282(a)’s five-year statute of limitations begins to run? Several courts have held that conspiracy under § 1951(a) is a “continuing offense.”¹⁶⁵ A continuing offense is defined as “a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy.”¹⁶⁶ In contrast to an “instantaneous” offense’s statute of limitations, which begins to run once a crime’s overt act has been committed, a continuing offense’s statute of limitations does not begin to run until the crime’s purposes have been abandoned or accomplished.¹⁶⁷ To put it bluntly, “the continuing offense doctrine extends the statute of limitations beyond its stated term, allowing the government to prosecute conduct that precedes the stated limitations period.”¹⁶⁸ Consequently, continuing offenses do not incentivize the government to maximize efficiency when prosecuting, nor do they maximize judicial efficiency.¹⁶⁹

Recognizing the problems that continuing offenses create, the Supreme Court has explained that the continuing offense doctrine must be strictly construed to apply in only “limited circumstances.”¹⁷⁰ The continuing offense doctrine’s limited applicability acknowledges that statutes of limitation are “designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.”¹⁷¹ Accordingly, the Court in *Toussie v. United States*¹⁷² instructed that a crime must not be construed as a continuing offense unless (1) the statute’s plain, explicit language “compels such a conclusion”; or (2) given the nature of the crime, “Congress must assuredly have intended that it be treated as a continuing one.”¹⁷³

Neither of *Toussie*’s considerations suggest that conspiracy under § 1951(a) should be treated as a continuing offense. First, nothing in the Hobbs Act expressly compels a conclusion that conspiracy should be treated as a continuing offense.¹⁷⁴ For that reason, “congressional

¹⁶⁵ See, e.g., *United States v. Franco-Santiago*, 681 F.3d 1, 10 n.14 (1st Cir. 2012).

¹⁶⁶ *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939).

¹⁶⁷ *United States v. Yashar*, 166 F.3d 873, 875–76 (7th Cir. 1999); see also Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 NW. J. L. & SOC. POL’Y 219, 228 (2012).

¹⁶⁸ Boles, *supra* note 167, at 229–30 (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)).

¹⁶⁹ *Id.* at 226 (explaining that instantaneous crimes’ statutes of limitation both (1) “prod law enforcement to investigate suspected criminal activity and prosecutors to charge offenders promptly”; and (2) “reduce[] transaction costs associated with gathering evidence to reconstruct the distant past, reduce[] the number of indictments filed, and simplif[y] judicial decisions by drawing a predictable bright-line rule”).

¹⁷⁰ *Toussie v. United States*, 397 U.S. 112, 115 (1970).

¹⁷¹ *Id.* at 114–15.

¹⁷² 397 U.S. 112 (1970).

¹⁷³ *Id.* at 115.

¹⁷⁴ Compare 18 U.S.C. § 1951 with 18 U.S.C. § 3284 (“The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense”) and 22 U.S.C. § 618(e) (“Failure to file any

silence is stronger in favor of not construing [§ 1951(a)] as incorporating a continuing-offense theory.”¹⁷⁵ As to *Toussie*’s second consideration, courts have not even attempted to ascertain Congress’s intent when concluding that conspiracy under § 1951(a) is a continuing offense. Instead, courts have concluded that conspiracy under § 1951(a) is a continuing offense either because no overt act need be shown,¹⁷⁶ or because conspiracy in general is the “prototypical continuing offense” on the basis that “each day’s acts bring a renewed threat of the substantive evil Congress sought to prevent.”¹⁷⁷

These conclusory findings undermine *Toussie*’s fundamental instruction for the continuing offense doctrine to apply in only limited circumstances because of a statute of limitation’s important purposes.¹⁷⁸ Concluding that conspiracy under § 1951(a) is a continuing offense merely by reasoning that § 1951(a) does not expressly require an overt act conflates ascertaining the elements of § 1951(a) with its proper statute of limitations. Moreover, reasoning that conspiracy under § 1951(a) is a continuing offense based on the notion that conspiracy in general is the “prototypical continuing offense” adopts a blanket conclusion ignoring the fact that several other federal conspiracy statutes, including 18 U.S.C. § 371, are not treated as continuing offenses.¹⁷⁹ Absent a clearer indication from Congress, it cannot be said that “Congress must assuredly have intended that [§ 1951(a)] be treated as a continuing one.”¹⁸⁰

such registration statement or supplements thereto . . . *shall be considered a continuing offense*”) (emphases added).

¹⁷⁵ See *Toussie*, 397 U.S. at 121 (“[W]e conclude that any argument based on congressional silence is stronger in favor of not construing [the Universal Military Training and Service Act] as incorporating a continuing-offense theory.”).

¹⁷⁶ See, e.g., *United States v. Franco-Santiago*, 681 F.3d 1, 10 n.14 (1st Cir. 2012) (“Evidence of an overt act is not required to establish a Hobbs Act conspiracy, and where a conspiracy does not require an overt act, it ‘continues as long as its purposes have neither been abandoned nor accomplished’”) (citations omitted); *United States v. Salerno*, 868 F.2d 524, 546 (2d Cir. 1989) (“It is true that where a conspiracy statute does not require the perpetration of an overt act, the limitations period does not begin to run until the conspiracy’s objectives have been ‘accomplished or abandoned.’”) (Bright, J., concurring in part and dissenting in part); *United States v. Tolub*, 187 F. Supp. 705, 709 (S.D.N.Y. 1960) (“Under [§ 1951(a)], unlike most conspiracy statutes, no overt act need be alleged or proven. Thus, the statute of limitations does not begin to run until the termination of the conspiracy.”) (citation omitted).

¹⁷⁷ See *Toussie*, 397 U.S. at 122.

¹⁷⁸ See *id.* at 114–15.

¹⁷⁹ *Fiswick v. United States*, 329 U.S. 211, 216 (1946) (holding that the “last overt act” triggered the statute of limitations in a criminal conspiracy); *United States v. Curley*, 55 F.3d 254, 257 (7th Cir. 1995) (holding that statute of limitations for conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846, which is subject to § 3282(a)’s five-year provision, begins to run “from the last overt act in furtherance of that conspiracy”); *United States v. Zalman*, 870 F.2d 1047, 1057 (6th Cir. 1989) (“The statute of limitations for prosecutions initiated pursuant to 18 U.S.C.A. § 371 is five years from the date of the commission of the last overt act in furtherance of the conspiracy.”).

¹⁸⁰ See *Toussie*, 397 U.S. at 115.

Amending § 1951(a) to require an overt act would cause courts to reconsider whether § 1951(a) is a continuing offense. Many courts have reached that conclusion because § 1951(a) does not expressly require an overt act.¹⁸¹ Thus, being unable to rely on § 1951(a)'s lack of an overt act requirement, courts would likely resolve doubts in favor of an accused and reject the continuing offense doctrine under § 1951(a).¹⁸² Indeed, Congress has provided no indication that § 1951(a) should be treated as a continuing offense. In turn, rejecting the continuing offense doctrine under § 1951(a) would encourage the government “to bring offenders to justice more quickly, and [relieve courts] of the burden of adjudicating long-abandoned or tenuous crimes.”¹⁸³ Consequently, amending § 1951(a) to require an overt act cause courts to properly resolve doubts in favor of an accused.¹⁸⁴

B. Requiring an overt act would ensure the government proves guilt beyond a reasonable doubt to convict.

Second, because an overt act stands as solid proof of a conspiracy,¹⁸⁵ Congress would honor due process by ensuring that the government proves guilt beyond a reasonable doubt to convict by amending § 1951(a) to require an overt act. Due process requires that an accused enjoy a presumption of innocence until the government meets its burden to prove guilt beyond a reasonable doubt.¹⁸⁶ This standard of proof is central to America's criminal justice system and serves as “a prime instrument for reducing the risk of convictions resting on factual error.”¹⁸⁷

To convict for most crimes, the government must prove both an *actus reus* and a *mens rea*.¹⁸⁸ To convict for conspiracy, the government must prove (1) an agreement; (2) a corresponding *mens rea*; and (3) if statutorily required, an overt act in furtherance of the conspiracy.¹⁸⁹ Consistent with the vague contours of conspiracy, it remains unsettled as to what

¹⁸¹ See *supra* note 176 and accompanying text.

¹⁸² See Boles, *supra* note 167, at 254 (discussing the rule of lenity's application to the continuing offense doctrine).

¹⁸³ *Id.* at 226.

¹⁸⁴ Additionally, amending § 1951(a) to require an overt act would also create a clear, workable rule enhancing prosecutorial and judicial efficiency. See *supra* Part VII(A).

¹⁸⁵ See *Yates v. United States*, 354 U.S. 298, 334 (1957) (“The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work,’ and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.”) (citation omitted), *overruled on other grounds by* *Burks v. United States*, 437 U.S. 1 (1978)).

¹⁸⁶ U.S. CONST. amends. V, XIV; see also *In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

¹⁸⁷ *Heller*, *supra* note 30, at 113 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

¹⁸⁸ LAFAVE, *supra* note 9, at 303.

¹⁸⁹ *Id.* at 622–30.

precise form conspiracy's agreement must take.¹⁹⁰ But a mere "tacit understanding" is sufficient, and no written or spoken words are necessary.¹⁹¹ As the Supreme Court explained in *Iannelli v. United States*,¹⁹² conspiracy's "agreement itself need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of each case."¹⁹³ Thus, proving conspiracy's agreement presents the government with a minimal burden.

Nonetheless, the government must also prove conspiracy's more complex *mens rea* element, which actually consists of two intents. First, the government must prove an accused intended to enter into conspiracy's agreement.¹⁹⁴ This intent asks simply whether an accused intended to form an agreement with her conspirators, or put another way, whether the conspirators all shared a meeting of the minds.¹⁹⁵ Because the government does not ordinarily seek to convict for conspiracy absent evidence of an agreement, proving the first intent is a minimal burden that is rarely contested in most prosecutions.¹⁹⁶ But an intent to enter into an agreement is "without moral content" and, standing alone, insufficient for punishment.¹⁹⁷

Thus, because conspiracy is a specific intent crime,¹⁹⁸ conspiracy's second intent requires the government to prove an accused had the specific intent to commit the conspiracy's underlying substantive offense.¹⁹⁹ Unlike the first intent, the second intent is "the crucial question in most conspiracy prosecutions."²⁰⁰ Because conspiracy's two intents are distinct from one another, one may exist without the other.²⁰¹ Consistent with the requirement of proof beyond a reasonable doubt, the government must prove each beyond a reasonable doubt.²⁰²

When seeking to prove conspiracy's two intents, the government normally relies on circumstantial evidence and direct evidence by way of co-conspirator testimony, which includes

¹⁹⁰ *Id.* at 622.

¹⁹¹ *Id.*

¹⁹² 420 U.S. 770 (1975).

¹⁹³ LAFAVE, *supra* note 9, at 622 (quoting *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975)).

¹⁹⁴ *Id.* at 628–31; *see also* Heller, *supra* note 30, at 117.

¹⁹⁵ LAFAVE, *supra* note 9, at 628–29; *see also* Heller, *supra* note 30, at 117 (quoting Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 631 (1941)).

¹⁹⁶ Heller, *supra* note 30, at 117.

¹⁹⁷ LAFAVE, *supra* note 9, at 628 (quoting *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 947 (1959)).

