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Note: Decarceration in a Mass Incarceration State: The Road to Prison Abolition

Robert H. Ambrose

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NOTE: DECARCERATION IN A MASS INCARCERATION STATE: THE ROAD TO PRISON ABOLITION

Robert H. Ambrose[†]

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I. INTRODUCTION

“Don’t be in a hurry to condemn a person because he doesn’t do what you do, or think as you think or as fast. There was a time when you didn’t know what you know today.”¹

To put a dent in our mass incarceration moral failure, we should follow the road to prison abolition. This does not mean we should tear down prison walls immediately and unleash the condemned masses into society.² Rather, prison abolition means striving to make prisons obsolete through crime prevention, sentencing reforms, and reevaluating what constitutes a crime.³ Legal and penal reforms, as opposed to “prison-backed policing,” are better methods to accomplish this goal.⁴

1. Letter from Malcom X to Maya Angelou (Jan. 16, 1965), in LINDA WAGNER MARTIN, *MAYA ANGELOU: ADVENTUROUS SPIRIT* (2016).

2. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1161 (2015) (stating that “abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement”).

3. *Id.* at 1167–68 (quoting ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 15, 21 (2003)) (noting that “[p]rison abolition . . . is an aspirational ethical, institutional, and political framework that aims to fundamentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls. As such, abolition seeks to ultimately render ‘prisons obsolete.’”); see Caroline E. Sapp, *Rehabilitate or Incarcerate? A Comparative Analysis of the United States’ Sentencing Laws on Low-Level Drug Offenders and Portugal’s Decriminalization of Low-Level Drug Offenses*, 23 *CARDOZO J. INT’L & COMP. L.* 63, 96 (2014). Prison-backed policing refers to prison’s utilization as a law enforcement tool. See generally McLeod, *supra* note 2, at 1199–2000.

4. McLeod, *supra* note 2, at 1159; see, e.g., JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT ON THE WAR ON DRUGS* 27 (1st ed. 2001); Katherine L. Eitenmiller, *Bending the Bars for Mothers: How Prison Alternatives Can Build a Stronger Oregon*, 92 *OR. L. REV.* 755, 780–81 (2014); Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and*

A knee-jerk reaction to the term “prison abolition” is not generally positive, as it seems an unrealistic and dangerous concept to many. Prisons offer society a sense of security, even though violent offenders are walking among us daily.⁵ Current policies driving incarceration are not effective against reducing crime.⁶ Recidivism rates show that prison is not a successful deterrent against future crimes.⁷ Effective deterrents exist in the prison abolition movement, while acknowledging there are a “dangerous few,” who will require confinement.⁸ These “dangerous few” are a rare group of people resistant to rehabilitation and will likely remain threatening to society.⁹ This small percentage of individuals does not derail the larger goal of prison abolition.¹⁰

Children Are Affected by Sentencing Guidelines and Mandatory Minimums, 47 SANTA CLARA L. REV. 285, 292 (2007);

5. See Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016), <http://time.com/4596081/incarceration-report/> [<https://perma.cc/QM4Z-KEEF>] (explaining that 25% of prisoners would be better served by alternatives to incarceration such as by being enrolled in treatment programs, community service, or probation; secondly, another 14% of prisoners can safely be set free since they have already served long sentences for more serious crime; and finally, that releasing these prisoners would save nearly \$20 billion annually).

6. See, e.g., Council of Economic Advisors, Exec. Office of the President, *Economic Perspectives on Incarceration and the Criminal Justice System* (2016) (“Despite the correlation between declining crime and increasing incarceration, rising incarceration is not a fundamental driver of the decline in crime. A large body of economic research shows that incarceration has only a small aggregate impact on crime reduction, and that this impact falls as the incarcerated population grows.”); Bridget Lowrie, *Stop Asking Which Came First, the Jail or the Criminal - Start Reinvesting in Justice in Maryland*, 47 U. BALT. L. F. 99, 103 (2017) (citation omitted) (“[I]ncarceration ‘has only a small aggregate impact on crime reduction, and that this impact falls as the incarcerated population grows.’”).

7. MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/AZ3M-62TC>] (“Five in 6 (83%) state prisoners released in 2005 across 30 states were arrested at least once during the 9 years following their release.”); Dashka Slater, *North Dakota’s Norway Experiment, Can Humane Prisons Work in America? A Red State Aims to Find Out*, MOTHER JONES (2017), <https://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/> [<https://perma.cc/GF4Z-EB43>] (explaining that 77% of inmates released from state prisons are rearrested within five years).

8. McLeod, *supra* note 2, at 1168 (“[I]t bears noting that there may be, in the end, some people who are so dangerous to others that they cannot live safely among us, those rare persons referred to in abolitionist writings as ‘the dangerous few.’”).

9. *Id.*

10. *Id.*

The pinnacle of abolition is reducing the prison population, which will disintegrate the need for prison facilities.¹¹ To collapse mass incarceration, our penal system must undergo a drastic transformation.¹² Instead of focusing on retribution, deprivation, and punishment, the system should stress rehabilitation and reintegration into society.¹³ Some states have already achieved “large reductions in their prison populations without experiencing any concurrent increase in their crime rates.”¹⁴ Without a shift towards rehabilitation, mass decarceration will fail.¹⁵

Our nation’s mass incarceration problem is virtually undeniable.¹⁶ Legislators no longer ignore the fact that the United States incarcerates people at an absurd rate.¹⁷ While being harsh on crime was a popular position for politicians in the past, being in favor of sentencing reform is

11. See generally Michael O’Hear, *Mass Incarceration: Fiscal & Social Costs*, 91 WIS. LAW. 20, 24 (2018) [hereinafter O’Hear, *Fiscal & Social Costs*] (analyzing the costs associated with incarceration and stating savings from decarceration could be achieved by closing whole facilities).

12. See, e.g., Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 560 (2015) (“The U.S. penal system has grown so extensive that it has . . . altered how key governing institutions, public services, and benefits operate everything from elections to schools to public housing.”).

13. See, e.g., Emily Labutta, *The Prisoner As One of Us: Norwegian Wisdom for American Penal Practice*, 31 EMORY INT’L L. REV. 329, 352–54 (2017) (proposing that the United States follow the Norwegian penal system which has the lowest crime and recidivism rates); Sara C. Schiavone, *Wiping the Slate Clean: A Proposal to Expand Ohio’s Expungement Statutes to Promote Effective Offender Reintegration*, 45 CAP. U. L. REV. 509, 516–21 (2017) (proposing a change to Ohio’s expungement statute to avoid retribution and a criminal label thereby facilitating reintroduction into society).

14. O’Hear, *Fiscal & Social Costs*, *supra* note 11, at 22–24.

15. IRINA DUNN, CHALK AND CHEESE: AUSTRALIAN VS. NORWEGIAN PRISONS 5 (2017) (“Norway has one of the lowest recidivism rates in the world, just 20% compared to the US, which has one of the highest rates of recidivism, with 76.6% of prisoners arrested just within five years of being released.”).

16. Michael M. O’Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. U. L. REV. 709, 709 (2013) (“As is well known, America’s incarceration rate has exploded to unprecedented heights in the past generation, with the national prison population quintupling in size since the late 1970s.”).

17. *Id.*

now a safe political play.¹⁸ Both sides of the political aisle agree on the need for criminal justice reform.¹⁹

To support mass incarceration, the costs are staggering—estimated to be as high as \$182 billion per year.²⁰ Shifting funds used to fuel incarceration to other budgetary vehicles is appealing. However, recent sentencing reform has been like bringing a garden hose to a forest fire.²¹ The intentions are good, but it does not come close to making a significant dent in incarceration rates.

Part II of this note details the problem of mass incarceration in our criminal justice system.²² It provides historical context from the 1960s through the present to explain the creation of our mass incarceration state.²³ Next, it discusses how systemic power structures, such as prosecutorial

18. See, e.g., Seung Min Kim, *Trump Endorses Bipartisan Criminal-Justice Reform Bill*, WASH. POST (Nov. 14, 2018), https://www.washingtonpost.com/politics/trump-endorses-bipartisan-criminal-justice-reform-bill/2018/11/14/9be8f926-e84c-11e8-bd89-eeef3b178206_story.html?noredirect=on&utm_term=.0ddbfe49973c [<https://perma.cc/65PH-WC8B>] (reporting bipartisan, presidential, and special interest support, including the Fraternal Order of Police and the International Association of Chiefs of Police for the First Step Act, which would loosen some mandatory minimum sentencing laws).

19. See *id.*; see also Anthony Romero & Mark Holden, *A New Beginning for Criminal Justice Reform*, POLITICO (July 7, 2015), <https://www.politico.com/magazine/story/2015/07/a-new-beginning-for-criminal-justice-reform-119822> [<https://perma.cc/9TQV-D8JT>] ([N]oting in 2015 the Safe, Accountable, Fair and Effective (SAFE) Justice Act was a bipartisan bill introduced by Representatives Jim Sensenbrenner, a Republican from Wisconsin, and Bobby Scott, a Democrat from Virginia. The bill ultimately failed but received support from two unlikely bedfellows: the ACLU and the Koch brothers.).

20. *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017), <https://eji.org/news/mass-incarceration-costs-182-billion-annually> [<https://perma.cc/9724-HFA3>] (“According to the Bureau of Justice Statistics, the annual cost of mass incarceration in the United States is \$81 billion. But that figure addresses only the cost of operating prisons, jails, parole, and probation—leaving out policing and court costs, and costs paid by families to support incarcerated loved ones.”); Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/U4WX-HWBG>].

21. See, e.g., Jonathan Simon, *Amnesty Now! Ending Prison Overcrowding Through a Categorical Use of the Pardon Power*, 70 U. MIAMI L. REV. 444, 444 (2016) (“Actual reforms, however, like President Obama’s recent grant of clemency to forty-six federal prisoners serving long drug sentences for nonviolent conduct, or recent one-off sentencing reforms aimed at preventing imprisonment for minor drug or property crimes, are manifestly insufficient to end mass incarceration, or even the chronic overcrowding that represents its most degrading and destructive aspect.”).