¹⁹⁸ Heller, *supra* note 30, at 117 ("Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.") (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959)).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*; *see also* LAFAVE, *supra* note 9, at 628–31.

²⁰² *See generally* LAFAVE, *supra* note 9, at 628.

hearsay.²⁰³ Eliminating conspiracy's overt act requirement does not implicate proof beyond a reasonable doubt if the government relies solely on circumstantial evidence to prove conspiracy's two intents.²⁰⁴ By proving conspiracy's two intents beyond a reasonable doubt with circumstantial evidence, the government necessarily proves that at least one overt act in furtherance of the conspiracy was committed.²⁰⁵

In contrast, eliminating conspiracy's overt act requirement threatens proof beyond a reasonable doubt. Specifically, because the government could rely solely on direct evidence by way of co-conspirator testimony to convict, false convictions can too easily be had.²⁰⁶ In many cases, co-conspirators willingly provide the government with testimony in exchange for plea deals.²⁰⁷ Moreover, co-conspirator testimony is often persuasive. For example, co-conspirator testimony frequently points to evidence of wrongdoing and may enflame jurors' emotions.²⁰⁸ Oftentimes co-conspirator testimony also appears to solve the case by casting blame on the alleged wrongdoer.²⁰⁹ Although co-conspirator testimony is therefore appealing to jurors, co-conspirator testimony is notoriously unreliable because co-conspirators' best interests may often be to obtain plea deals by incriminating each other with statements that may be false.²¹⁰ Consequently, eliminating conspiracy's overt act requirement and allowing juries to convict based solely on co-conspirator testimony increases the likelihood of false convictions.²¹¹

²⁰³ Heller, *supra* note 30, at 118. The Supreme Court has held that convictions may be obtained solely on co-conspirator testimony, even if uncorroborated. *See Caminetti v. United States*, 242 U.S. 470, 495 (1917).

²⁰⁴ Heller, *supra* note 30, at 119.

²⁰⁵ *Id.* (“By relying on circumstantial evidence to prove that a defendant intended to enter into a conspiratorial agreement and specifically intended to commit the conspiracy’s underlying substantive offense, the government necessarily proves that the defendant committed at least one overt act in furtherance of the conspiracy.”).

²⁰⁶ *See id.* at 119–33.

²⁰⁷ *Id.* at 123–24.

²⁰⁸ *Id.* at 134 (quoting *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring)); *see also Caminetti*, 242 U.S. at 495 (explaining that courts should “caution juries against too much reliance upon the testimony of accomplices, and [] require corroborating testimony before giving credence to such evidence”).

²⁰⁹ Heller, *supra* note 30, at 134. Justice Robert Jackson recognized that the dangers of co-conspirator testimony are only exacerbated in joint trials, where, if an accused is “silent, he is taken to admit and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.” *Id.* (quoting *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring)).

²¹⁰ *Id.* at 131.

²¹¹ *Id.*; *see also* David. S. Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1383 (1972) (explaining that the co-conspirator exception “will often allow evidence otherwise considered unreliable to come before the jury, with the consequent danger that the verdict will be unduly affected not only as to any alleged conspiracy, but also as to any alleged choate crimes”).

Because an overt act stands as solid proof of a conspiracy, amending § 1951(a) to require an overt act would reduce the chance of punishing the innocent. Allowing juries to convict based solely on co-conspirator testimony, which may be false, threatens to undermine due process's proof beyond a reasonable doubt standard.²¹² Given that § 1951(a) offers the most extreme punishment of all the major federal corruption statutes,²¹³ ensuring that the innocent go free is critical under § 1951(a).

C. Requiring an overt act would protect First Amendment rights.

Finally, by amending § 1951(a) to require an overt act, Congress would safeguard an accused's First Amendment rights. The Constitution's First Amendment states, in absolute terms, that "Congress shall make no law . . . abridging the freedom of speech."²¹⁴ Despite the First Amendment's plain language, which appears to provide an absolute right to free speech, history and case law show otherwise. Indeed, the First Amendment's broad terms do not prohibit the government from regulating speech with both content-neutral and content-based restrictions that fall into historically recognized categories of permissible exceptions.²¹⁵

The government's regulation of speech has made at least two things clear at the intersection of the First Amendment and crime. First and foremost, the First Amendment generally protects speech that advocates for criminal conduct.²¹⁶ Second, the First Amendment does not protect speech that constitutes actual criminal conduct.²¹⁷ Because conspiracy's agreement is sufficient to meet conspiracy's *actus reus* element,²¹⁸ the most relevant First Amendment limitation for speech used to form conspiracy's agreement appears to be the restriction for speech that constitutes actual criminal conduct. However, the Supreme Court has never spoken at any length about the intersection of the First Amendment and conspiracy, creating uncertainty.²¹⁹

At the uncertain intersection of the First Amendment and conspiracy, virtually no scholar has advocated for a categorical approach, whereby the First Amendment should *always*

²¹² Heller, *supra* note 30, at 121–24, 134–42.

²¹³ McCartney, *supra* note 6, at 181 n.3.

²¹⁴ U.S. CONST. amend. I.

²¹⁵ See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382–90 (1992).

²¹⁶ See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (providing First Amendment protection to speech advocating for criminal conduct unless it is "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

²¹⁷ See, e.g., United States v. Alvarez, 567 U.S. ___, 132 S. Ct. 2537, 2545 (2012).

²¹⁸ See United States v. Shabani, 513 U.S. 10, 16 (1994).

²¹⁹ Justice Robert Jackson acknowledged that "[c]ommunication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved." Dennis v. United States, 341 U.S. 494, 575 (1951) (Jackson, J., concurring). Nonetheless, Justice Jackson rejected arguments that the First Amendment required reversal of communist party organizers' conspiracy convictions. *Id.* at 572–77.

uniformly apply, or not apply.²²⁰ Scholars have instead recognized that the First Amendment should apply to conspiracy in some circumstances.²²¹ For example, some scholars have argued that speech used to form conspiracy's agreement should be protected until the agreement is solidified to an extent creating a mutual obligation between the conspirators to act.²²² Still other scholars have acknowledged that determining when an agreement is solidified to this extent would likely create a judicially unworkable rule.²²³

A better approach, then, is to acknowledge the uncertainty at the intersection of the First Amendment and conspiracy, defer to the Constitution, and presume that speech used to form conspiracy's agreement is protected. This approach recognizes that the Framers could not have intended for the First Amendment to not apply to conspiracy. Indeed, the modern law of conspiracy did not emerge until Chief Justice Lord Denman famously articulated its definition in 1832.²²⁴ The First Amendment, however, was ratified in 1791.²²⁵ Similarly, this approach comports with jurisprudence providing expansive First Amendment protections.²²⁶ The Court has established that the First Amendment generally protects a right to defame public figures.²²⁷ The First Amendment also protects a self-styled Nazi's right to march down a city's streets populated by Holocaust survivors.²²⁸ Based on the First Amendment's expansive protections, speech used to form conspiracy's agreement should likewise be protected.

²²⁰ See Redish and Downey, *supra* note 20, at 697.

²²¹ See, e.g., *id.* at 697–99; Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 868–73 (2013).

²²² Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 743–45 (1980), available at <http://www.jstor.org/stable/828074>.

²²³ Redish and Downey, *supra* note 20, at 717–18; see also Morrison, *supra* note 220, at 908–13.

²²⁴ LAFAVE, *supra* note 9, at 614 (quoting *Rex v. Jones*, 4 B. & Ad. 345, 110 Eng. Rep. 485 (1832)). See *supra* Part II for a further discussion of conspiracy's history.

²²⁵ Redish and Downey, *supra* note 20, at 719.

²²⁶ See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”).

²²⁷ Redish and Downey, *supra* note 20, at 699; see also *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment protects defamation of a public figure absent a showing of “actual malice”).

²²⁸ Redish and Downey, *supra* note 20, at 699 (citing *Collin v. Smith*, 578 F.2d 1197, 1199, 1207 (7th Cir. 1978) (upholding the First Amendment right of the National Socialist Party of America to hold a public demonstration in a Chicago suburb with a large Jewish population that included several Holocaust survivors)).

Nonetheless, it cannot seriously be argued that the First Amendment should give the guilty *carte blanche* to escape prosecution. Accordingly, speech used to form conspiracy's agreement should lose its protection once an overt act in furtherance of the conspiracy is committed.²²⁹ Committing an overt act in furtherance of the conspiracy causes speech used to form conspiracy's agreement to become part of the overt act itself, thereby stripping it of First Amendment protection.²³⁰ This, too, comports with First Amendment jurisprudence, which instructs that the First Amendment does not protect non-expressive conduct, even if speech may be closely intertwined.²³¹

Requiring an overt act to strip speech of its First Amendment protection is important under Section 1951(a) for two primary reasons. First, speech used to form conspiracy's agreement under § 1951(a) could represent high value political speech in some circumstances. In fact, § 1951(a) is the government's "primary tool" to prosecute misuse of political office for personal gain.²³² And it is already established that high value political speech warrants special protection under the First Amendment.²³³ Second, Congress enacted § 1951(a) to combat racketeering in labor disputes, and now, the government uses § 1951(a) to prosecute political corruption and commercial disputes.²³⁴ Section 1951(a) conspiracy offenses may therefore likely be non-violent and executed over several months or even years by sophisticated parties,²³⁵ suggesting that the incitement of imminent illegal activity test does not apply to § 1951(a).²³⁶

²²⁹ *Id.* at 732.

²³⁰ *Id.*

²³¹ *Id.*; *see also* *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (holding that speech intertwined with non-expressive conduct is not entitled to First Amendment protection); *United States v. Aguilar*, 883 F.2d 662, 685 (9th Cir. 1989) (holding that the First Amendment does not require reversal of a conviction when "speech was inextricably intertwined" with illegal conduct); *United States v. Buttorff*, 572 F.2d 619, 623–24 (8th Cir. 1978) (holding that the First Amendment does not protect speech closely intertwined with illegal conduct).

²³² *McCartney*, *supra* note 6, at 181; *see also* *United States v. Cerilli*, 603 F.2d 415, 418–21 (3d Cir. 1979) (affirming state officials' convictions for solicitation of political contributions even though the contributions were used for a lawful purpose); *United States v. Albertson*, 971 F. Supp. 837, 838 (D. Del. 1997) (acquitting defendant who was convicted under the Hobbs Act because organizing "legitimate legal and political opposition" to proposed land development is beyond the Hobbs Act's ambit).

²³³ *Roth v. United States*, 354 U.S. 476, 484 (1957) (emphasizing that the First Amendment's core protections include "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

²³⁴ *McCartney*, *supra* note 6, at 181.

²³⁵ *See, e.g.*, *United States v. Box*, 50 F.3d 345, 348 (5th Cir. 1995) (affirming non-violent conviction for conspiracy under § 1951(a)); *United States v. Clemente*, 22 F.3d 477, 478–80 (2d Cir. 1994) (same); *United States v. Tuchow*, 768 F.2d 855, 858–61 (7th Cir. 1985) (same); *United States v. Butler*, 618 F.2d 411, 413–14 (6th Cir. 1980) (same).

²³⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (providing First Amendment protection to speech advocating for criminal conduct unless it is "directed to inciting or producing *imminent* lawless action")

Thus, by amending § 1951(a) to require an overt act, Congress would acknowledge these concerns and ensure that an accused is not punished for exercising her First Amendment rights.