22. See *infra* Part II.

23. See *infra* Part II.A.

discretion, mandatory minimums, and sentencing guidelines, are rooted in racism and inequality.²⁴ Then it explains how these power structures allowed courts to incarcerate the masses, resulting in an exploding prison population.²⁵

Part III describes new approaches being used to address the mass incarceration issue.²⁶ First, it discusses attempts at sentencing reform and how such reforms are treating this epidemic but are doing little to end its terminal prognosis.²⁷ Second, it discusses prison abolition as the only moral, legal, and just model for a humane penal system.²⁸ For instance, other developed countries, such as Norway and the Netherlands, successfully operate criminal justice systems focused on rehabilitation and reintegration by treating offenders like humans.²⁹ As a result, either directly or indirectly, these countries have incredibly low crime and recidivism rates.³⁰ What other countries are doing is not going unnoticed in the United States.³¹ North Dakota, using Norway as a model, implemented policies focused on decreasing the segregation population, fostering a less aggressive atmosphere,³² and establishing a re-entry camp to help acclimate prisoners as they approach their release dates.³³ Such a strategy does not take decades and an act of Congress to implement.

24. See *infra* Part II.B; Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 882 (2014) (“Almost a decade after the ADAA was passed, the *L.A. Times*, in 1995, reported that not a single ‘Caucasian defendant had been charged with crack cocaine offenses in federal courts in Los Angeles, Boston, Denver, Chicago, Miami, Dallas, or in seventeen state courts.’” (citation omitted)).

25. See *infra* Part II.C.

26. See *infra* Part III.

27. See *infra* Part III.A.

28. See *infra* Part III.B.

29. DUNN, *supra* note 16. Prisons in Norway provide humane living conditions, which include “televisions, computers, showers and sanitation, kitchens with sharp objects, and windows without bars. Prisoners are allowed to walk around unaccompanied as this autonomy will help them adapt to life when they are released.” *Id.*

30. *Id.*; see *supra* text accompanying note 15.

31. See Labutta, *supra* note 13, at 332 (“[I]f the United States adopted Norwegian-style lower, indeterminate sentencing and applied the Norwegian principle of normality within prisons, then the consequent changes in the penal system would lower incarceration and recidivism rates.”).

32. Dan Lieberman & Claudia Morales, *Heated Floors and Pillow-Top Mattresses . . . in Prison*, CNN (June 22, 2018), <https://www.cnn.com/2018/03/08/us/prison-reform-north-dakota-norway/index.html> [<https://perma.cc/YSM5-8PG6>].

33. Andrew Hazzard, *Focus on Reform: North Dakota Uses Education, Work to Prepare Prisoners for Re-Entry*, BISMARCK TRIB. (Oct. 14, 2017), <https://bismarcktribune.com/news/state-and-regional/focus-on-reform-north-dakota-uses->

Finally, Part IV recommends the steps we can take to make prison obsolete in the United States, including systemic changes, cultural changes, and the utilization of restorative justice programs.³⁴ Critically, we must treat offenders more humanely. As a prisoner from Norway said, “[T]reat people like dirt and they will be dirt. Treat them like human beings, and they will act like human beings.”³⁵

The systemic changes this article recommends include eliminating cash bail,³⁶ jail for misdemeanors,³⁷ and sentencing guidelines.³⁸ Eliminating cash bail can free defendants sitting in jail simply because they cannot afford freedom.³⁹ Eliminating jail for misdemeanors prevents citizens from being introduced to the system for minor offenses, a step that can often lead to a lifetime of repeated incarcerations.⁴⁰ Alternatives to incarceration are available for virtually every misdemeanor offense. These include diversionary programs, restorative justice, community service, and house arrest.⁴¹ Finally, we should eliminate sentencing guidelines for all nonviolent crimes. Sentencing guidelines at both the state and federal levels place people in boxes. Judges must send offenders to prison based on their criminal history and offenses.⁴² Recent sentencing reforms in Minnesota and

education-work-to-prepare/article_2d8fc7a3-0f28-5222-a1b9-f7b3b22a9be4.html
[https://perma.cc/2CUR-FR5T].

34. See *infra* Part IV.

35. DUNN, *supra* note 16.

36. See *infra* Part IV.A.1.

37. See *infra* Part IV.A.2.

38. See *infra* Part IV.A.3.

39. Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J. L. & SOC. CHANGE 125, 133 (2017) (“Nationwide, more than 60% of the people in jail are being detained pretrial and have not actually been convicted of a crime.”).

40. Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control,”* FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/> [https://perma.cc/S8AL-3PA5] (“It is a system that operates to control people, often at early ages, and virtually all aspects of their lives after they have been viewed as suspects in some kind of crime.”).

41. James Byrne & Don Hummer, *An Examination of the Impact of Criminological Theory on Community Corrections Practice*, 80 FED. PROBATION 15, 24 tbl.3 (2016).

42. Mirko Bagaric et al., *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663, 1682 (2017) (quoting Nancy Gertner, Opinion, *Undoing the Damage of Mass Incarceration*, BOS. GLOBE (Nov. 4, 2015), https://www.bostonglobe.com/opinion/2015/11/04/undoing-damage-mass-incarceration/9Ww80SKxQm9EbdHxmZG5sM/story.html?s_campaign=8315 [https://perma.cc/H4CX-TDYZ]) (“Over a 17-year judicial career, I sent hundreds of defendants to jail—and about 80 percent of them received a sentence that was

at the federal level are a good start but are not enough to significantly decrease incarceration rates.⁴³

Besides changes to the judicial and political system that effect people after they break the law, cultural changes need to be made to impact communities and prevent at-risk people from committing crimes. This article recommends cultural changes, such as a focus on crime prevention, greening efforts, and decriminalizing of drug offenses.⁴⁴ It can be a challenge to understand how to prevent people from breaking the law, but to reach prison abolition, it is vital we eliminate the need for so many prisons across our country.

Lastly, this article recommends the use of restorative and rehabilitative justice as opposed to punitive consequences for offenses.⁴⁵ This means eradicating segregation units in prison and drastically remodeling prisons in a Norway model.⁴⁶ Making incarceration feel as close to what life is like outside of prison walls helps prevent recidivism.⁴⁷ This means amending the current probationary model, and preserving offenders' civil rights as they reintegrate into society.

II. THE PROBLEM OF MASS INCARCERATION

Whether you believe there is a mass incarceration problem in the United States is a tipping point. If you fundamentally reject the premise that mass incarceration is a problem in this country, then statistics to the contrary will not be persuasive. If you fall into that mindset, consider what other countries are doing, such as Norway and the Netherlands, and how changing the treatment of offenders can help reduce crime in the first place.⁴⁸ One judge interviewed for this article noted: "When there is such a huge

disproportionate, unfair, and discriminatory. Mass incarceration was not an abstraction to me. Sadly, I was part of it.").

43. See McLeod, *supra* note 2, at 1209 ("Even under these most optimal conditions, however, with consistent, marked incarceration-reductive reforms such as those in 2012, it would take almost one hundred years to return to 1980 levels of imprisonment.").

44. See *infra* Part IV.B.

45. See *infra* Part IV.C.

46. Cheryl Corely, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR (July 31, 2018), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confineme> [https://perma.cc/DAY8-BCNX]; see also Slater, *supra* note 7.

47. Bagaric et. al., *supra* note 42, at 1709 ("The aim of the Norwegian sentencing and prison system is to reduce the rate of re-offending and it is thought this is best achieved by making the prison experience as close as possible to living in the general community. It is achieving outstanding success, with recidivism as low as twenty percent.").

48. DUNN, *supra* note 16.

percentage of our prisoners who recidivate as compared to other countries, the answer is clear to me: we put too many people in prison who are not at serious risk to public safety, and we wreck their lives and the lives of those around them in the process.”⁴⁹ The statistics on mass incarceration are quite shocking, often triggering support for reforms across party lines.⁵⁰

A. *Historical Context*

In 1972, the United States had 196,000 people incarcerated in state and federal facilities.⁵¹ The prison population was so low it prompted a ten-year moratorium on prison construction.⁵² Twenty-five years later, in 1997, almost a million more people were in custody.⁵³ Five years after that, there were another million people incarcerated, totaling 2.1 million.⁵⁴ Over the past three decades, the federal prison population exploded by 800 percent.⁵⁵

These numbers do not include the amount of people on probation or parole. In 1976, roughly 900,000 people were on probation.⁵⁶ By 2010, that number grew to over four million.⁵⁷ Similarly, about 140,000 people were on parole in 1975, which escalated to an estimated 840,000 people by 2010.⁵⁸

1. *1960s – 1980s*

Both crime rates and incarceration rates rose through the 1960s and 1970s.⁵⁹ President Richard Nixon combined the Office for Drug Abuse Law

49. Interview with Judge Jay Quam, Hennepin County District Court Judge (Sept. 11, 2018).

50. See *Congress Discovers a Bill with Bipartisan Support that the President Will Sign*, *ECONOMIST* (Dec. 15, 2018), <https://www.economist.com/united-states/2018/12/15/congress-discovers-a-bill-with-bipartisan-support-that-the-president-will-sign> [<https://perma.cc/FF3F-7ZN3>].

51. McLeod, *supra* note 2, at 1194.

52. *Id.*

53. *Id.*

54. *Id.*

55. Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 *HOFSTRA L. REV.* 1063, 1065 (2016).

56. McLeod, *supra* note 2, at 1194.

57. Takei, *supra* note 39, at 129.

58. *Id.* at 130 (footnote omitted) (“As the National Academy of Sciences reported in its comprehensive 2014 study of mass incarceration, parole violations accounted for an increasing share of state prison admissions as mass incarceration became more entrenched—rising from 20% in 1980 to 30% in 1991 and then between 30 and 40% in 2010.”).

59. *Id.* at 130; see NAT’L RES. COUNCIL OF THE ACADEMIES, *THE GROWTH OF INCARCERATION IN THE U.S.: EXPLORING CAUSES AND CONSEQUENCES* 46 (Jeremy

Enforcement and the Office of National Narcotics Intelligence to create the Drug Enforcement Administration in 1973.⁶⁰ Although drug crimes stopped increasing, President Ronald Reagan declared a war on drugs in 1982.⁶¹ To make good on his tough-on-crime campaign, President Reagan helped funnel a wave of funds to law enforcement.⁶² While those funds helped address the crack cocaine epidemic,⁶³ they had collateral consequences including militarization of police⁶⁴ and federal mandatory minimum drug sentences.⁶⁵ These measures were not so much about drug abuse as “politics, including racial politics.”⁶⁶ As time went on, the Democratic Party

Travis et al. eds. 2014), http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf [<https://perma.cc/TG6V-P47R>] (“The country experienced a large increase in crime from the early 1960s until the 1980s. From the early 1990s, crime rates began to fall broadly for the following two decades.”).

60. See Exec. Order No. 11,727, 38 Fed. Reg. 18,357 (July 6, 1973) (establishing, by executive order, the Drug Enforcement Administration and giving the Attorney General authority to coordinate all federal drug law enforcement activities).

61. Childress, *supra* note 40.

62. *Id.*; see also President Ronald Reagan, Remarks in the Rose Garden on the Announcement of White House Conference for a Drug Free America (May 5, 1987), <https://www.reaganlibrary.gov/050587d> [<https://perma.cc/YJ93-G69W>]; cf. Exec. Order No. 12,595, 52 Fed. Reg. 17,383 (May 5, 1987) (“The heads of Executive agencies, to the extent permitted by law, shall provide the Conference such information with respect to drug abuse law enforcement, interdiction, and health-related drug abuse matters, including research, as it may require for the purpose of carrying out its functions.”); Exec. Order No. 12,368, 47 Fed. Reg. 27,843 (June 24, 1982), *amended in* Exec. Order No. 12,590, 52 Fed. Reg. 10,021 (Mar. 26, 1987) (“The National Drug Policy Board is designated to direct all the activities under Title II of [the Drug Abuse Prevention, Treatment, and Rehabilitation] Act, in accord with Section 202 (21 U.S.C. 1112).”).

63. See U.S. GEN. ACCOUNTING OFF., HRD-91-55FS, DRUG ABUSE THE CRACK COCAINE EPIDEMIC: HEALTH CONSEQUENCES AND TREATMENT 2 (1991), <https://www.gao.gov/assets/90/89031.pdf> [<https://perma.cc/6LGB-262U>] (noting a study by the National Institute on Drug Abuse National Household Survey on Drug Abuse “show[ing] the number of cocaine users declined by nearly 60 percent between 1985 and 1990 (from 12.2 to 6.2 million)”; see generally Childress, *supra* note 40.

64. See Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282, 285 (2015) (“The slide towards militarization began in the 1960s with the war on crime, during which police departments around the country created paramilitary-style police units.”); see generally Childress, *supra* note 40.

65. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837 (1984); see generally Childress, *supra* note 40.

66. Childress, *supra* note 40 (“President Ronald Reagan wanted to make good on campaign promises to get tough on that group of folks who had already been defined in the media as black and brown, the criminals, and he made good on that promise by declaring a drug war.”).

did not want to be portrayed as being soft on crime.⁶⁷ Because of this, when President Clinton was elected, the mass incarceration problem only worsened.⁶⁸

2. 1990s - 2000s

After President Clinton took office, Congress passed the 1994 Crime Bill.⁶⁹ Then-Senator Joe Biden and then-Representative Chuck Schumer led the charge to pass the 1994 Crime Bill, which drastically increased mandatory minimum sentences and gave billions of dollars to fund new prisons.⁷⁰ The states quickly followed the federal government's example and instituted harsher penalties.⁷¹ These tough-on-crime initiatives helped push incarceration numbers to new heights by putting a million more people in custody from 1997 to 2002.⁷² The 1990s saw more people go to jail and prison than any other decade in our history.⁷³ Because of the tough-on-crime attitude, "there are more African Americans under correctional control in prison or jail, on probation or parole, than were enslaved in 1850, a decade before the Civil War began."⁷⁴

3. Present Day

Today, 2.2 million people are incarcerated in the United States at state and federal facilities.⁷⁵ That roughly equals the population of our Nation's

67. *Id.* ("[I]n the height of the war on drugs, a Democratic administration desperate to prove they could be as tough as their Republican counterparts and helping to give birth to this penal system that would leave millions of people, overwhelmingly people of color, permanently locked up or locked out.")

68. *Id.* ("It was the Clinton administration that supported many of the laws and practices that now serve millions into a permanent underclass, for example. It was the Clinton administration that supported federal legislation denying financial aid to college students who had once been caught with drugs. It was the Clinton administration that passed laws discriminating against people with criminal records, making it nearly impossible for them to have access to public housing. And it was the Clinton administration that championed a federal law denying even food stamps, food support to people convicted of drug felonies.")

69. Takei, *supra* note 39, at 156.

70. *Id.*

71. See NAT'L RES. COUNCIL OF THE ACADEMIES, *supra* note 59, at 78-85.

72. McLeod, *supra* note 2, at 1194 (noting that the state and federal prison population rose from 196,000 in 1972, to 1,159,000 in 1997, to 2,166,260 in 2002).

73. Takei, *supra* note 39, at 156.

74. Childress, *supra* note 40.

75. See U.S. DEPT. OF JUSTICE, NCJ 251211, CORRECTIONAL POPULATIONS IN THE U.S., 2016 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

fourth largest city—Houston.⁷⁶ To keep up with this rate of incarceration, we have built more jails and prisons than any other country.⁷⁷ Even though the United States is merely 5% of the world’s population, we incarcerate more than 20% of the world’s prisoners.⁷⁸ We average between 670 and 753 prisoners per 100,000 residents, while Norway averages between 69 and 75 prisoners per 100,000 residents.⁷⁹ Within two years of release, between 50% and 60% of prisoners in the United States return to custody.⁸⁰ In Norway, only 20% return.⁸¹

B. Systemic Power Structures

The criminal justice system possesses power structures and dynamics that prejudice fairness and create intrinsic pressure to incarcerate people.⁸² Prosecutorial discretion, mandatory minimums, and sentencing guidelines are just three of the structures that drive incarceration as the preferred result of the criminal justice system.⁸³

1. Prosecutorial Discretion

Prosecutors have a tremendous amount of power in the criminal justice system: they decide whether to file charges against someone and what

[<https://perma.cc/9GUA-SXDM>] (“The incarcerated population decreased slightly from 2,172,800 in 2015 to 2,162,400 in 2016.”).

76. U.S. CENSUS BUREAU, QUICKFACTS HOUSTON CITY, TEXAS, <https://www.census.gov/quickfacts/fact/table/houstoncitytexas/PST045217>

[<https://perma.cc/W5ZS-QDQC>] (estimating that Houston’s population was 2,312,717 in 2017).

77. Jennie Neufeld, *A Mass Incarceration Expert Says the 2018 Prison Strike Could Be “One of the Largest the Country Has Ever Seen,”* VOX (Aug. 22, 2018), <https://www.vox.com/2018/8/21/17721874/national-prison-strike-2018-13th-amendment-attica> [<https://perma.cc/2PKL-DYJH>] (“We have 2.2 million people behind bars in this country.”).

78. Davis, *supra* note 55, at 1063 (citations omitted).

79. William Lee Adams, *Norway Builds the World’s Most Humane Prison*, TIME (May 10, 2010), <http://content.time.com/time/magazine/article/0,9171,1986002,00.html> [<https://perma.cc/2779-KPPR>] (“[A] low level of criminality gives Norway a massive advantage. Its prison roll lists a mere 3,300, or 69 per 100,000 people, compared with 2.3 million in the U.S., or 753 per 100,000—the highest rate in the world.”).

80. *Id.*

81. *Id.*

82. See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 9, 13–24 (2009).

83. See Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 377–79 (2010).

specific charges to file; whether to keep someone out of incarceration in exchange for a plea of guilty; and what sentence to seek if the defendant is ultimately convicted at trial.⁸⁴ In courtrooms across this nation, prosecutors proclaim they represent the state, the United States of America, and the people.⁸⁵ They bear an incredible amount of responsibility to the community and the alleged victims of crimes.⁸⁶ They often adhere to office policies that require them to file the most severe charges and push for the worst sentence possible under the guidelines.⁸⁷ It is clear prosecutors play a major role in mass incarceration.⁸⁸

One local county prosecutor interviewed for this article stated her office is generally very supportive in giving each prosecutor discretion in negotiating plea deals. But, her “office takes firearms-related crimes very seriously and would not be inclined to negotiate for anything less than a guideline sentence on those cases.”⁸⁹

Prosecutors often ask judges to send someone to prison for years for committing nonviolent offenses, such as drug crimes, thefts, and DWIs.⁹⁰ Before making such an argument on the record, the prosecutor will say they must seek such severe punishments, regardless of whether a defendant has changed his or her life prior to sentencing.⁹¹

Victims and their families often provide input to prosecutors and judges prior to imposing a sentence. Those wishes can often influence a prosecutor’s recommendation for a more severe punishment than normal or for a judge to hand down a harsher sentence. Ironically, when it comes to a victim’s recommendation for leniency, it sometimes has the opposite

84. See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 129–60 (2017) (suggesting that prosecutorial discretion is the primary cause of mass incarceration); Simons, *supra* note 83, at 377–79; Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 *CRIME & JUST.* 1, 1 (2012); Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 *NEV. L.J.* 107, 164 (2017).

85. See Scott Ingram, *Representing the United States Government: Reconceiving the Federal Prosecutor’s Role Through a Historical Lens*, 31 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 293, 303 (2017).

86. See *id.* at 298–99.

87. GARY T. LOWENTHAL, *DOWN AND DIRTY JUSTICE: A CHILLING JOURNEY INTO THE DARK WORLD OF CRIME AND THE CRIMINAL COURTS* 53 (2003).

88. See Tonry, *supra* note 84.

89. Interview with anonymous Assistant County Attorney, in Minnesota, (Sept. 23, 2018).

90. See Abigail A. McNelis, Comment, *Habitually Offending the Constitution: The Cruel and Unusual Consequences of Habitual Offender Laws and Mandatory Minimums*, 28 *GEO. MASON U. CIV. RTS. L.J.* 97, 98–99 (2017).