D. Congress should amend § 1951(a) to require an overt act.

Based on the foregoing, Congress should amend § 1951(a) as follows:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do *and commits any overt act in furtherance thereof*, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Amending § 1951(a) with these eight words would resolve the circuit split that § 1951(a)'s ambiguous plain language has created.²³⁷ These eight words would also establish a workable standard for calculating § 1951(a)'s statute of limitations.²³⁸ In addition, these eight words would ensure that the government proves guilt beyond a reasonable doubt²³⁹ while simultaneously protecting an accused's First Amendment rights.²⁴⁰

VIII CONCLUSION

When Congress enacted § 1951(a) in 1946, conspiracy had existed as a criminal offense for over 600 years. During that time, conspiracy's scope continuously broadened, becoming so vague to almost "expand itself to the limit of its logic."²⁴¹ Congress did not resolve conspiracy's uncertain contours when enacting § 1951(a). Instead, § 1951(a)'s ambiguous plain language has generated uncertainty as to whether the government must prove an overt act to convict. This uncertainty has split the federal courts of appeal, complicated § 1951(a)'s statute of limitations, threatened due process's proof beyond a reasonable doubt standard, and risked punishing those exercising First Amendment rights. These problems illustrate that Justice Robert Jackson was

and "likely to incite or produce such action") (emphasis added); *see also* Redish and Downey, *supra* note 20, at 729–31. Similarly, although it is beyond the scope of this Article, the other First Amendment limitations—(1) fighting words; (2) obscenity; (3) racist and hate speech; (4) profane and indecent speech; (5) commercial speech; and (6) sexually-oriented speech—do not categorically apply to speech used to form conspiracy's agreement under § 1951(a), given the crimes § 1951(a) outlaws.

²³⁷ *See supra* Part VI.

²³⁸ *See supra* Part VII.A.

²³⁹ *See supra* Part VII.B.

²⁴⁰ *See supra* Part VII.C.

²⁴¹ *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

correct to caution that “loose practice as to [conspiracy] constitutes a serious threat to fairness in our administration of justice.”²⁴² With the government’s frequent use of § 1951(a) and § 1951(a)’s extreme punishment provision, Congress should not overlook § 1951(a)’s problems. Eight words provide Congress with a solution.²⁴³ It is now up to Congress to act.

²⁴² *Id.* at 446.

²⁴³ *See supra* Part VII.D.

CRIMINAL JUSTICE REFORM PANEL
FEBRUARY 16, 2016
IDAHO LAW AND JUSTICE LEARNING CENTER

CRIMINAL JUSTICE REFORM PANEL

INTRODUCTION

On February 16, 2016 the University of Idaho College of law, along with the ACLU of Idaho and the Idaho Freedom Foundation, were the proud sponsors of a criminal justice reform panel that questioned the effectiveness of the Idaho and federal criminal justice system.

This panel featured three distinguished members of the legal and criminal justice communities. The first featured panelist was the Honorable Raúl Labrador. Congressman Labrador currently serves as a U.S. Representative for the first congressional district of Idaho. Through his work on the judiciary committee, Representative Labrador has become a leader of the criminal justice reform movement and has promoted the need for more reform-minded conservatives. The second featured panelist was Kathy Griesmyer. Ms. Griesmyer currently serves as public policy strategist for the American Civil Liberties Union (ACLU) of Idaho. Through her position at ACLU of Idaho, Ms. Griesmyer has promoted the ACLU's legislative and public policy agenda on the issue of criminal justice reform. The third featured panelist was Wayne Hoffman. Mr. Hoffman currently serves as president of the Idaho Freedom Foundation and is a leading expert on Idaho's legislature and public policy. Mr. Hoffman has promoted the need for accountability amongst elected officials and state programs that affect the criminal justice system. The moderator for this panel discussion was Shaakirrah R. Sanders, Professor at the University of Idaho College of Law.

The primary purpose of this criminal justice reform panel was to inform the public of criminal reforms at the state and federal level. The goal of this forum was to explore equitable solutions that encourage the pursuit of justice and create momentum among Idaho's policy makers. The topics explored include prison overcrowding, public defender representation, and the lack of transparency in Idaho's criminal justice system. Panelists also discussed some of the current criminal justice reform bills that are in the making both at the state and federal level.

IDAHO CRIMINAL JUSTICE REFORM PANEL

MODERATOR: SHAAKIRRAH R. SANDERS*

PANELIST: THE HONORABLE RAÚL LABRADOR,** KATHY GRIESMYER,*** AND WAYNE
HOFFMAN****

Shaakirrah Sanders: Good evening everyone and thank you so much for being here tonight. My name is Shaakirrah Sanders. I am an associate professor here at the University of Idaho College of Law. I teach courses related to government structure and individual rights and liberties under the United States Constitution, including criminal procedure and advanced criminal procedure. I'd like to introduce our panelists tonight on what I am very sure will be a very informative and enlightening discussion on state and federal trends on criminal justice reform.

First, to my right, which I think is your left, did I get that right?

Raúl Labrador: I don't go left.

(Laughter)

Sanders: ...is Congressman Raúl Labrador, a three-term member of the U.S. House of Representatives. Representative Labrador represents Idaho's first congressional district, which stretches from Nevada to Canada in western Idaho. He is a graduate of Brigham Young University, where he received his undergraduate degree, and the University of Washington School of Law. He clerked in federal district court in Boise before starting his own practice that included immigration and criminal defense. Representative Labrador served two terms in Idaho House of Representatives before his election to Congress in 2010. He also serves on the Natural Resource and Judiciary committees, where he is a leader on immigration and criminal justice reform. In 2015, Representative Labrador helped found the House Freedom Caucus, which is a group of reform-minded conservatives.

To my far left is Kathy Griesmyer, who serves as the public policy strategist for the ACLU of Idaho. Kathy joined the ACLU of Idaho in 2010. As public policy strategist, Kathy works as a lobbyist during Idaho's legislature session and oversees a statewide policy for the ACLU. Before her work there, she was an employee at the Idaho Action Help Network, where she helped organize Idahoans to enforce their right to vote. Kathy is a graduate of the University of Oregon, where she received a Bachelor's of Arts in Spanish and International Studies with a focus on

* Shaakirrah Sanders is an Associate Professor at the University of Idaho College of Law.

** Raúl Labrador is an Idaho Congressman serving his third term in the U.S. House of Representatives.

*** Kathy Griesmyer is a public policy strategist for the ACLU of Idaho.

**** Wayne Hoffman is the president of the Idaho Freedom Association.

Diplomacy and Law. This certainly explains Kathy's ability to bring together diverse groups of people on important issues

Finally to my near left is Wayne Hoffman, who is the president of the Idaho Freedom Foundation. Mr. Hoffman has run this organization since its launch in January of 2009. He is one of Idaho's leading experts on public policy, Idaho's Legislature, and journalism in Idaho. Wayne spent 25 years writing about government and politicians and has won numerous awards for his investigative and political journalism. He previously served as the Special Assistant to the Director of the State Department of Agriculture and has successfully managed the communication efforts of several political campaigns.

Please join me in welcoming our panelists.

(Applause)

We are going to start tonight with some opening remarks from the congressman and then we'll get perspectives from the ACLU and the Idaho Freedom Foundation.

Labrador: Thank you very much. I actually love this room. I don't know how many of you know that this is where we had the legislature for two years. I was a freshman state legislator and I was in my second year. Our Speaker of the House decided that he wanted to keep the younger members of the House away from the older member of the House and he put us up there in the rafters. It was probably the worst mistake he ever made because he had no control over us because he couldn't see what we were doing. We all had these chairs that would recline and we would say something or create some havoc. Then then we would recline all at the same time and he had no idea who was doing it. So, I think they learned their lesson that they needed to keep an eye on the younger members of the House. But, this is where I learned to be a legislator so I have a great deal of affinity for this building. I was super excited when the [University of Idaho] law school decided that they were going to turn this into a law school building. I want to thank the ACLU, the Idaho Freedom Foundation, and the University of Idaho College of Law for hosting this event on Criminal Justice Reform and for inviting me here to speak.

Criminal justice reform is an issue which is of great importance to me and I believe it should be of great concern to every single American. This is an area of policy where I believe we will see some of the greatest reforms in a generation and I'm thrilled to see momentum for this issue, not only at the federal level, but also at the state level. We actually have several state legislators here today. I don't know where they went, but I think they are interested in the issue and I think you are going to start to see some bills also being floated in the [Idaho] State Legislature.

I believe that our bloated prison system is not benefiting tax payers, it's not benefiting society, and it's not benefiting inmates. Instead we have filled our prisons with non-violent, youthful offenders who become, in my opinion, lifetime criminals. They go to prison and learn how to be a better class of criminals. I don't think that's what our society should be doing. Judges who know the facts are barred from employing alternatives for defendants who may deserve a second chance. This may qualify as tough justice, but it's not smart justice. On top of

hardening first-time offenders, mandatory sentences damage their families and they damage our communities. Momentum has been steadily building for reform. This Congress alone, I have met with President Obama twice. Yes I have, twice, met with President Obama, believe it or not, to discuss this important issue. I don't know if you remember in his State of the Union, this was the first issue that he discussed when he was speaking to us. It was the only issue I agreed with him on.

Last year I re-introduced HR 920, The Smarter Sentencing Act, with Representative Bobby Scoot, who is a Democrat from Virginia. The Smarter Sentencing Act would allow judge's discretion in non-violent drug cases, ensuring that limited resources are focused on the most serious offenders in our society. In the House Judiciary Committee, we are working right now on a series of bills that address our criminal justice system. In November, our committee advanced a sentencing reform act, which incorporates many of the changes that were introduced in my Smarter Sentencing Act. The reforms would reduce certain mandatory minimums for drug offenses, reduce the three-strike mandatory life sentence to 25 years, and broaden the existing safety valve for low-level drug offenders.

We also advanced the Second Chance Reauthorization Act. That bill authorizes funding for public and private entities to evaluate and improve academic and vocational education for offenders in prison, jails, and juvenile facilities. And just last week, just before I came back to Boise, we passed a bill implementing a post-sentencing risk assessment system so that we could identify an inmate's risk of recidivism. The bill also establishes incentives for inmates to participate in correctional programs aimed at lowering our recidivism rates.

I co-sponsored each one of these bills as each moved through the committee. House Speaker Paul Ryan has expressed his support and has promised to bring a reform package to the floor for a vote this year. The Senate Judiciary Committee has also advanced a criminal justice package that includes many of the same reforms that we have advanced in the House [of Representatives]. As you know, the House passes something, the Senate will pass something else, and then we will go to conference and hopefully we will have the final bill come out.

Now— before you start thinking that Congress is going to pass all of these bills, these needed reforms still face an uphill battle. What we have in Washington D.C. is actually not a partisan divide on this issue; it's a generational divide on this issue. Many of the older, more seasoned legislators are used to what was happening in the 60s and the 70s. That's the era where they grew up, where they started forming their policies and when we've had this "Tough On Crime" legislation in many of the cities, states and at the Federal level. Some of the younger legislators are coming in and realizing that we need a change to our crowded prisons. But, criticism has come out in both the House and the Senate from fellow Republicans. We don't know exactly what's going to happen, but I would continue to fight for these reforms.

I think you know the statistics, but I'm just going to say a few of them quickly. Only have 5% of the world's population lives in the United States. The United States is home to 25% of the world's prison population. We have 500% more inmates in federal custody today than we did 30 [years ago]. And as a fiscal conservative the number that scares me the most: spending on federal

incarceration, which has increased by more than 1100% with each prisoner costing the taxpayers approximately \$31,000 per year.

We've forgot the purpose of the legal system, the purpose of sentencing and the purpose of due process. The aim is not to coerce folks into pleading guilty to avoid harsh mandatory sentences, which happens in the federal system all the time. The purpose should be justice. After decades of failed "Tough On Crime" policies, a room of people like this leads me to believe that we're moving into a new era. When a bill like my Smarter Sentencing Act is supported by not just the Center for American Progress and the ACLU on the left, but also by Americans for Tax Reform and Idaho Freedom Foundation on the right, I think both sides of the aisle are realizing that we can't incarcerate our nation out of an inner-city war on drugs or any other Federal disputes. I am honored to be in the middle of this fight that is, I think, at the core of protecting out liberties. The criminal justice system was never supposed to make it easy to take away someone's liberty. And I think that if you're a conservative, in particular, you need to understand that I stand up not just for the Second Amendment or just for the First Amendment, but I will stand up for the Third and the Fourth and the Fifth and the Sixth. It's the entire Constitution that I went back to Washington to defend. Thank you very much.

(Applause)

Sanders: As somebody who teaches the Fourth, Fifth, Sixth, and Eighth Amendments, that is good news to my ears. Kathy Griesmyer from the ACLU of Idaho.

Kathy Griesmyer: Great. My name is Kathy Griesmyer, I'm the Public Policy Strategist with the ACLU of Idaho. I first off just want to thank Shaakirrah for helping organize this panel and for my fellow panelists here, Representative Raúl Labrador and Wayne from the Freedom Foundation. I think what we have in the room here tonight is really an exciting opportunity to celebrate maybe unusual allies coming together on an issue of such critical national and state importance. Criminal justice reform has been something that the ACLU has been monitoring and advocating for many years now, and it's really starting to pick up steam both at the federal and national level and I think, in large part, due to an opportunity for folks on the right or folks on the left, conservatives, progressives, however you want to deem it, coming together and realizing that our system is broken and has failed to provide justice for folks who get caught up in the system. The ACLU's work on criminal justice reform expands a pretty wide breadth of issues. Most notably right now, at least here in the state of Idaho, public defense reform has been a large priority for the organization. In 2010, the National Legal Aid and Defenders Association came out and studied public defense delivery systems in the state and concluded that none of Idaho's counties were providing constitutionally adequate defense. Subsequently, we ended up filing a lawsuit this past summer, and now we actually have strong, comprehensive public defense reform that was just introduced yesterday in the House Judiciary and Rules Committee which we're very much looking forward to its progress at the legislature.

I think what Representative Labrador said earlier about this generational divide that's been happening here with Criminal Justice Reform, a lot of it is being sparked not only by the, sort of, ballooning corrections and criminal justice costs that we're facing. Especially in these hard economic times it's about figuring out how do we put in efforts that allow for cost savings, but also maintain a high level of public safety. Looking at our criminal justice system is a good opportunity to realize that we prioritize folks who need to be in the system and folks who have; there are better alternatives for them to get treatment out in the community. That's where they should be and we should, instead, be prioritizing prison space for folks who really do need to be there. Some of the things that we will probably get into later during this discussion, we'll be talking about Justice Reinvestment Initiative which was brought here in Idaho in 2014 and looked at doing just that; how do we save Idaho tax-payer dollars from building a new prison, better prioritizing our prison space, looking at how do we reduce recidivism rates and better track what's working and not working.

Of course there are always opportunities for more. Last year there was a lot of great work on some misdemeanor reclassification, taking down some misdemeanors to infractions, limiting the number of folks who would get more officially caught up in the Criminal Justice System and that's continuing again this year. Also, from a corrections perspective, I'd like to acknowledge we have Director [Kevin] Kempf from the Department of Corrections who's here tonight along with several of his leadership staff. They have been doing great work, partnering with the ACLU and really taking on the initiative to better reform our prison system. In turn, this help folks who come out of our prison system reintegrate back into our society. We want to make sure that they have every tool and opportunity to successfully reintegrate back into work, employment, providing for their families, paying legal fees and so on and so forth.

We are very excited for tonight's panel. We're looking forward to the conversation and continuing to partner with the great Representative, the Freedom Foundation, and advocating for these reforms, not only on the national level, but also here in Idaho. Thanks.

(Applause)

Sanders: I know there are some people who are still coming in or looking in and I do want to remind everyone, we do have overflow space, this is being broadcast across the hall, or you could just get a chair and find a place to put it in here. Wayne Hoffman from the Idaho Freedom Foundation.

Wayne Hoffman: Thank you. Will you guys indulge me for a little bit? I want to tell a story. Is that all right? So as you've heard I started out in journalism. Back as a young guy, in fact our high school in Arkansas had a radio station and that's where I started doing journalism. As a young man one of my first roles as a reporter was covering criminal justice and I just loved this stuff. I had a police scanner. My own little police scanner next to my bed. It was horrifying. I never went on any dates. I always went to crime scenes and car crashes and things like that and I truly enjoyed the criminal justice system and all the things that entails until about 1992. In 1992,

I may have the year slightly wrong, in 1992, and this is again in Eastern Arkansas, there were these 3 little boys, 8 years old that were murdered. Some of you have HBO probably have seen a movie on this. Anyway, these 3 boys were brutally murdered and these teenagers were charged with the crime. They were at the time 16, 17, and 18. And I remember distinctly that those defendants were provided a public defender. Each one them, untrained, ill equipped, horribly outgunned, horribly outmanned. And because the community was so interested in bringing justice to these youngsters who had been murdered there was a race to justice. And all three of those young men were incarcerated. Some twenty years later, the state of Arkansas released the three people because they found that there was obviously issues with the trial, issues with the testimony, issues with the evidence, and they pleaded guilty in an effort to leave prison and all three of them are free today. That trial stuck with me in a way that I can't begin to describe. It said, as a youngster, that the criminal justice system has failings. And every day I see those failings represented and I have seen those throughout my career in journalism.

In the 2000's I worked for the Idaho Press Tribune and then the Idaho Statesman. At the Idaho Statesman I covered the corrections system. And no one cared. People in the corrections system cared. Their families cared. But the people generally speaking didn't want to see news stories about how screwed up the corrections system was. I remember going to my editor and saying here's a great story about a problem with the corrections system. And the editor saying, "Eh, who cares about that?" And it might be a thing, such as a problem with a law and it makes people easier to be incarcerated or we have hundreds of people who are outside of Idaho, they have to be shipped off to a prison somewhere else because there is no room in the state prison system. It's amazing to me how now we can have an honest and open discussion about what's wrong in our criminal justice system. And people are actually paying attention, and they care. They are saying why are we locking people up for stupid things? Why are we spending all this time and money and energy and throwing away the key on people who could be productive active members of society? So it's really cool and that's why I am very excited about tonight's event and I'm looking forward to the conversation about what we can do to improve not only the congressional system, the congressional system, no can't fix that tonight, the correctional system both federally and in the state of Idaho. Thank you.

Sanders: Thank you, Wayne. And I want to say that we can have this conversation tonight because of people like you and all the people in this room who continue to care. You didn't stop and I think that's really important. So we have a series of discussion questions that I thought would help get our conversation going with our panel. We'll do that for a little bit and then we want to really open the floor up to questions from our audience in Boise and Moscow. So my first question: What are some of the barriers, other than the generational divide mention earlier, to criminal justice reform at both the state and federal levels?

Labrador: Well, at the federal level the biggest one is that generational divide. You have members of congress who were there and made their careers by being tough on crime. And I'm not advocating for not being tough on crime. I'm a very conservative member in Congress. I

want crime to be punished. But I think I want us to have a smart way of punishing people and to really look at the individual and how the system will affect each individual. So that's one of the things. The other thing is a lot of you, a lot of hard working prosecutors use the mandatory sentencing guidelines as a way to force people to, to plead guilty. You know this. And I was a criminal defense lawyer and I worked in many cases where it was to the benefit of the state or the benefit of the U.S. government to have a mandatory sentence because the choices were you were either going to plead guilty or you were going to go to prison for a hundred years. And when those are the two stark choices that you have and when there are all these mandatory sentences, it is very difficult to say well, I think have a defense and I can go to court and work on that defense but if we lose, you need to understand that you have five different crimes that you're being charged with and you're going to go to prison for a hundred years. So it's to the benefit of the prosecutor, which seems to be ok with some people. To me it is not. The purpose of the criminal justice system should never be to simplify the work of the state to find somebody guilty. That's actually the most precious thing that we have in the constitution. Is our right to liberty, our right to our property, and our right to, to all the things that we have. And when we make it easier for the state to take away somebody's liberty, I think we're making society weaker. But at the same time we want those prosecutors to have the ability to put in prison those bad guys and bad women that are out there harming our society. And it's this great balance that we have, that makes it difficult.

Sanders: Thank you. And I too spent some time as a criminal defense attorney and I understand exactly what you're talking about when it comes to the choices that your clients face once charges are brought. Kathy.

Griesmyer: Sure, I mean I definitely agree that there needs to be more of an attitude shift. There's definitely been decade's long mindset of being tough on crime. Going after drug king pens, but really we're seeing that small, smaller folks who are, just have simple possession, are being swept up and it's disproportionately far greater in communities of color and low income community members that are filling our prison system here. But speaking to Representative Labrador's piece about how it should be difficult for the state to take someone's liberties away, I think that's why this public defense reform issue is so important. That is your first line of defense in preventing or at least defending your constitutional right to a jury trial. To make sure that you understand how the legal process is proceeding. And without an adequate system here in this state and one that we would argue is unconstitutional, I think it's very possible that we have innocent folks sitting in our prisons and jails today who shouldn't be there, but who should be out in our communities working alongside of us. Their children going to soccer games with our kids. Things of that nature. It's so important that we protect our Sixth Amendment right to counsel and make sure that we do have a strong line of defense that's there as the prosecutors and law enforcement mount their case against you. And then you have one public defender who might be over worked. They're not getting paid the same as a prosecutor. They don't have the same access to investigative resources as prosecutors do. The cards are really stacked against a

lot folks here in this state. And so ensuring that a constitutional system of public defense is set here, does ensure that the rights checks and balances are in place so that it's not difficult for the state to steamroll somebody and incarcerate them for when they probably don't need to be there in the first place.