91. See *id.* at 103–04; Tonry, *supra* note 84.

effect. Sentencing mitigation specialist, Amy Butler, noted she has seen “prosecutors and even judges ignore the wishes of victims and/or a victim’s family if they are asking for leniency.”⁹² She believes “equal consideration should be given.”⁹³ Her prime example was a juvenile client with no prior criminal history certified as an adult for a serious offense. The juvenile:

attacked members of his family and seriously injured them. They were a family that desperately wanted to get help for [the juvenile’s] emerging mental illness. The client was thoroughly evaluated and doing really well at a secure mental health facility. The judge not only removed him from this facility to sentence him to prison, but was rather disrespectful in his language and tone to the family during sentencing. In that case, there was a secure option that would have addressed the underlying cause of the offense. It was difficult to hear the family’s disappointment in the system. Throughout the whole legal process this family felt as if no one cared about them.⁹⁴

Before a defendant even gets to sentencing, prosecutors will often pressure a defendant to plead guilty prior to trial.⁹⁵ It is common for a prosecutor to say something such as “if you have a contested pre-trial hearing or go to trial, and lose, then I am going to ask for more custody time than I am now.”⁹⁶ In other words, the prosecutor is insinuating if a defendant exercises his or her constitutional rights to have a trial and loses, then that prosecutor may make the defendant pay for the decision by requesting a harsher sentence.⁹⁷ Some prosecutors’ threats of harsh sentences are without merit, but others will follow through on their threats and pursue harsher sentences if the defendant challenges their case.⁹⁸

Ninety-five percent of criminal cases resolve through plea bargaining.⁹⁹ This happens, in part, because the current system simply cannot function if a significant percentage of cases actually went to trial, thus encouraging prosecutors to seek plea deals.¹⁰⁰ Hence,, the overwhelming number of pleas

92. Interview with Amy B. Butler, sentencing mitigation specialist (Sept. 20, 2018).

93. *Id.*

94. *Id.*

95. See Tonry, *supra* note 84.

96. PFAFF, *supra* note 84, at 129–60; Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191, 194–97 (2015).

97. See Davis, *supra* note 55, at 1072 (“Defendants who chose to exercise their constitutional right to a jury trial often suffered extremely harsh consequences.”).

98. See *id.*

99. *Id.* at 1071.

100. See Jacqueline L. Schreurs, Note, *For the Sake of Public Policy: Plea Bargaining Demands Sixth Amendment Protection Due to Its Prevalence and Necessity in the Judicial*

means prosecutors have a hand in deciding the sentence for almost every defendant, giving prosecutors an abundance of control.¹⁰¹ The power prosecutors have is so great that even the ethical rules state, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”¹⁰² “The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”¹⁰³

If all prosecutors truly were ministers of justice over the past three decades, then the United States would not be experiencing a mass incarceration crisis.¹⁰⁴ Far too often prosecutors are simply being an advocate for their office by adhering to mandatory minimums and sentencing guidelines. In 2010, former United States Attorney General Eric Holder attempted to change the process for prosecutors with his Smart on Crime initiative.¹⁰⁵ This program stopped requiring prosecutors “to bring charges that could result in the most severe possible sentence.”¹⁰⁶ The purpose of the initiative was “to avoid triggering excessive mandatory minimums for low-level, nonviolent drug offenders.”¹⁰⁷

2. *Mandatory Minimums*

A mandatory minimum sentence means that generally a judge cannot sentence for anything less than what the law states; however, the law also allows judges to disregard the mandatory minimum in certain situations.¹⁰⁸

System, 48 CREIGHTON L. REV. 629, 631 (2015) (“[P]lea bargaining allows for efficient final dispositions of the great majority of criminal cases and thus saves prosecutorial resources.”).

101. See Alkon, *supra* note 96, at 196.

102. See Davis, *supra* note 55, at 1077 (citing MODEL RULES OF PROF'L CONDUCT r. 3.8, cmt. 1 (AM. BAR ASS'N 2014) (entitled “Special Responsibilities of a Prosecutor”); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

103. Davis, *supra* note 55, at 1078 (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-1.2(b) (4th ed. 2015)).

104. See PFAFF, *supra* note 84.

105. Takei, *supra* note 39.

106. *Id.*

107. *Id.* at 825.

108. *State v. Rausch*, 799 N.W.2d 19, 23 (Minn. Ct. App. 2011) (“Because the legislature has not granted the district court the discretion to sentence without regard to the mandatory-minimum sentence contained in subdivision 1a, section 609.582 of the Minnesota Statutes, the district court erred by failing to impose on Rausch the mandatory-minimum sentence for burglary of an occupied dwelling.”); see also § 36:38 Mandatory

For example, a person deemed ineligible to possess a firearm or ammunition in Minnesota and later possesses one of those items faces a mandatory minimum sentence of sixty months in prison.¹⁰⁹ In this situation, the judge can depart from the mandatory minimum sentence, but not if the person was ineligible because he or she was previously convicted of certain crimes while using a firearm.¹¹⁰ Those convicted of “crimes of violence” are also ineligible to possess firearms or ammunition under Minnesota law.¹¹¹ While many of the offenses deemed “crimes of violence” actually involve a violent act, controlled substance crimes are also deemed “crimes of violence” in Minnesota.¹¹² As a harsh result, if a felony drug offender is arrested with even one bullet in their pocket and they do not even own or possess a firearm, they still face a mandatory minimum prison sentence of sixty months.¹¹³

At the federal level, mandatory minimum sentences gained notoriety for harsh punishments of nonviolent drug offenders primarily because of the Anti-Drug Abuse Act of 1986 (ADAA).¹¹⁴ This act created the well-known sentencing disparity for those found with similar amounts of crack cocaine compared to powder cocaine—the “amount of powder cocaine required to trigger the five-year and ten-year minimum mandatory sentences prescribed by the ADAA is 100 times greater than the amount of crack cocaine required to trigger those sentences.”¹¹⁵ Besides escalating mass incarceration, the ADAA also amplified the racial disparities for those placed in prison, because the vast majority of crack cocaine offenders are

Sentences, 9 MINN. PRAC., CRIMINAL LAW & PROCEDURE § 36:38 (4th ed.) (“[J]udges may disregard mandatory sentences only when authorized to do so by statute.”).

109. MINN. STAT. § 609.11, subdiv. 5 (2018).

110. MINN. STAT. § 609.11, subdiv. 8(c).

111. MINN. STAT. § 624.712, subdiv. 5; § 624.713.

112. MINN. STAT. § 624.712, subdiv. 5.

113. See, e.g., *United States v. McCurry*, 832 F.3d 842, 844 (8th Cir. 2016) (holding that defendants lower cognitive abilities did not make his mandatory minimum sentence cruel and unusual punishment for being a convicted felon in possession of a firearm); *United States v. Yirkovsky*, 259 F.3d 704, 707 (8th Cir. 2001) (holding 180 months for possession of a single bullet is not cruel and unusual punishment).

114. Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. §§ 801-02, 841 (2000)). Mandatory minimum sentences were criticized by the U.S. Sentencing Commission as early as 1991. Eric E. Sterling, *Drug Laws and Snitching: A Primer*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/> [<https://perma.cc/U9RW-VX54>]. The commission found that all defense lawyers, and nearly half of prosecutors queried, had serious problems with mandatory minimum sentences and most of the judges pronounced them as manifestly unjust. *Id.*

115. Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1331 (2005).

African-American, while the vast majority of powder cocaine offenders are Caucasian.¹¹⁶

As an attempt to lessen the disparity, President Obama signed the Fair Sentencing Act (FSA) in 2010, which reduced sentencing differences between crack cocaine and powder cocaine.¹¹⁷ The FSA also eliminated mandatory minimum sentences for simple possession of crack cocaine.¹¹⁸ Unfortunately, further efforts related to sentencing reform, such as the Sentencing Reform and Corrections Act of 2015 and the Smarter Sentencing Act, fell short in Congress and never ultimately passed.¹¹⁹

Recently the FIRST STEP Act, a bipartisan criminal justice overhaul bill, passed Congress and was signed into law.¹²⁰ Among other things, the law retroactively reduces crack-powder sentencing disparities, providing nearly 2,600 federal prisoners convicted of crack offenses before 2010 an opportunity to have their sentences reduced and brought into line with justice and common sense.¹²¹ However, this bill was low hanging fruit on a gigantic reform tree. It was popular to snag and easy for the taking, but it does not come close to clearing the forest.

3. *Sentencing Guidelines*

While mandatory minimum sentences tell judges how much time they must give a defendant to start, sentencing guidelines give judges a range of time for each offense according to the severity of the offense and the defendant's criminal history.¹²² Sentencing guidelines are just as responsible as mandatory minimum sentences in assisting mass incarceration.¹²³ When a judge is simply determining how much time a person should get on top of

116. *Id.*

117. Takei, *supra* note 39, at 155.

118. *Id.* at 155-56.

119. *Id.* at 827-28.

120. Brian Hamilton, *Trump Signed the First Step Act for Criminal Justice Reform. Here's the Second Step*, FORTUNE (Dec. 27, 2018), <http://fortune.com/2018/12/27/first-step-criminal-justice-reform/> [<https://perma.cc/3LGR-MZV7>].

121. *Id.*; see also Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES, (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://perma.cc/7EKQ-ZX4C>]; Justin George, *What's Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act> [<https://perma.cc/3B32-A7PG>].

122. Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 450-51 (2013).

123. *Id.*

the mandatory minimum, the trial judge has no discretion to determine whether incarceration is appropriate at all.¹²⁴

In Minnesota, judges must follow sentencing guidelines unless they find substantial and compelling reasons to depart from them in order to render a lower sentence.¹²⁵ On the flip side, prosecutors may seek an aggravated departure by requesting a longer sentence than the sentencing guidelines provide.¹²⁶ Prosecutors may also appeal sentencing departure motions in instances where they believe judges were too lenient in sentencing defendants.¹²⁷ Accordingly, the Minnesota Court of Appeals will reverse trial court sentences in instances where there is a lack of legal support to justify a mitigated departure.¹²⁸ This may result in judges feeling pressure to incarcerate a defendant rather than risk a reversal on appeal.

In 1978, Minnesota created the Minnesota Sentencing Guidelines Commission (MSGC).¹²⁹ The MSGC enacted sentencing guidelines intending to create sentences proportional to a defendant's culpability and crime.¹³⁰ The guidelines aimed to be rational, consistent, and would either eliminate or greatly reduce sentencing disparities.¹³¹ Ironically, the MSGC aimed to make sentencing more economical and treat incarceration as a last resort.¹³²

Despite the MSGC's objectives, the opposite ensued over the past four decades and Minnesota's prison population increased 500%.¹³³ During this time period, the frequency of incarceration remained the only constant within the sentencing framework system, which does not align with the purpose of MSGC.¹³⁴ Moreover, similar to federal sentencing, the highest levels of incarceration in Minnesota showed massive racial disparities.¹³⁵

124. See *State v. Turck*, 728 N.W.2d 544, 546-47 (Minn. Ct. App. 2007) (upholding mandatory minimums for drug offenses).