Hoffman: I think there is a big political problem, quite candidly. And I'll go back and take a look at where we've been in the state of Idaho. For years there have been folks that have wanted to change the sentencing laws of the state and they ran into one big brick wall, and his name was Denton Darrington. I have to be honest, Senator Darrington, nice guy, friend of mine, I like him. Senator Darrington was the chairman of the Senate Judiciary Committee. And Senator Darrington refused to hear any bill that would reduce sentencing or that would allow sentencing reforms. And part of that goes back to the mindset that people have, that you have a tough on crime environment. And I think there's another part that really is very important to remember. That a lot of politicians are really afraid that if they reduce a sentence or change a law, that a bad guy's going to get out and hurt somebody. And then that person's going to become a big news story for them. That they're going to be criticized because of the action they took as lawmakers. I think the good news is that people are starting to recognize that we have swung the pendulum so far that we're locking up people unnecessarily. And going back to what Congressman Labrador said, you have law enforcement and prosecutors who pile on charges. If you're a young person, let's say you're eighteen or nineteen years old and you're arrested for a crime and they charge you. They have a whole laundry list of things that you could possibly be charged with as sort of leverage against you. If you don't plead down, we're going to charge you with all this. That doesn't just happen in the federal criminal system. It happens in the state, in the State of Idaho, too. We have folks who... There's a law in Idaho called frequenting. So, and the way the frequenting law works is if you're in a place where you know drugs are being used, guilty of frequenting. So how many of you have been to a college dorm? Or a music concert? So I mean you're guilty of frequenting because you knew drugs were being used. So police will raid a house. There will be, you know ten nineteen, twenty, twenty-one year olds there. And everyone's charged, even if only one person is using drugs. That's a problem. So we have to have, to start highlighting these stories for people so that we can break down this wall and explain to folks, no we're not trying to get people to be soft on crime. We just don't want people to be so tough on crime that you're locking away good people who didn't commit any crime at all.

Sanders: Thank you.

Labrador: Just real quick on the political angle. You realize that every word I'm saying tonight is going to be used against me. That's why people don't stand up and don't stand up for what's right. Because I know that I'm taking a risk by being here. In my next campaign if somebody decides that they're going to, that they want to take me on, they're going to use every word, somebody's probably taping in here right now. Is it you? Probably taping right now, making sure that they have this for any political fight that they might have in the future. I don't care about

that. But it's very difficult to, to, to do those things because you know your words are going to be misused. In fact, in my first campaign for Congress, I don't know how many of you remember this. My democratic opponent used the fact that I was an immigration lawyer and had defended people with criminal backgrounds against me. Not, my republican opponent, my democratic opponent spent 2.5 million dollars attacking me for the things that I did in my practice. So that's why people don't stand up because it is difficult and you know, I already know what the ads going to look like. And you're going to star in it so no (jokingly stated towards Professor Sanders).

Sanders: So, what does the long-term success with criminal justice reform look like?

Hoffman: There are about a hundred of my fellow Canyon Country residents, perspective jurors sitting in the room. They're all taking the day off of work. They're not being productive. They're away from their families. They're away from their businesses. You get the idea. The defendant has a public defender who is unprepared. You can tell this person has obviously been dealing with a lot of cases, and they didn't really have time to prepare for this particular one. And, there are two (count them) two prosecutors working on this minor drug case as well as those two bailiffs and a judge and all the other things that go with doing criminal justice in the state of Idaho. I want to see that go away. I'm not saying I want the criminal justice system to go away. I don't want people to be on trial for dumb stuff where people are taking time away from their busy days and their lives and their kids and their families and their day jobs to go sit in some courtroom for some petty crime. That's what criminal justice reform should be. It's where we say we're only going to prosecute the folks who really committed a crime against society, truly. And if they didn't, then we're going to leave people alone. I think there's some really good efforts right now to do that. There are some legislators over and across the way that are trying to get felonies reduced to misdemeanors, and misdemeanors reduced to infractions. The other things are, I don't want to walk into a courtroom where there is a public defender who has no idea what's going on. Who has just been handed a file, and they have to quickly sift through there and figure out and do their jury selection with just the little bit of information that they have. If we can fix those things, we would have a much better criminal justice system in our state.

Labrador: So I want to tell you a story. And I think, obviously, the fiscal issue is important, but we cannot do this just for the fiscal issue. In fact, the only cost to society is the fiscal issue. It might be worth it to pay a little bit more to keep people in jail, if that's the only issue that we have. But there's the societal and an individual cost and to people that are going through the justice system. I'm going to tell you about my father-in-law. My father-in-law was the first lawyer justice of the peace in the state of Idaho. Actually his chambers were just down the street over here just about a block away from here. And at the time he had the opportunity to have a lot of creative sentencing, and he told me the story about this young man who came in and he kept getting in trouble. They were all minor and petty offenses that he was getting in trouble with, and

one day he just kind of had it with him. And he said, 'you're going to come to this address on this day, and I'm going to have you work for three days.' So he owned a farm, and he took him to the farm to work for three days. Now think about this. What would happen to a judge that did that? First, he would lose his robe because they would think that he was just doing it to benefit himself. That he was having this person coming to his farm to work. He didn't need the work. He had eleven children. The eleven kids can do the work at the farm. He was trying to teach this young man something about hard work, about the potential that he had, and he tells the story that many years later this young man came to him at a grocery store and said, 'Judge Johnson, you don't remember me', but and then he relays this story of who he was and says, 'But that one thing changed my life. That somebody cared enough to not just throw me in jail, but to actually teach me how to work, to teach me a lesson. That's what the criminal justice system should be about, and I know you're trying to make it that. And I really applaud the work that you're trying to do in there because it is important that we realize that there are real people that are being affected. Not just the victims and the victims, they're suffering is innumerable and is insurmountable in many cases. But we have people that are going into the system and as I said earlier and they are coming out the worst kind of criminal rather than learning something where they're becoming better citizens that are better for our society.'

Sanders: An interesting piece to this is what the DOJ is trying to do with this New Smart Crimes Initiatives. Realizing that part of what needs to happen is that resources need to be put back into communities not just the victims but the families of offenders because the trickle-down effect of having someone in your family whose incarcerated is quiet great, Kathy.

Griesmyer: Well gosh, what does the perfect criminal justice system look like?

Sanders: –Maybe not perfect–

Griesmyer: We could be here a really long time. I think Idaho deserves some credit. We've started the conversation addressing our over-incarceration problems. Idaho has a real, I would say, addiction to incarcerating folks, and locking people away who do not necessarily need to be there. And we could be better utilizing our prison space. We are coming up close to maximum and running out of beds, which is why we had some folks housed outside of the state for a chunk of time who are, thankfully, coming back to Idaho. Thank you Director Kempf. So we've started looking at with justice reinvestment how do we prioritize prison space, and how do we prioritize folks to be released out on probation and parole for low-level drug offenses or non-violent offenses, and keeping prison spaces for folks who really need to be there. I think before we end up having to divert folks out of the prison system, out of incarceration, we should be looking at why we're sending folks to prison in the first place. That's how we can really stop this prison bloat: in federal sentencing reform like Congressman Labrador is sponsoring and even some of this misdemeanor classification that's happening in Idaho. But we need to go further and really look through our criminal codes and identify what really need to be a crime? Does this sentence

fit the nature of the crime? Is this an appropriate punishment for folks? Because once you go to prison or jail you don't just serve. That should be your consequence. You oftentimes lose your job. You lose some time from your familial relationships, but then you're supposed to get you out and your life is supposed to go back to normal, but that is not what a lot of folks are facing. They are discriminated against because they have a criminal history. We deny employment and they can be denied access to housing, and those are two really crucial components to getting folks successfully reintegrated into our society. If they don't have a safe place to go home to at night, to house themselves and their family members or to have employment to pay off their fines for parole or probation or on-going legal fees or what-not then they're really struggling, and we wonder why we have such a high recidivism rate in this state. So really addressing why folks are going to prison in the first place and then offering expanded community resources for those who are leaving the criminal justice system and are in need of transitional assistance to better acclimate to life outside of the prison walls. That could really help address some of the on-going problems we see in Idaho and sort of move us down the rosy path to our perfect criminal justice system if there is one. We're still working on it.

Sanders: So I've got one more question and then we'll open it up to our audience. Switching gears a little bit here, are there any particular reforms that you are thinking about with regards to juveniles versus adults. Kathy, I'll think we'll start with you this time.

Griesmyer: Sure. So there is actually, I was looking, through the questions, and I was thinking, 'Oh gosh, juvenile reform what's going on in that area.' And there is a piece of legislation that's making its way through the house rights now, and I have it. It's a house bill that was introduced last week by Representative [Lynn] Luker in the house judiciary and rules committee that would turn what is currently a misdemeanor for minor in possession down to infraction. It removes the criminal penalty for that and makes it a civil offense for that just like a speeding ticket. For individuals who are 18 and under which, it provides an additional layer of protection for to make sure that they have appropriate representation in our criminal justice system under the Juvenile Corrections Act. I know having grown up here and been in high school, not that I ever had an MIP--a minor in possession, but it is happening. Folks are learning what's out in the world, experimenting with alcohol, and so this is a great way for them to divert getting a criminal conviction at an early age. Them paying the fee and them moving on with their lives so it doesn't impact them or follow them around as they look at graduating from high school or moving on to college. So I think that's an exciting piece of criminal justice reform that will be coming out and impacting juveniles in this state.

Sanders: Okay, Wayne.

Hoffman: I'm actually going to dovetail off of what she said. I think that legislation is very important. We have been looking at it for a couple of years, so I'll just tell a quick story. I know a girl who was at a party, fifteen years old, had one of those red solo cups with beer in it. She's

holding it. She says she's not drinking. We'll just stipulate it and say maybe she was drinking. I don't know. Anyway, she's charged with minor in consumption. Three years later, she's in the work-force, and she's working at a call center making \$9.00 an hour. Another call center calls her up and says, 'Hey, you can come work for us. We'll pay you \$11.00 an hour, but we need you today.' So she says, 'alright.' So she quits her job at the call center goes over to his other call center where they're going to pay her \$11.00. They're showing her around, literally showing her around the facility, when somebody from HR shows up and says, 'Oh, wait a minute. Sorry, we just looked at your record. You can't work here.' So she's unemployed. That's an injustice on top of an injustice. This bill that Representative Luker's put in is very, very important. It will stop things like that from happening to people who as youngsters make dumb mistakes. Name a youngster who doesn't do something stupid. Trust me, I've got an eighteen-year old and a fifteen-year old who do dumb stuff all the time. So those types of things and getting rid of those laws that make it easier for law enforcement to charge young people with a crime in an effort to leverage some charge against some other people like the frequenting charge that I mentioned earlier. And there are plenty of others like that. We have got to stop taking adolescent behavior and turning them into criminal offenses that ruin their lives forever. And I think if we get nothing else out of this event tonight, I hope you'll, if you have a chance to grab a legislator on the way out the door, reinforce that with them because everything the legislator does to criminalize behavior has a consequence that has a bearing on people's lives forever. Just one more thing and then I'll let it go. Right now in the state of Idaho, if you go into a store and you shoplift, you could be charged with burglary, not petty theft, but burglary. And I just went through this with another one of my daughter's friends who ended up in that situation where she was in Walmart, and she decided she wanted those eyelashes that you put on, right, which I don't know how much they cost. But because she was in there with the intent to steal, and law enforcement asked her, 'Did you go into Walmart in order to steal the eye lashes?' And she says, 'Yes.' Burglary! Which is whole other level of crime than just petty theft, so those kinds of things need to absolutely positively be addressed by our legislators.

Labrador: Well there are a couple of bills going through the house. I co-sponsored one which is the second change reauthorization act which includes funding for programs that include mentoring for juveniles. There's also a little bit of discussion about regulations regulating juvenile detention. How we are going to treat juveniles in prison. So there's a few little things that we are doing, but there are a few issues addressed here that are important as well.

Sanders: And just as a point of information for our audience. Some of the most interesting cases on criminal procedure have been in regards to juveniles and this is in the past ten years. The court has said no death penalty for juveniles. They also expanded that to include no life without parole for juveniles. In this current term, the court decided that the prohibition on life without parole applies retroactively in state in federal prisons. Which means that any person currently incarcerated who is a juvenile who has been sentenced to life without parole is entitled to at least apply for parole and have some type of determination on their eligibility. So I think that from a

judicial standpoint, that's is pretty exciting. Recently, President Obama has signaled that he will end solitary confinement for juveniles.

Labrador: Just to be clear, that what President Obama is doing is that he is not necessarily ending it. They're actually going through a study of the purposes of solitary confinement, the reasoning and all those different things. There are some good reasons for solitary confinement. Some young people are at risk of being offended, you know violated, in prison. And sometimes you—so if you just go ahead and say there is no isolation of an inmate, what's going to end up—you may actually be putting people into dangerous situations, so I think they're investigating that right now. It's my understanding.

Sanders: Thank you and I want to remind our Moscow attendees that you can email me at srsanders@uidaho.edu. I just got an e-mail from someone in Moscow. And the question is, "in your opinion, why do you think prosecutors do not play a larger role in the effort to reform the criminal justice system— both prosecutors as individuals and as an organization?" What is the role of the prosecutor in this conversation?

Hoffman: Probably somebody else should go first just because I might get in trouble again. And the night is still young. It's interesting, the prosecutors—people think of prosecutors and they think, "oh, my local prosecutor," the person who shows up to go to court, or maybe they also serve a dual role that they represent the county commissioners as their legal attorney, but they do more than that. The prosecutors are a really, really big lobbying force at the legislature and one of the reasons why this minor in consumption bill didn't advance a couple of years ago is because there were some objection to it and who objected the loudest? Anyone? Prosecutors! So yes, they like having these tools in the tool kit. They like having the ability to leverage these really stiff sentences against potential criminal defendants in order to achieve the result that they want. So, you just need to be aware that the prosecutors are a tremendously powerful lobbying force. They show up at the legislature and when there's a bill on sentencing reform, you can guarantee they will weigh in. And sometimes in a way that those of us who are invested in criminal justice reform don't like.

Griesmyer: I would echo what Wayne has to say. I mean, they are a very strong presence down at the statehouse; one that's well-respected and listened to by legislators as well. They definitely have their ear when talking about some of these issues. I think part of the reason why—beyond this tool, it's a tool often for them to—maybe manipulate is not the right word—but to advance larger sentencing or gain really large convictions for them. But it's also an attitude shift that I don't think has quite made it down to the prosecutors. I think a lot of this conversation around criminal justice reform and being smart on crime and choosing when to appropriately seek certain sentences and what those sentences might be—that's not something that I've seen here personally in my experience at the statehouse and with the lobbying—excuse me, with the prosecution lobbying groups are really considering and so I think—I hope that they're not one of

the last groups to get on board with this because it really would be great to have prosecutors on board advocating for smart-on-crime reforms that we're looking for, but we'll continue moving forward in doing the work that we do. I will note last year during the misdemeanor reclassifications that came through, I don't remember them being there to oppose the legislation but we're also talking very small misdemeanor reclassification. I think if we got into larger—like drug sentencing or mandatory minimums—we'd really see a very strong push from prosecutors coming out and opposing this so, I think we can start taking some small victories, but as we really start getting into the crimes and sentences that really do have a large impact on our criminal justice system, we'll definitely see them rise up in opposition and I hope they can be our partners someday.

Labrador: We also have to realize that prosecutors have a very hard job. You know, they are overworked, they have a lot of people that they have to look—a lot of cases that they have to look at, so, you know, I think one of the issues that—my experience with prosecutors has generally been a very positive one. I have very many friends who are prosecutors, I continue to have many friends that are prosecutors and they are trying for the most part to protect society and to keep society safe. So they are going to look for whatever ways that make their jobs easier, and mandatory sentences and tough crime legislation makes their job easier. That's why it's the job of the legislator to weigh the balance of both—of all the interests that are coming before them and make the right decision for society.

Sanders: Great. We have a question in Boise.

(Audience Member): So the way I look at it is we've covered basically the first half of what happens when somebody's sentenced. You get sentenced, you committed the crime, you're found guilty, then what happens? You go into the custody of IDOC. When are we going to start holding people like Olivia Kraven responsible for her actions, somebody who has shares in private corporations of Idaho prisons? People who are keeping people in after they finished their minimum sentence. People who are sentenced to three plus two, etcetera—they have a minimum stay and then they have the max. Right? They have a determinate and then the indeterminate time that follows. So they go into IDOC custody and people like Olivia Kraven or (unintelligible) are charging these people. They do nothing and they let Olivia Kraven run amok with the system and push people out past their minimum sentences, oftentimes, only further crowding the prison systems and backing it up to the point where we're not even talking about the prosecution level now, we're talking about the back end of it. At what point are we going to start dealing with IDOC? Governor Otter coming out and saying, you know, "parole's not a right. Parole's a privilege." When are we going to start changing that viewpoint and start dealing with IDOC and future (unintelligible)?

Sanders: Well this is your lucky night. Because we have—in our audience today—the director of IDOC, Mr. Kevin Kempf, so I'm going to turn it over to you.

Kevin Kempf: Thank you, first off, lucky night might be kind of a strong word. First off, thank you—thank you. First off, Congressman, you won't know this, you aren't a member but, twenty plus years ago I was a lowly detention enforcement officer for immigration and used to work in the courtrooms where you represented clients and you even back then—one of the things I respect about you is how you treated me back then. You had no idea who I was and you always treated me with such respect and I appreciate that very much. Thank you, first off, for the passion that you just had in your question. So, my name's Kevin Kempf and, as mentioned before, I'm the Director of Corrections. Olivia Kraven is also the former Director of the Parole Commission who Sandy Jones has replaced right now. Rather than kind of talk to you about what it is we're going to do, I'll tell you what we've done. We—first off—many of our staff is here in the audience. Since June of 2015, to today, we have 400 less inmates in our system. I was so fortunate to be able to go in front of the joint finance and appropriations committee last Wednesday and start my presentation off by telling them that we're giving them back \$1.2 million dollars to the general fund. We're able to do that, first and foremost, because we have put into place immediately, in the past year, transparency in our system. That—in my opinion, our industry, our corrections industry across the country—we suffer greatly from that. We are a closed group. And when you close yourself off like that, you close yourself off to change, you close yourself off to criticism, you close yourself off to a lot of different things. So one of the first things we put into play is all 105 lawmakers in Idaho have 24/7 access to any single facility. Any facility at all in the state of Idaho. Two o'clock in the morning, they literally just show up, show your legislative ID, (unintelligible) is in the background, he's taking advantage of this as well, show your legislative ID, you'll get unfettered access to anywhere to you want to go. I don't know. So that's the good news. The good news is that, we also have—through justice reinvestment—there are several different things legislatively that we have to provide from the Department of Corrections. One of those, is what we call 150% report and it shows, how many offenders you have going beyond their tentative parole eligibility date. And I'm happy to report that we are crushing that, right now. We are far below where we were before and most of those 400 inmates that I just spoke of are drug and property crime offenders that are now on parole, that used to sit in a prison bed and the taxpayers were paying for it. So, pretty good stuff. I hope that answers your question.

Sanders: And I'm going to let the rest of our panelists respond to any of those statements so Kathy and then Wayne.

Griesmyer: Sure. I think that's a great question. It's one that the ACLU has definitely been watching. Right? How do we get folks who need to be or are parole eligible out in time so that you've gone before the parole board, you've got a tentative release date, how do you access programming and make sure that they're being released when they should be so that they're not staying longer than they need to at taxpayer expense? And I really do think that the Department

of Corrections does deserve a nod of encouragement for the work that they're doing. When we talk about this attitude change, Director Kempf and his leadership team are really sort of practicing what they're speaking about—really getting smart on crime. I know that we may not always agree on everything at some point but we really are appreciating and enjoying this partnership that we found with the Department of Corrections. Them really taking the initiative and addressing how do folks get access to the programming they need to be able to be eligible to be released on parole. I know the Parole Commission has been doing a lot of work under justice reinvestment and making sure that folks who are meeting their parole eligibility dates are being released and that they're prioritizing folks and having them processed appropriately. I'm sure that there are some kinks that still need to be worked out but that process is in place there and the Director has really opened it up for an opportunity for transparency for legislators and individuals to better understand how the Department is doing their work and we welcome that transparency. It's something that the ACLU is a big advocate for. We're always advocating for openness and transparency in government and that includes government agencies like the Department of Corrections, so I'll say "good job," Director Kempf. Please keep up the good work and let us know how we can help support.

Hoffman: Thank you Kathy. I just want to be really brief. So, if you don't know how sentencing works in Idaho, basically you have your fixed sentence and then you have your indeterminate sentence. And so, your fixed sentence—let's say if you're sentenced to five years fixed, ten years indeterminate—once you've passed your fixed portion, and you get into your indeterminate, your release is contingent upon you're having completed programming. When I wrote about this issue at the Idaho Statesman in the early 2000s, the Department of Corrections didn't care. They weren't really even tracking who was in the prison system beyond their fixed time. The fact that the Department is actually is tracking it, and cares about it and wants to do something about it—in fact, they had people that were in the wrong building to receive the programming they needed to actually get out. So, you know, you have to receive a certain drug treatment program, and you're in a prison that doesn't offer the programming that you need to leave, it's going to be awfully hard to complete your sentence, and be able to be released. They're actually fixing that and that's a really cool thing. So what I would just encourage—we'll keep an eye on ya, of course, to make sure you're doing a good job—but I'm glad they are and we'll applaud you for that fine work. We really appreciate it.

Kempf: Thank you, man.

Sanders: Any other response? Okay. Question in the front and keep your hands up because I'm going to get to, try to get everyone.

(Audience member): So this is part comment, part question. I wonder if anybody's heard of the book, *The New Jim Crow*, which argues and demonstrates quite clearly that the drug war that we created in the wake of the civil rights movement was really just a brand new way of locking up

people of color. It's a really excellent, well done book. Wonder if anybody's heard about that. And in the meantime, while we're all sitting on our duffs waiting for the legislature to get off their duffs and do some reform, I just want to let you all know, about jury nullification, which if you don't know, is the right of the people to find a defendant not guilty—even if the law clearly says that person is guilty—and this is the way for “we the people” to step up and do the job that our legal system ought to have done many, many, many, many, many years ago, and refuses to do. So guess what? All of y'all I'm imagining are registered voters, so if you're registered voters and you're a part of that, you know, jury pool thing, so, when you show up for jury duty, you can find the defendant not guilty. And you can convince your other jurors to do the same. Even if the law, such as in the case of drug possession, which it doesn't matter if they're your drugs or not, you're in possession, you're guilty, and it's a felony. You know, it's a useful tool. Jury nullification. That's my time, thank you very much.

Sanders: Was there no question after all?

(Audience member): Has anybody read The New Jim Crow? What do you all think about jury nullification?

Sanders: Any response from our panelists?

(Audience Member): I got a few questions. This is for corrections. About twenty years ago, we did a study of about 10,000 inmates and about seventy percent of the inmates were in there because of alcohol or drugs. And, then, at this point—recidivism, I don't know what the current statistics are—but if you take alcohol and drugs, and you take recidivism—how could your correction numbers go down?