125. MINN. SENTENCING GUIDELINES AND COMMENTARY 38 (MINNESOTA SENTENCING GUIDELINES COMM'N 2018).

126. *Id.*

127. See, e.g., *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009).

128. See *State v. Rund*, 896 N.W.2d 527, 534-36 (Minn. 2017) (reversing the Court of Appeals' affirmation of a mitigated durational departure).

129. John Stuart & Robert Sykora, *Minnesota's Failed Experience with Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 WM. MITCHELL L. REV. 426, 427 (2011).

130. *Id.* at 428.

131. *Id.*

132. *Id.*

133. *Id.* at 428-29.

134. *Id.* at 428 n.7.

135. Takei, *supra* note 39, at 132.

C. *Consequences of Mass Incarceration*

1. *Racial Disparities of Prison*

The mass incarceration boom created disturbing racial disparities throughout the country.¹³⁶ For similar crimes, African Americans and Hispanics receive harsher penalties than whites and “are more likely to be stopped, searched, arrested, convicted, and sentenced to harsher penalties.”¹³⁷ Further, “[r]ates of parental incarceration are two to seven times higher for African-American and Hispanic children [than whites].”¹³⁸

2. *Reoffenders and Nonviolent Drug Offenders*

A probation or parole violation further amplifies the problem of mass incarceration throughout the United States.¹³⁹ Far too often, parolees or those on probation are unable to abide by stringent probation conditions and ultimately end up back in custody.¹⁴⁰ Often, the recently released prisoner is not even committing new offenses but rather having sobriety issues. These individuals should not be returned to jail if they fail out of chemical dependency treatment. Yet, policy makers justify this decision as a parole or probation violation because it offers the country a false sense of safety by returning these individuals to jail.¹⁴¹ However, if the justice system focused on rehabilitation over punishment, it could end this cycle of recidivism and mass incarceration.

136. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-73 (2004) (“[M]ost of the people sentenced to time in prison today are black. On any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system[:] either behind bars, on probation, or on parole.”).

137. Takei, *supra* note 39.

138. *Id.*

139. *Id.* at 130 (“As the National Academy of Sciences reported in its comprehensive 2014 study of mass incarceration, parole violations accounted for an increasing share of state prison admissions as mass incarceration became more entrenched—rising from 20% in 1980, to 30% in 1991, and then between 30% and 40% in 2010.”).

140. Eli Hager, *At Least 61,000 Nationwide Are in Prison for Minor Parole Violations*, MARSHALL PROJECT (Apr. 23, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations> [<https://perma.cc/Z3EB-ZDVM>].

141. See, e.g., *Commonwealth v. Eldred*, 101 N.E.3d 911, 925 (Mass. 2018) (affirming a trial court’s decision to incarcerate the defendant for violating the sobriety condition of her parole and justifying that decision on the basis of the court’s duty to protect the public).

3. *Prison Corrupts*

One despicable result of mass incarceration is that prisons are the most sexually violent place in the country. In 2008, nearly 216,000 sexual assaults occurred in U.S. prisons.¹⁴² This grossly underestimated number does not account for unreported assaults.¹⁴³ The Department of Justice estimates about 13% of prisoners have been sexually assaulted with many subjected to repeat assaults.¹⁴⁴

III. NEW APPROACHES TO SOLVE MASS INCARCERATION

A. *Sentencing Reform*

Mass incarceration has not gone completely unnoticed in Minnesota. The Minnesota legislature passed sentencing reforms for drug laws in 2016.¹⁴⁵ Further, Minnesota attempted to parallel the goals at the federal level by trying to make punishment more proportional for serious drug dealers compared to low-level drug offenders with chemical dependency problems.¹⁴⁶ Minnesota, in an attempt to solve the problem of mass incarceration, lowered mandatory minimum sentences, expanded statutory stays of adjudication, and increased drug quantity thresholds.¹⁴⁷

The bipartisan coalition #Cut50 aims to cut incarceration levels in half in ten years by reducing incarceration for low-level, nonviolent offenders.¹⁴⁸ These intentions are incredibly well-grounded, and a step in the right direction towards decarceration. Still, cutting the incarceration rate by 50% would not knock the United States off the perch of having the highest incarceration rate in the world.¹⁴⁹ The only true way for the United States to reach more normal rates of incarceration is to firmly plant itself on the road to prison abolition. To achieve prison abolition, sentencing reforms at the state and federal levels need to be more drastic. Recent sentencing reforms,

142. McLeod, *supra* note 2, at 1180.

143. *Id.*

144. *Id.*

145. MINN. STAT. § 609A.02 (2018); Ricardo Lopez, *Minnesota House Unanimously Approves Drug-Sentencing Reforms*, STAR TRIB. (May 21, 2016), <http://www.startribune.com/minnesota-house-unanimously-approves-drug-sentencing-reforms/380369111/> [https://perma.cc/YR8H-YNBK].

146. *Id.*; see also Justin Collins, *Navigating Minnesota's New Drug Laws, A Guide for Criminal Law Practitioners*, BENCH & BAR OF MINN. (April 5, 2017), <http://mmbenchbar.com/2017/04/new-drug-laws/> [https://perma.cc/Z58Z-AXQ2].

147. *Id.*

148. McLeod, *supra* note 2, at 1209.

149. *Id.* at 1209-10.

and attempts thereto, are simply falling short of sweeping decarceration. While recent reforms are definitely better than before, “[e]ven under these most optimal conditions . . . with consistent, marked incarceration-reductive reforms . . . it would take almost one hundred years to return to 1980 levels of imprisonment. Yet, already, in 2013, this downward trend reversed course as incarceration increased slightly at the state and federal levels.”¹⁵⁰ In 2009, the prison and jail population across the United States reached its peak.¹⁵¹ Since then, the same population decreased by 5%.¹⁵² “However, contrary to popular belief, this modest reduction in the national incarceration rate is not the result of a uniform, nationwide decarceration trend. Instead, it is attributable to specific policy changes that reduced prison populations in a handful of states—primarily California, New York, and New Jersey.”¹⁵³ Nationwide, the jail population has barely changed since 2011.¹⁵⁴ “[C]laims that mass incarceration is clearly or inevitably on its way out have been greatly exaggerated.”¹⁵⁵

B. Prison Abolition

1. Background

In 1978, when the Minnesota legislature developed the MSGC and sentencing guidelines, it had a goal to “establish rational and consistent sentencing standards that promote public safety, reduce sentencing disparity, [and] ensure that the sanctions imposed for felony convictions are proportional to the severity of the offense and the offender’s criminal history,” which would make prisons more obsolete.¹⁵⁶ Because the result was the complete opposite, the state needs to learn from history and use different means to achieve lower incarceration rates. With bipartisan support for decarceration,¹⁵⁷ now more than ever, we should be striving towards prison abolition.

To grasp the concept of prison abolition, it is important to understand that the concept does not mean prisons and jail should all be shut down tomorrow. Prison abolition means we should strive to not need prisons in

150. *Id.* at 1209.

151. Takei, *supra* note 39, at 129.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See About MSGC, MINN. SENTENCING GUIDELINES COMM’N*, <https://mn.gov/sentencing-guidelines/about/> [<https://perma.cc/44U4-U48F>].

157. Takei, *supra* note 39, at 167.

the first place. The current “prison-backed policing” model is clearly failing to reduce recidivism and mass incarceration.¹⁵⁸

We cannot keep repeating our historic failures. Drastic changes to our legal and penal systems are needed to stop mass incarceration. Our focus on punishment is so prominent that when a person is charged with a felony offense, the first reaction is to look to the sentencing guidelines to see how much prison time they may get.¹⁵⁹ Not only do mandatory minimums and sentencing guidelines need to change significantly, a punishment-based criminal justice system needs to be altered to stress rehabilitation and reintegration into society.

2. *Elephant in the Room: The Dangerous Few*

Skeptics and supporters alike must address the common question related to prison abolition: what are you going to do with the most violent members in our society—murderers and rapists? The crucial part of prison abolition is to understand the overall goal: to not need prisons in the first place. If there was less of a need for prisons, there would be less of a need to address what to do with violent offenders.

Despite common misconceptions, prison abolitionists are realists. We understand that a rare fraction of our community, “the dangerous few,” are so unsafe that they cannot be rehabilitated.¹⁶⁰ Even Norway, with its low incarceration rate, still sends some people to prison.¹⁶¹ Still, Norway’s goal is to rehabilitate offenders the best it can so the person does not reoffend.¹⁶²

3. *Goals and Public Acceptance*

One reason sentencing reform has recently gained bipartisan support is because politicians love to talk about balancing a budget funded by the taxpayer’s dime.¹⁶³ Politicians often fail to fulfill their campaign promises

158. Slater, *supra* note 7 (“Fred Patrick, director of the Center on Sentencing and Corrections at the Vera Institute of Justice, cites the Nation’s staggering recidivism rate—77 percent of inmates released from state prisons are rearrested within five years.”); *see also* McLeod, *supra* note 2, at 1159.

159. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 47 (2011).

160. McLeod, *supra* note 2, at 1168.

161. *World Prison Brief*, INSTITUTE FOR CRIM. POL’Y RES., <http://www.prisonstudies.org/country/norway> [<https://perma.cc/WM8R-D66A>].