Kempf: Well thank you for that question, and I will certainly echo what others have said about this, just as a reinvestment, the past focuses a lot of effort in making sure that the drug or property crime offender is not sitting in a prison bed, but they are in fact on parole, fiscally at four dollars a day as opposed to with us at 57 dollars a day. So one of the ways we do it, is that, it's a great time to be in corrections, and one of the things we are responsible for is... It's an interesting thing, we don't control the front door, we don't control the back door; the judiciary controls who comes to us, the parole commission decides who leaves. What we control is what happens when we have them, and we do not take that lightly. One of the things that we did, and this goes back to that transparency, is in March of this past year, we asked the council of the state government who were here 2 years ago, working on justice reinvestment, we asked just this one question, while you were here did you come across anything in our system that looked concerning to you but for whatever reason you didn't bring it to our attention? Be it that you didn't think that we wouldn't listen or you came across a sacred cow, and their answer was that yes and they pointed to our program. They said that the program that they have in our system, it

did not look like it worked and so we asked them because we are a justice reinvestment state, we asked them to come in, outsiders, and do a top to bottom review of all of our programming and they did that and spent several months in our system. And they found that our programs were complex, confusing, 9 out of the 12 programs that we were using did not have sufficient enough evidence to suggest that they worked. They found out that our therapeutic communities and worked more towards shaming and mixed reviews and so we didn't waste any time. We discontinued the use of all therapeutic communities across our system. We just stopped them. The evidence and research in the system has shown that it didn't work. We're going from 12 programs, 9 out of 12, that evidence said they didn't work, and we are going to five and all five of those programs are researched and evidence based. And if you are familiar with Dr. Tessa from the University of Cincinnati, these are his programs that are coming in place. At the end of the day what we are going to have, and we are already implementing the University of Cincinnati, is that we are going to have a system that is simple, that is modernized-evidence based, and so while they are with us, we are going to be efficient. We are going to do things only that work, so they are prepared for parole when they are parole eligible and based off their behavior and those types of things can dictate if they get out, not our inefficiencies within the department of corrections.

Griesmeyer: Yes I have read parts of The New Jim Crow. I have not read all parts, but it's a great book. But I also have a terrible problem of falling asleep when I get home from work, so I am reading at like 3 pages at a time, making slow progress. The book's author Michelle Alexander used to be an ACLU staff member working out of our California office working on racial justice issues. I do think that she does bring up a fair point in that our criminal justice system does lock up a large percentage of folks from communities of color. And just to share some data that I found earlier from the prison policy imitative (let's see, I just have some quick stats) and these are statistics based on Idaho prisons. Hispanics represent 11 percent of the total population of the state but account for 16 percent of the incarceration population in Idaho prisons. Blacks account for 1 percent of the states total population but account for 3 percent of the Idaho's total incarceration population. And American Indians and Alaskan natives account for 1 percent of Idaho total population and account for 3 percent of our incarcerated population. So even in Idaho, despite our very small numbers of ethnic minorities, are vastly overrepresented based on their state populations and our correctional facilities. And, in fact, in this ACLU 2010 report looking at the disparities of arrests between black and white communities for simple marijuana possession, blacks are 2.8 times more likely to be arrested then whites on a simple marijuana possession. That directly correlates back to the war on drugs that primarily targets communities of color. We see it reflected on our statistics of the state and our prison population. That is a fair and universal assessment across the states and even a state like Idaho, were we do not have much diversity and still is an issue in our prison system here.

Labrador: I haven't read the book, but I have talked to several people, who have read it. It's been brought to my attention quite a few times. I have a little bit of a disagreement with the

premise that the war on drugs started for the expressed purpose of putting people of color in prison, but I do believe that the war on drugs have had a disproportionate effect on people, on communities of color. There is no question about it and I think the way it is being enforced has had a disproportionate effect. I think it's something that we need to reconsider and look at some things. I know some people would advocate the legalization of drugs. I don't advocate for that. I do advocate for re-thinking the types of punishment that we should have for using drugs and whether there should be a citation vs. misdemeanor vs. a felony. We should always look for treatment before we start putting people in prison and in jail. And crowding prisons with people that are non-violent offenders as oppose to other people that we really want to be taking care of in those prisons.

Sanders: I am going to summarize the questions: we have got some concerns about excessive bail, property confiscation, effective assistance of counsel, the ability of the prosecutor to obtain a conviction on a less included charge that was not actually charged in the indictment of when a jury declines to prosecute on a higher included charge and then grand jury reform. So is there any comments on any of these questions?

Labrador: Most of those issues are state issues so I can't really address them. But in the grand jury reform I haven't really thought about it so that is something that I probably need to look into at the federal level. I, just frankly, have been concentrating on other aspects of criminal justice reform and there are so many things that we are working on and I might need to take a look at that.

Griesmyer: Well I have personally have served on a grand jury before so that was an interesting experience, which I could talk about afterwards. At least, speaking about public defense reform, this is one of our key critical criminal justice issues that the ACLU has been advocating for since 2010. And this year we are finally seeing legislation, like I said, was just introduced yesterday and it has been a very long, slow, arduous process with many legislative interim committee meetings, with panelists and experts and public defenders and prosecutors coming in and providing input. And this collective group of senators and representatives have come together to put together some legislation and, quickly summarize what is included in the legislation because it really is, I think, one of the largest pieces of criminal justice reform the state has looked at in the most recent years, other than justice reinvestment, I think this is a really strong piece of reform in our system and ensuring there are safeguards protections for our constitutional rights and adequate defense. So the legislation consists of three different components. One it includes principles or standards. There has been some discussion about which words are appropriate or what word legislators feel more comfortable with, but standards that basically outline how public defenders should be doing their work. Things around having the process be free from political and judicial influence and allowing greater parity between prosecutors and public defenders and pay. Making sure that public defenders can meet with their clients in a private room so that they can appropriately and openly discuss an individual's trial. Then it also puts together a funding

mechanism, and now we know one of our largest problems with our public defense system is the lack of funding that counties face and at this point the counties are paying for the state responsibility to provide for public defense so the counties will maintain their payment. Right now they are using justice levy funds to finance criminal defense in the counties. The state's Governor Otter has come forward and allocated, I think, around five million dollars in his state of the state address for public defense. That will then create a pool, counties can write to the public defense commission, which will be this oversight body for public defense reform in Idaho requesting funds to help cover additional costs they might have and make sure they are compliant with those standards. And then the key component for us is this enforcement mechanism so we can answer the question if the county is not providing constitutionally adequate public defense then who is held responsible because there are still hundred and thousands of Idahoans that go to court everyday who needs a public defender to make sure that their rights, their constitutional rights of public defense is being maintained in health. And so this enforcement piece comes in and provides opportunities for the county and the public defense commission to sort of mediate a solution and ultimately if the county is materially negligent in providing public defense, the public defense commission can come in and provide whatever sort of services that are not being provided to indigent clients, and could even intercept funds from the county and the public defense commission to then supply the public defense service. So with the caveat of there not being enough funding, 5 million is a good start but nowhere near adequate. We think this is a pretty good feel and definitely provides far more comprehensive legislative and direction for this state then there ever has been before, which will help alleviate all of the problems that many indigent clients face in the state. And there is an interesting fact, one in three Idahoans cannot afford a private attorney. So this is a really critical issue that affects a lot of folks across the state.

Labrador: This is the closest we have ever gotten in thirty years to having any kind of sentencing reform. We are getting closer. I think you have more and more people, as I indicated earlier, especially as you get more and younger members of Congress going into office from both parties. But there is still some pretty stiff opposition, and we have been trying to reform the criminal justice system now for thirty years. I think we are as close as we have ever been. But we are going to continue fighting. You have Mike Lee who has been a hero from Utah in the Senate. You have me and others working in the House. And we are going to continue to work for it. But it is a heavy lift. It is a very heavy lift and we are going to work on it.

(Audience Member): Congressman Labrador talked about how we are presumed innocent, but when you're facing a prosecutor for a charge or a series of charges—the concept of pleading guilty to this lesser charge, or series of charges, or face the consequences of the potential of being found guilty and going to prison for a very long time. The other thing – and maybe this is a question for the director – that one must acknowledge guilt before one is allowed out on parole. That has always bothered me if we are presumed innocence, have never pled guilty or even if we have pled guilty under those circumstances, there are people who are innocent who go to prison

and then they are faced with, “we are going to keep you here longer unless you admit to doing something that, maybe you did or maybe you didn’t do.” That has always offended my sense of fairness. Is that a requirement these days and if so why and what can be done about?

(Audience Member): My name is Peter Vasquez. I was wondering if the law was still in place in Idaho that is a gang law that sends people to federal prison? And when you send people to federal prison on a five-year term they come back and parole your community. One of things is like it’s going to Yale for criminal school to send somebody with a five-year term out of our district and out of our hands... You get what I’m saying. They can be a drug trafficker in the United States...but then you come back to Idaho...eight years ago I couldn’t find heroine anywhere in Idaho. You had to go to Salt Lake, you had to go to Oregon, you had to go to Utah, you had to go somewhere out of the state, and now you can find it in downtown Boise...and there is a lot of drug trafficking in Idaho. I saw a story the other day about kids from California dropping off drugs in our state. But I just wanted to know, exactly what is being put in place to deal with this in the future?

(Audience Member): First of all, I just want to say I think it is very exciting that all of us are here tonight. I think it’s great that you guys are here. My question is addressed to the entire panel, but especially to you Congressman. We have certain legislation that has been passed, like Amendment 782. We are trying to reduce mandatory minimums. We are trying to get people out of prison on these non-violent drug offenses. But yet we seem to have these stonewalls, like the Bureau of Prisons, where BOP gets their reduction, they are not let out because they all the sudden modify their [unintelligible]. So they are doing all this programming but they are not being allowed out when a judge is telling them to. What can citizens do to get Bureau of Prisons to get off their butt and let people out when they are entitled to be?

Sanders: So I am going to summarize these questions. I promise to do my best. We have some concern about the presumption of innocence, which is a constitutional right that we all enjoy. And in particular, how the guilt admission for prerequisites affects parole. We have another comment or question that talks a lot about the increased federal incarcerations for state prosecutions for gang activities and then increased drug trafficking in Idaho. And then finally, we have a question surrounding the concern of stonewalling in corrections agencies.

Labrador: I want to address the presumption of innocence. I actually did a lot of parole work when I was a criminal defense attorney. In fact, there was a period of time where I was probably at every parole hearing that they ever had in Idaho for a couple of years. And that is a difficult question because I think you should have the presumption of innocence when you are going to trial, but once you have either pled guilty or have been found guilty the system assumes you are guilty. They don’t assume that you are innocence or else they would be assuming that an injustice has been done. And for the parole commissioners, at least the ones here in Idaho that I have worked with, I think that is just the mindset that if you want to get out then you will have to

admit at some point that you committed a crime. And that was one of things I had to work with my parole clients to talk about what really happened—go through the story and sort of try to help them explain in their own words what happened. And in some cases you do have to admit that you did something wrong because the prison system is not going to let you out if you are claiming that you haven't done something wrong. That makes it very difficult. And I don't know if I have a problem with the system assuming that once you're in there that you're guilty. But that's why I believe we need to look at it from the front end. How do we keep people from going to prison who are non-violent offenders first, and also maybe the number of felonies we have, maybe there are some actions – we keep adding felonies to the criminal code, both at state and federal level – maybe there are some actions that should not be counted as felonious. They might be wrong, they might be civil violations, or maybe they are misdemeanors, but we need to start reconsidering some of these actions that we are actually sending people to prison on for long periods of time. But once you have been found guilty, you no longer enjoy that privilege.