162. Lieberman & Morales, *supra* note 32.

163. Childress, *supra* note 40 (“[B]ecause these reforms have been motivated primarily out of concern about tax dollars rather than out of genuine concern about the communities that have been decimated by mass incarceration, people who have been targeted in this drug war and their families, the reforms don’t go nearly far enough.”).

because so much money goes to incarceration.¹⁶⁴ For politicians wanting to portray a tough-on-crime façade, they can try to save face by using budgetary explanations as a basis for sentencing reform.¹⁶⁵

Accounting for every state and federal prison and jail, “the total U.S. budget for incarceration rises to a staggering \$81 billion, enough to fund transformative initiatives like universal preschool for every three- and four-year-old in America.”¹⁶⁶ The amount of money spent annually on incarceration is astronomical. For example, if the incarceration budget went towards education, the government could “eliminate tuition at every single one of our public colleges and universities.”¹⁶⁷ Nearly a third of the Department of Justice’s budget is spent on housing prisoners at the federal level.¹⁶⁸ Responding to these rising costs, some states instituted reforms to cut incarceration rates, including historically punitive states, such as Georgia, South Carolina, and Texas.¹⁶⁹

IV. RECOMMENDATIONS TO SOLVE MASS INCARCERATION

Pure abolitionists do not merely aim to replace jail with probation.¹⁷⁰ The overall goal is to have a criminal justice system that focuses on crime prevention to make it less likely people will break the law in the first place. If the criminal justice system attempted to reduce the number of criminals, the demand for prison would also decrease.¹⁷¹ The system should strive to decrease the need for prison through rehabilitation and reintegration, restoring felons’ civil rights more quickly, decriminalizing drug crimes,

164. *Id.*

165. *Id.*

166. See EQUAL JUST. INITIATIVE, *supra* note 20 (stating the U.S. spends \$182 billion on incarceration); PRISON POL’Y INITIATIVE, *supra* note 20 (affirming the same figure).

167. Takei, *supra* note 39, at 129 (quoting President Barack Obama, Remarks at the NAACP Conference, The White House Briefing Room (July 14, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/H6X4-UDS6>]).

168. See Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18863, (April 30, 2018).

169. PEW CHARITABLE TRUSTS, STATE REFORMS REVERSE DECADES OF INCARCERATION GROWTH 5–6 (2017), https://www.pewtrusts.org/-/media/assets/2017/03/state_reforms_reverse_decades_of_incarceration_growth.pdf [<https://perma.cc/RA8X-ZCJB>].

170. McLeod, *supra* note 2, at 1164 (“In contrast to leading scholarly and policy efforts to reform criminal law, abolition decidedly does not seek merely to replace incarceration with alternatives that are closely related to imprisonment, such as punitive policing, noncustodial criminal supervision, probation, civil institutionalization, and parole.”).

171. *Id.*

eliminating cash bail, eliminating mandatory minimum sentences, drastically changing sentencing guidelines to only apply to the most violent cases, radically changing misdemeanor and gross misdemeanor jail sentences, expanding restorative justice programs, furthering community policing efforts, continuing to green high-crime areas, and restoring broken windows. No stone should be left unturned.

A. *Systemic Changes*

1. *Eliminate Cash Bail*

Too many defendants who cannot afford bail are sitting in county jails awaiting the conclusion of their case.¹⁷² Most will plead guilty to their crimes to get credit for time served and a promise to get out of jail.¹⁷³ Holding defendants while their cases are pending has a profound impact on conviction, incarceration, and recidivism rates.¹⁷⁴ Even those who spend “as little as two to three days in jail after being charged [were] associated with significantly increased chances they would commit new crimes within the next two years compared to similar people who had been released within 24 hours.”¹⁷⁵ States are taking notice of this problem and attempting to change the process of holding defendants.¹⁷⁶

On August 28, 2018, California became the first state to eliminate cash bail completely.¹⁷⁷ The California Money Bail Reform Act will go into effect on October 1, 2019.¹⁷⁸ Instead of requiring monetary bail to secure a

172. Takei, *supra* note 39, at 133 n.41.

173. *Id.* at 133.

174. *Id.* at 133–34 (footnotes omitted) (“The New York City Criminal Justice Agency found that in nonfelony cases, defendants who were released pending disposition had a 50 percent conviction rate, but detained defendants had a 92 percent conviction rate. . . . [D]efendants held during their entire pretrial period were significantly more likely to be sentenced to jail or prison upon conviction, with longer sentences than their non-detained counterparts.”).

175. *Id.* at 134.

176. Takei, *supra* note 39.

177. Alejandro Lazo & Dan Frosch, *California Eliminates Cash Bail, Accelerates a National Trend*, WALL ST. J. (Aug. 28, 2018), <https://www.wsj.com/articles/california-eliminates-cash-bail-accelerating-a-national-trend-1535488669> [<https://perma.cc/YEX6-HTLS>]; Madison Park, *California Eliminates Cash Bail in Sweeping Reform*, CNN (Aug. 28, 2018), <https://www.cnn.com/2018/08/28/us/bail-california-bill/index.html> [<https://perma.cc/VL9D-WMSC>].

178. California Money Bail Reform Act, S.B. 10, 2018 Leg., 2017–18 Reg. Sess. (Cal. 2018); see Thomas Fuller, *California is the First State to Scrap Cash Bail*, N.Y. TIMES, (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html> [<https://perma.cc/2EYR-ZG7K>]; see also Dorothy Weldon, *More Appealing: Reforming*

person's release while their criminal case is pending, a pre-trial assessment will be completed to determine whether there is a high, medium, or low risk that person will appear in court or commit a new crime.¹⁷⁹ Those deemed high risk will not be released. The ACLU in California believes this new law does not do enough to lessen racial inequality,¹⁸⁰ but it is still a step in the right direction towards decarceration.

2. *Eliminate Jail for Misdemeanors*

In Minnesota, misdemeanors have a maximum punishment of up to ninety days in jail and a \$1,000 fine.¹⁸¹ Gross misdemeanors carry a maximum penalty of up to a year in jail and a \$3,000 fine.¹⁸² Misdemeanors include offenses such as a first-time DWI offense, theft of property worth less than \$500, first-time domestic assault with no injuries to the victim, traffic offenses, and possession of marijuana in a motor vehicle.¹⁸³ Gross misdemeanor offenses usually include repeat DWI offenses, theft under \$1,000 but more than \$500, and second-time domestic assault in ten years against the same victim.¹⁸⁴

Many people who commit misdemeanor offenses do not receive a sentence of jail time. Instead, they often receive a stayed jail sentence with probation and an agreement to abide by certain probationary conditions.¹⁸⁵ Many first-time misdemeanor offenders receive alternative sanctions such as community service and educational classes.¹⁸⁶ Gross misdemeanor

Bail Review in State Courts, 118 COLUM. L. REV. 2401, 2434–35 (2018) (discussing the California Money Bail Reform Act).

179. Lazo & Frosch, *supra* note 177 (“When the law goes into effect on Oct. 1, 2019, people accused of crimes in California will no longer be required to put up money in order to ‘make bail’ and be released before trial. Instead, public employees will conduct a risk assessment and then recommend to a judge whether the accused should be kept in jail or be released either on their own recognizance or with conditions such as home detention or GPS trackers. Prosecutors will also be able to request detention.”).

180. *Id.*

181. MINN. STAT. § 609.02 subdiv. 3 (2016).

182. MINN. STAT. § 609.02 subdiv. 4.

183. See MINN. STAT. § 152.027 subdiv. 3 (2018); *Level of Offenses*, MINN. HOUSE RES. DEP’T (June 2007), <https://www.house.leg.state.mn.us/hrd/issinfo/cr-offn.aspx?src=4> [<https://perma.cc/R4VQ-ZPYC>].

184. *Id.*

185. Alexandra Natapoff, *Why Misdemeanors Aren’t So Minor*, SLATE (Apr. 27, 2012), <https://slate.com/news-and-politics/2012/04/misdemeanors-can-have-major-consequences-for-the-people-charged.html> [<https://perma.cc/N4H8-CQ58>].

186. See, e.g., *Misdemeanor Probation*, GALLATIN COUNTY. CT. SERVICES., http://gallatincomt.virtuالتownhall.net/Public_Documents/gallatincomt_courtservices/MisdProb [<https://perma.cc/Q83Y-8KCN>].

offenders are more likely to serve jail time than misdemeanor offenders, but many still result in alternatives to jail, such as house arrest and community service.¹⁸⁷

During an interview, a Hennepin County judge with a favorable view towards decarceration, stated eliminating jail sentences for misdemeanors and gross misdemeanors would be a bad idea.¹⁸⁸ He said:

People committing misdemeanors and gross misdemeanors should be punished, and that punishment often should be incarceration. But sending those people to prison would remove them from any stability in their community, making it very hard to re-enter. The local jails allow a couple of really important functions: (1) the ability to stay in touch with those close to them; and (2) the ability through Huber work release and other furloughs to be employed and engage in resources in the community. What would be good is if the local jails had more effective programming for their inmates.¹⁸⁹

The problem with jail sentences for more minor offenses is that it still supports “prison-backed policing.”¹⁹⁰ A pure abolitionist framework, on the other hand, strives to eliminate the need for jails. A person’s chance of recidivism increases with even a limited exposure to incarceration.¹⁹¹ Furthermore, the vast majority of misdemeanor and gross misdemeanor offenses result in probation—which is often a delay of incarceration.¹⁹² If an offender fails to abide by their probationary conditions—often at the discretion of a probation agent—it can eventually result in jail time.¹⁹³

187. JIM CLEARY, JAIL TIME FOR DWI OFFENDERS IN MINNESOTA: A BRIEF SURVEY OF PRACTICES 6 (2000), <https://www.house.leg.state.mn.us/hrd/pubs/jailtime.pdf> [<https://perma.cc/SR9C-CW54>].

188. Interview with Judge Jay Quam, *supra* note 49.

189. *Id.*

190. See McLeod, *supra* note 2, at 1159.

191. Takei, *supra* note 39, at 134 (“[S]pending as little as two to three days in jail after being charged was associated with significantly increased chances they would commit new crimes within the next two years compared to similar people who had been released within 24 hours.”).

192. *Id.* at 130 (“Because violations of terms of supervision often return people to prison and jail, the growth in probation and parole supervision helped further feed the incarceration boom.”); see also COLUMBIA UNIV. JUSTICE LAB, LESS IS MORE IN NEW YORK: AN EXAMINATION OF THE IMPACT OF STATE PAROLE VIOLATIONS ON PRISON AND JAIL POPULATIONS (2018), http://justicelab.iserp.columbia.edu/img/Less_is_More_in_New_York_Report_FIN_AL.pdf [<https://perma.cc/Y66A-7DYA>].

193. *Id.*

3. *Eliminate Sentencing Guidelines and Mandatory Minimums*

While the purist prison abolitionist point of view may want sentencing guidelines eliminated entirely, and we should strive for that goal, “the dangerous few” may still require some structure for sentencing.¹⁹⁴ Regardless, sentencing guidelines are unreliable and do not equally apply to everyone.¹⁹⁵ First, sentencing guidelines are terribly restrictive. Second, in Minnesota, “[a]s use of the Guidelines evolved, it became apparent that their sentencing numbers were not really based on anything.”¹⁹⁶ This defeats the purpose of guidelines, because the guidelines are supposed to be fair and justly applied. But “[w]hat is the true ‘just desert’ of someone who possesses half an ounce of cocaine? Should it be probation? Twelve months in prison? Eighty-six months—as it is now—in the post ‘War on Drugs’ era?”¹⁹⁷

One judge interviewed for this Article stated the following:

[Sentencing guidelines] can take away the luck of the draw involved in your particular judge’s sentencing approach. It hurts the justice system when there are wildly different sentences for individuals with the same background and engaging in the same conduct.¹⁹⁸ On the other hand, they take away a judge’s ability to exercise the judgment necessary to recognize circumstances that make it inappropriate to send someone to prison.¹⁹⁹

Like sentencing guidelines, mandatory minimum sentences need to be eliminated. The role of mandatory minimum sentences in the mass incarceration boom is widely known.²⁰⁰ Even when a judge wants to give a

194. McLeod, *supra* note 2, at 1168.

195. *Id.*; see Stuart & Sykora, *supra* note 129, at 428–29.

196. *Id.* at 429.

197. *Id.*

198. See Carol A. Brook, *Racial Disparity Under the Federal Sentencing Guidelines*, 35 LITIG. 15 (2008) (noting that harm occurs to justice system because “there can be no doubt that the sentencing guidelines have contributed to racial disparity in sentencing”); see also CASSIA SPOHN, *HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT* 127–29 (2d ed. 2009) (offering hypotheticals and questioning the fairness of the sentencing process when defendants have committed the same or similar crime).

199. Interview with Judge Jay Quam, *supra* note 49.

200. Matthew C. Lamb, Note, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 127–28 (2015) (“After the proliferation of these [sentencing] policies, most notably mandatory minimum sentences, the prison population skyrocketed. The total prison population increased by approximately 116%, and the population of incarcerated drug offenders increased by approximately 532%.”); see also *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [https://perma.cc/3C3M-G82Q].

sentence they believe is fair, mandatory minimums prevent the judge's discretion. Judges are supposed to serve as an independent administer of justice. But when a judge cannot do anything but pronounce a mandatory minimum sentence, they are unable to execute their independent role. As one judge noted, "[T]oo many mandatory sentences are a product of political expediency. My perspective is that too many of our lawmakers vote for long mandatory sentences, so they are seen as tough on crime without any real thought to whether they truly are in the public's best interest."²⁰¹ The judge then shared a story about just how cruel sentencing guidelines and mandatory minimums can be:

I had a woman before me for a drug sentence. She got involved in drugs and the criminal world through her abusive boyfriend. Thanks to him, she picked up a huge addiction and some serious legal trouble. Following the charge in my case, the woman bonded out. She turned her life around—dumped the boyfriend, got sober, got a job, got her kids back, became a mentor for young, drug-addicted women, found God, and became everything you would want her to be. Her probation officer came in on the day of her sentencing crying because it was such a waste to have to send the woman to prison for a really long time. But I had to because the callous and cruel guidelines gave me absolutely no discretion.²⁰²

Giving judges absolutely no discretion to hand down a just and fair sentence is counterproductive to a prison abolitionist framework, which is a sad result of "prison-backed policing."²⁰³

A prosecutor interviewed for this article noted the problem when those with high criminal history scores commit a low-level offense, they end up falling into a presumptive commit to prison based on their record. She does not see justice "when defendants with high criminal history scores are charged with Third Degree Burglary for stealing twenty dollars of merchandise from a store after previously being trespassed. I don't necessarily see the justice in sending someone to prison for that kind of offense simply because the guidelines call for it."²⁰⁴

201. Interview with Judge Jay Quam, *supra* note 49.

202. *Id.*

203. McLeod, *supra* note 2, at 1159.

204. Interview with anonymous Assistant County Attorney in Minnesota, *supra* note 89.

B. Cultural Changes

1. Crime Prevention and Societal Changes

“Nobel Prize-winning economist James Heckman has found . . . spending on early childhood education for disadvantaged children produces much higher returns than criminal law enforcement expenditures.”²⁰⁵ To establish policy that favors the expenditure of more governmental dollars on education and less on incarceration, many changes need to be made. First, politicians must be willing to go against the grain of the tough-on-crime rhetoric and aspire to sensible policies focusing on crime prevention, abolitionist goals, and significant decarceration.²⁰⁶

Research proves an overwhelming number of defendants are involved in crime because of mental health problems, alcohol, or drug use.²⁰⁷ It is crucial to recognize that providing adequate treatment and services to those with mental health and chemical dependency struggles is at the core of our ability to move the criminal justice system away from mass incarceration.

Miami-Dade County, Florida, took a preventative approach to the intersection of mental health and the criminal justice system.²⁰⁸ The county reported that “ninety-seven people with serious mental illness accounted for \$13.7 million in services between 2010 and 2014.”²⁰⁹ Realizing that officers were frequently coming into contact with this section of the community, “the county provided key mental health de-escalation training to their police officers and 911 dispatchers.”²¹⁰ From 2012 to 2016, officers “responded to

205. McLeod, *supra* note 2, at 1205.

206. For example, previous Attorney General Eric Holder had introduced a Smart on Crime Initiative that used alternatives to incarceration for low-level, nonviolent drug crimes. THE DEP'T OF JUSTICE. THE ATTORNEY GENERAL'S "SMART ON CRIME" INITIATIVE 2014), <https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-smart-on-crime-fact-sheet.pdf> [<https://perma.cc/9W55-MDQZ>]. Likewise, criminal justice reform has also been supported by Hakeem Jeffries and Doug Collins who proposed a bill on criminal justice reform that was signed into law on December 21, 2018. Press Release, United States Congressman Hakeem Jeffries for the Eighth District of New York, Collins-Jeffries Historic Criminal Justice Reform Bill Signed into Law (Dec 21, 2018), <https://jeffries.house.gov/media-center/press-releases/collins-jeffries-historic-criminal-justice-reform-bill-signed-into-law> [<https://perma.cc/ADY4-XS7U>].

207. McLeod, *supra* note 2, at 1202 (“Many people who break the criminal laws do so in a condition of severe mental illness, alcohol or drug addiction, or in a state of rage.”).

208. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 824 (2017); see also C. Joseph Boatwright II, *Solving the Problem of Criminalizing the Mentally Ill: The Miami Model*, 56 AM. CRIM. L. REV. 135 (2018) (offering further information regarding incarceration of the mentally ill).

209. Obama, *supra* note 208.

210. *Id.*

almost 50,000 calls for service for people suffering from mental health issues but have made only 109 arrests and have directed more than 10,000 people to services or safely stabilized situations without arrest.”²¹¹ The result was a significant reduction in the county’s jail population and a savings of \$12 million per year.²¹² This decrease in jail population is a win for abolitionists as Miami-Dade County worked to cure the root of their mass incarceration problems.²¹³

Miami-Dade County’s approach should serve as a model to the country, to those struggling with mental health, as well as to those suffering from addiction. Often, officers come into contact with addicts, leading to that person’s arrest. While the officer is required to arrest the addict if they are in illegal possession of a drug, the arrests often do not provide adequate resources to help the addict move forward toward a healthier life.²¹⁴ To diffuse the high arrest rates, we can decriminalize drug offenses and allow officers to respond to these situations in a solution-oriented way, instead of automatically putting addicts behind bars.

2. *Broken Windows and Greening*

In 1982, the “broken windows” theory of crime, the idea that “minor forms of disorder in a community weaken informal social controls and lead to more serious crime,”²¹⁵ gained steam as part of the community policing movement.²¹⁶ By attempting to repair the “broken windows” in a community, such as lessening offenses like “prostitution, drug use, panhandling, loitering youths, and street vending,” community deterioration and criminal activity may also decrease.²¹⁷ Similarly, according to a study by the University of Pennsylvania School of Medicine, “greening” projects that beautify urban areas with landscaping and parks can reduce crime and

211. *Id.*

212. *Id.* (stating that “[t]he jail population fell from over 7,000 to just over 4,700,” which allowed the county to close a jail which resulted in \$12 million in savings each year).

213. *See generally id.*

214. *Id.*, *supra* note 208, at 848–49 (finding that “a relatively small number of highly vulnerable individuals cycle repeatedly” through public systems including jails, emergency rooms, and shelters which results in these individuals receiving fragmented care which “leads to poor outcomes and comes at a great cost to taxpayers”).

215. Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C. R.-C.L. L. REV. 359, 366 (2005); *see also* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/RC5N-KQX6>].

216. Lanni, *supra* note 215, at 366.

217. *Id.* at 366–67.

improve residents' perception of safety.²¹⁸ They found that "greening could be associated with reduced gun assaults, vandalism, stress, and increased physical exercise."²¹⁹ While researchers recognized that these efforts would not eliminate *all* violence, they act as a preventative measure that improves an overall feeling of safety and community wellbeing.²²⁰ These crime prevention efforts could aid in decarceration without taking a wrecking ball to prison walls. Based on the findings of these studies, if policymakers took some of the billions currently allocated to incarceration and put it toward proven crime prevention efforts, crime rates as a whole would likely decrease.

3. *Decriminalization of Drug Offenses*

The decriminalization of minor drug offenses is not a new concept.²²¹ Many jurisdictions have already shifted away from criminalizing some minor actions, such as possession of a small amount of marijuana.²²² For these policies to be effective in decreasing incarceration rates, they must be applied across all racial and socioeconomic communities.²²³ New York City has begun issuing summonses for possession of marijuana instead of making arrests.²²⁴ Unfortunately, the city did not enforce the policy fairly and while "arrest rates fell across the city . . . summonses were issued far more frequently in Black and Latino neighborhoods than in white neighborhoods."²²⁵ *Vice* aptly stated, "Weed Is Basically Legal in New York City Now, but Only If You're White."²²⁶ With a criminal justice system

218. McLeod, *supra* note 2, at 1230-31.

219. *Id.* at 1231.

220. *Id.*

221. See Michael Specter, *Getting a Fix*, NEW YORKER (Oct. 17, 2011), <https://www.newyorker.com/magazine/2011/10/17/getting-a-fix> [https://perma.cc/NYV9-7BKB].