Hoffman: I want to back up what Congressman Labrador said with regard to the front end. I was going to give a quick example with a piece of legislation from last year. There was a bill—and I am going to briefly and very unartfully describe marijuana for just a minute. There are essentially two components if you will: THC, which gets you high and CBD, which is extracted as an oil, which has been used to help people with seizures and other medical conditions like that. Doesn't get you high. But there have been kids with, intractable epilepsy for example, who could really use CBD oil. Last year there was a bill that said, “all right we're not going to go and arrest anybody if you have CBD oil and you're bringing home to give it to your kids.” That bill narrowly passed the [Idaho] House and narrowly passed the [Idaho] Senate and was vetoed by the Governor, or as I like to say it, Idaho politicians are really against big government except for when they're for it and this is an example of that. What we're ultimately saying here is that if you are carrying CBD oil on you and you're bringing it home to your kid to potentially treat their condition of intractable epilepsy—the state of Idaho is willing to arrest you, prosecute you, and jail you. I think that is wrong. The problem that we have is that we have too many laws. We have too many things that people can be arrested for. Too many crimes that you can be convicted for. If we are really ever going to get a handle on all the problems that we've talked about in our prison system, we have to start with these laws that lock up these people for something as simple and as innocent as trying to help a kid who has a horrible medical condition.

Griesmyer: I think Wayne outgoing stated the thought process that is going on here. Idaho is really trying to move forward and take the right steps in reforming its criminal justice system. When something as simple as providing a non-addictive natural supplement to young children who have a very terrible medical condition gets so clogged up in the process with the opposite drug policy and prosecutors coming in and testifying against saying, “our hearts go out to your children, but this really opens the door for XYZ.” We're reaching a bottleneck where we can't really move through and yet these are reforms that are really necessary and get to the point of thinking: “Is this really an appropriate crime? Does this need to have a sentence? Do we need to

be sending people to prison for that? Should we be sending mothers to prison for providing a natural supplement to their children to help treat intractable epilepsy?" I would agree with Wayne in that, the answer is no. The ACLU would go even farther to say that we should be legalizing medicinal marijuana. We have our neighbors to the west who are doing it. We have a lot of our neighbors in the western states who have legalized CBD oil, Utah included. Idaho is slowly moving behind that trend. We are really kind of lacking progress in that sense. When we can start addressing the drug sentencing and mandatory minimums then we're really going to see a drop in the number of folks who are being sent to Idaho's prisons and jails. That's really the missing component that is not being discussed here in Idaho. It's difficult to come out because I know it can be a hard position to take. We certainly get some feedback for that. Elected officials should take that brave step and realize that it does have an impact on our families. It has an impact on our criminal justice system. There is significant cost to our taxpayers. Really it's just common sense piece of legislation and reforms that we should be taking advantage of here. We will keep talking and encouraging lawmakers to make the right choice. Until then we will keep on advocating.

Kempf: There are people who talk about it and there are people who be about it. And I just want to go back to Peter Vasquez and express appreciation to Peter. Peter could be doing a lot of different things with his life right now and what he is doing is he is taking this knowledge and history that he has and this passion that he and his wife have and he is applying it to the good. One of things that Peter and his wife do is they have an organization that works very closely with gang members who have, in many cases at a young age, tatted themselves up big time with their prison tats or gang tattoos. One of the things that Peter and his wife do is they work in this organization that helps these gang members, that are coming out of our institutions, get those tattoos removed from them that allows them to be more presentable and those types of things. We have a lot of people out there who aren't heard, but the Peter Vasquezes of the world and his wife are being about it. They are putting their passion towards really good things. I just wanted to express my appreciation for him and his wife for all their efforts and for moving this needle in the right direction.

Sanders: So let's take our last vignette of questions from this side of the room.

(Audience member): I have a question for the panel and the director: the question for the panel is, while I generally agree with your previously stated assessment that most prosecutors are fine upstanding citizens and doing their job to the best ability that they have, however we've all seen in recent years the prosecutorial misconduct. Is there any discussion amongst the criminal reforms for penalizing prosecutorial misconduct? That is for the panel. For the director: While I applaud your efforts, (and by the way twenty years ago I was in the legislature and I did go visit south of town, I got a surprise visit, and I got a substantially different tour than when we went on the company sponsored tour, but apart from that) I applaud your efforts of what you've done to have reduced the inmate population by 400. My question is: let's assume you can do that next

year and reduce the prison population by another 400, is that not somewhat counter intuitive for a government agency to be reducing the requirement for ever increasing employees and how do you adjust your employee moral based on reduction of workers?

Sanders: Alright.

(Audience member): Yeah, I was looking at the Idaho history of the Idaho bicycle stop laws recently and what was entertaining was basically that when you are on a bicycle, a stop like works as a stop sign and if you go to a stop sign when you're on a bicycle it works as a yield. And I wasn't able to verify sources, but regardless, the point remains the merit that I read was they came from Idaho judicial offices, and they went and looked at Idaho law to find laws that could be reduced in fractions and make overall life better. And I thought that was fantastic. And for those of us who ride around on bikes all the time it is great, I mean traffic flows better for everybody, we're not a harm to ourselves or anyone else, it's fantastic. What kind of initiatives and drive are we seeing to hold down laws that are inherently, just not a proactive or not a good thing overall for what they end up making? Thank you.

(Audience Member): No one has really mentioned yet where it all starts and that's with the police and I wanted to know, from my experience, it seems police have their priorities all wrong. Twice in my life I have had thousands of dollars in property stolen from me and the police – I even have a surveillance video of who did it – and the police couldn't give me the time of day, they could care less. I called them over and over and over again and they didn't care. And yet, they detain me and my family, with a three-year-old and, and a five-year-old, and a six-year-old, in public park because a five-pound Chihuahua was not on a leash for an hour and called in eight back up police officers. And it doesn't make any sense at all that you can detain a family for a five-pound dog not on a leash, but then don't investigate thousands of dollars in property stolen from someone. And so I want to know – they hide out all day with speeding guns getting people for speeding – so I want to know what can we do to see where the police are allocating their human resources and financial resources? Because to me it seems like it's all backup plans and they just do what's easy.

Labrador: I'm going to address one issue, last time I was on panel, I was assigned by the judiciary committee chairman, to sit on a panel that dealt with criminal reform for a year, and it was a bipartisan panel. We had some really good discussions about a lot of the issues that we are talking about here today. One of the things that we did pass out of the House was a bill in November that cleaned up our criminal justice system, that tried a criminal code. That sort of went through line-by-line and we didn't complete the project, but it was the first step in the project to look at different kinds of laws that were in there that were either old or unnecessary and we got rid of a lot of the parts of the criminal code. That was one of the things that we did. The other things that we have been working on is the issue of *mens rea*. And anyone that was in

criminal law, in law school, understands what *mens rea* is. What *mens rea* is, is when you have an intent, an evil intent for your actions. The federal criminal code is riddled with laws that have no criminal intent. There is, in fact, is strict liability criminal crimes and we are trying to get rid of those. There is a big movement to get rid of just about every crime that does not require an intent, and when you think about it, there are thousands and thousands of those crimes in the criminal code. And then the third thing that we are doing, and this is the fault of Congress, we have passed a lot of laws that say “X and Y action is a crime,” but we don’t give it a sentence. So it is actually the regulatory agencies that are deciding what the sentences are going to be or what the punishment is going to be in those cases. And we are also going through the code and trying to take that authority back, and we will decide what the sentences are and what the minimum and maximum sentences are. So we’ve engaged in this prolonged review of our criminal code trying to make sure that we get rid of bad laws and that we are actually punishing people for crimes that they intended and not just for their actions alone, which will deal with a lot of the issues that we are discussing here.

Griesmyer: I’ll address two issues, briefly, one about the police accountability and transparency. One item of importance that I think is going to start, well the conversation has already started, but what I think will intensify as technology sort of develops and advances, is the use of body cameras for law enforcement. And really it is a sort of appropriate tool that allows transparency from a public perception. Law enforcement would be required upon onset of some sort of encounter with a citizen, whether it be a traffic stop or being stopped on the street. You know, that camera goes on and it allows for the public to better understand exactly what happened in that interaction. But it is also a good tool for law enforcement: for them to protect themselves and for them to be able to say I followed protocol and procedures here. But it really is a good tool for accountability for the public to better understand how use of force might be used, for us to understand what policies need to be changed, and really does provide an opportunity for the public to be able to address and understand how law enforcement is handling itself. If there are videos that are flagged with interest, excessive use of force and deadly force. We’ve had some incidences that I think and I know, in 2015, there were thirteen deaths by the hands of law enforcement and there are some of them that are still under investigation and are not entirely conclusive. But if we were to have body warmth police cameras we could at least be able to better understand what was the interaction like between law enforcement and that public citizen, and better understand what went wrong in that interaction that could then be addressed. The other piece about these, what I would call, collateral consequences of a criminal conviction. I think there is a lot of conversation starting to happen around how do we address the stigma that is associated with having a criminal conviction? As I said earlier, you go to prison or jail to serve a sentence, it is a punishment, and often times those punishments extend beyond prison or jail where those people are denied access to housing, denied access to employment, and really they are just unable to successfully reintegrate into society. So there is a push at the federal level called “Ban the Box,” which would bar certain employers from asking about an individual’s criminal background. So that folks who have felonies on their record would be eligible for

additional employment. That you want folks who are qualified to have the right jobs, but also provide the right kind of financial compensation so they can afford a home, they can pay for their families, they can pay for restitution. There are a lot of things that we count on our jobs for providing. People who are coming out of the criminal justice system, who already paid their debts to society, should be able to access employment and be able to move on with their lives. So that is something I look forward to progressing nationally and I'm hoping that conversation will come here to Idaho as well.

Hoffman: I'll be super brief because I know that we are over. First of all, there are occupational licenses where it says you can't participate in that occupation if you have been convicted of a certain kind of crime. Sometimes it's just any felony. And that is an issue and we have been trying to point that out more and more as occupational licensure laws come to the legislature, not a fan of occupational licensure at all, but that makes occupational licensure even worse. The second thing is, getting back to the question about the police and abuse in law enforcement activities, all this really goes back to is what legislatures and governors authorize law enforcement to do in the first place. If you don't give them that authorization, it's not going to be a problem and you are not going to have law enforcement going off and doing stupid things. I know this doesn't have anything to do with criminal justice, but the case in point, last year the Idaho State Police, which we are always told is short staffed, don't have enough people to go patrol the roads; sent two, count them, two detectives to the movie theatre in Meridian to sit and watch 50 Shades of Grey and be served gin and tonics...so they can go in and enforce the alcohol beverage laws that say you are not allowed to watch a provocative movie and have alcohol at the same time. You can do it at your house I guess, for now. But you can't do it at a public movie theatre. So if we really want to focus our resources on the things that really matter, then we have to have legislatures and governors that are willing to stop passing stupid laws that treat people like little children.

Sanders: And I think that is a good note upon which to wrap up. Thank you all for coming and I hope you enjoyed tonight's program.