222. McLeod, *supra* note 2, at 1226; see, e.g., *States That Have Decriminalized*, NORML, <https://norml.org/aboutmarijuana/item/states-that-have-decriminalized> [https://perma.cc/UKB4-P2FJ].

223. See, e.g., Nicole Lewis, *Oregon Bill Decriminalizes Possession of Heroin, Cocaine, and Other Drugs*, WASH. POST (Jul. 11, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/11/oregon-legislature-passes-bill-decriminalizing-heroin-cocaine-meth-possession-hoping-to-curb-mass-incarceration/?noredirect=on&utm_term=.a80576f79992 [https://perma.cc/ZBA9-6DE5] (recognizing that an Oregon bill on decriminalizing drug possession needs to make an active effort to apply it equally amongst varying races and socioeconomic classes).

224. Takei, *supra* note 39, at 173.

225. *Id.*

226. Theodore Hamm & Alex S. Vitale, *Weed is Basically Legal in New York City Now, but Only If You're White*, VICE (Oct. 23, 2015, 2:45 PM),

deeply rooted in racism, any efforts to decrease incarceration rates must strive to reduce racial disparities within the system.²²⁷ Otherwise, there is a risk of making racial disparities worse.²²⁸ For example, Minnesota has some of “the lowest incarceration rates in the country, but has some of the greatest racial disparities in incarceration.”²²⁹

Many states have decriminalized marijuana, and more are likely to do so in the foreseeable future.²³⁰ But to move forward with decarceration and the road to prison abolition, states should strive to amend laws criminalizing other illegal narcotics.²³¹ The knee-jerk reaction to this concept is similar to those concerns of murderers and rapists being released—that addicts will be high on drugs with no consequences. Criminalizing drugs does not decrease the number of addicts but focuses on incarcerating them instead of getting them the help they need through rehabilitation.²³²

In 2001, Portugal “became the first European country to abolish criminal sanctions for personal possession of narcotics, including heroin, cocaine, and methamphetamine.”²³³ As a result, “the number of HIV infections transmitted by sharing needles decreased and the percentage of adolescents using narcotics declined, while the numbers of people pursuing addiction treatment increased substantially.”²³⁴ Therefore, the government

https://www.vice.com/en_us/article/5gjke8/weed-is-basically-legal-in-new-york-city-now-but-only-if-youre-white-1023 [https://perma.cc/NTQ5-PRLN].

227. Takei, *supra* note 39, at 173 (describing the “racialized caste system” that communities of color are continually subjected to).

228. *Id.* (recognizing the societal harm that these racial disparities cause that keep black people from being able to fully participate in civic life).

229. *Id.*

230. McLeod, *supra* note 2, at 1226; *see, e.g., States that Have Decriminalized*, *supra* note 222.

231. *See, e.g.,* McLeod, *supra* note 2, at 1226 (noting that in 2001 Portugal abolished criminal sanctions for personal possession of a variety of narcotics, and those in possession would instead be referred to a treatment facility without imprisonment); Nicole Lewis, *Oregon Bill Decriminalizes Possession of Heroin, Cocaine, and Other Drugs*, WASH. POST (Jul. 11, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/11/oregon-legislature-passes-bill-decriminalizing-heroin-cocaine-meth-possession-hoping-to-curb-mass-incarceration/?noredirect=on&utm_term=.a80576f79992 [https://perma.cc/ZBA9-6DE5] (recognizing Oregon’s bill to curb mass incarceration through the decriminalization of narcotics).

232. *See* David Schultz, *Rethinking Drug Criminalization Policies*, 25 TEX. TECH L. REV. 151, 165 (1993) (recognizing that the fear of arrest and public disapproval often keep addicts from obtaining the help they need, and the current structure of criminalization deters money that could be utilized for treatment toward punitive measures that do not address the true harm).

233. *Id.*

234. *Id.*

should combine Portugal's model of decriminalization and Miami-Dade County's model of providing support for the mental-health crisis to decrease crime as a whole and thus, decrease incarceration rates.

C. *Restorative and Rehabilitative Justice*

1. *Background*

One alternative to decrease crime while still holding offenders responsible for wrongdoing is to use the restorative justice model, instead of imprisoning non-dangerous offenders.²³⁵ Restorative justice embraces the values of “shared power, voluntary participation, and equal voice” in creating a dialogue about criminal conduct and consequences.²³⁶ This dialogue often includes face-to-face meetings among offenders, victims, and community members to discuss strategies to move forward.²³⁷ The conversation that takes place should be a space for “honest exchanges about difficult issues and painful experiences” that may be used to resolve conflict but also may be used “for celebration, support, and community building.”²³⁸

Critics of restorative justice say that its benefits only attach to those who are less likely to re-offend in the first place.²³⁹ A tough-on-crime focus, however, is what has led to “excessive use of incarceration.”²⁴⁰ While “prison-backed policing” has been proven ineffective, it seems to be ingrained in the minds of prosecutors.²⁴¹ Prosecutors are not required to follow a victim's requests and often may pile on charges to secure a plea deal.²⁴² Prosecuting with this mindset does nothing to restore the victim, offender, or community.²⁴³

Besides changing how prosecutors approach cases in the courts, restorative justice can have profound effects on rehabilitation and reintegration into society for an offender. In Norway and the Netherlands, for example, restorative justice models have shown a decrease in negative

235. Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternative Paradigm for Justice*, 20 CUNY L. REV. 323, 332-33 (2017).

236. *Id.* at 327.

237. *Id.*

238. *Id.*

239. William Wood & Masahiro Suzuki, *Four Challenges in the Future of Restorative Justice*, 11 VICTIMS & OFFENDERS 149, 166 (2016).

240. ARLÈNE GAUDREAU, ASSOCIATION QUÉBÉCOISE PLAIDOYER-VICTIMS, *THE LIMITS OF RESTORATIVE JUSTICE 2* (2005).

241. Davis, *supra* note 55, at 1070-71; *see also* McLeod, *supra* note 2, at 1159.

242. *See id.* at 1072, 1075.

243. Agnihotri & Veach, *supra* note 235, at 331-32.

effects of incarceration and have created safer communities.²⁴⁴ The model used in these countries focus on education and other life skills, which can “better prepare inmates for life after prison and future social integration.”²⁴⁵ Similar to this concept, a critical aspect of the prison abolitionist framework is to treat offenders in a humane way before and after disposition.²⁴⁶

2. *Rehabilitation and Reintegration*

To quickly move towards prison abolition, states should focus on offender rehabilitation right when the offender is convicted. For example, in an effort to decrease recidivism, North Dakota modeled Norway and focused on reintegrating offenders into society.²⁴⁷ North Dakota looked at “multiple studies suggest[ing] that inmates who have regular visitors are less likely to reoffend later.”²⁴⁸ Leann Bertsch, the Director of the North Dakota Department of Corrections and Rehabilitation, often has prisoners work in oil fields, with the idea that the prisoners need to have skills to work in life after prison.²⁴⁹

Treating prisoners like human beings while incarcerated and keeping their lives as normal as possible can help them reintegrate back into society, and likely give them a better chance at not reoffending. For example, solitary confinement in prison has become as ingrained in our criminal justice system as mandatory minimums and harsh sentencing guidelines. Solitary confinement has become a routine and acceptable form of punishment. However, solitary confinement is profoundly inhumane and scars people in a comparable manner as physical torture.²⁵⁰ These effects are counterproductive to helping prisoners maintain normal lives and preparing them for reintegration.

Changing the environment in prison and remodeling its physical structures would take a significant amount of time and be a drastic shift from prisons’ strict regimes.²⁵¹ The change may be a good thing as the current model is not effective and does not value human rights.²⁵² Bertsch wishes the

244. DUNN, *supra* note 16.

245. *Id.*

246. McLeod, *supra* note 2, at 1161.

247. Slater, *supra* note 7.

248. *Id.*

249. *Id.*

250. McLeod, *supra* note 2, at 1178; *see also* Obama, *supra* note 208 at 830 (“Studies suggest [solitary confinement] can have profound negative consequences, exacerbating mental illness and undermining the goals of rehabilitation.”).

251. Bagaric et al., *supra* note 42, at 1709.

252. *Id.* at 1723.

legislature would “understand that incarcerating more people is not a good investment” and believes the government should focus on helping offenders move forward.²⁵³

a. Changes to Corrections

For those that already served time, probation or parole can be an easy path back to incarceration.²⁵⁴ On the other hand, for those that did not serve time and instead were placed on probation, the requirements can actually lead to incarceration, as it is easy for an offender to not follow all of their probation conditions. In Wisconsin, for example, offenders sentenced to community supervision had around thirty conditions linked to their probation.²⁵⁵ Similarly, those who must complete “counseling or drug treatment are often more likely to end up having probation or parole revoked than those who are not offered treatment services.”²⁵⁶ It is common for those on probation to come back to court for a violation that does not even include committing a new criminal offense and then be sentenced to prison.²⁵⁷ People are incarcerated because they fail urine tests, miss appointments with parole officers, or stay out past curfew during their probation.²⁵⁸

b. Preserving Civil Rights

True reintegration places an offender back into society with the same civil rights he or she had prior to the offense. Sex offender laws are a prime example of improper reintegration. The laws require an offender to register as a sexual offender, and, as result, undergo perpetual publicly shaming,

253. Slater, *supra* note 7.

254. Takei, *supra* note 39, at 139 (“[O]ne study recently concluded that patterns of probation and incarceration after the mid-1980s are ‘consistent with the idea of probation as a net-widener that played a role in the build-up of mass incarceration, with both populations expanding throughout the build-up.’”).

255. *Id.* at 138.

256. *Id.* at 138–39.

257. *Drug Users on Probation Can be Forced to Stay Sober or Risk Jail, Court Says*, CBS NEWS (July 16, 2018, 1:28 PM), <https://www.cbsnews.com/news/drug-users-can-be-jailed-for-relapsing-probation-court-rules-today-2018-07-16/> [<https://perma.cc/8DUU-M7YD>]. See generally *Serial: You’ve Got Some Gauls*, CHI. PUB. RADIO (Sept. 20, 2018), <https://serialpodcast.org/season-three/2/youve-got-some-gauls> [<https://perma.cc/X36Z-92WS>].

258. See generally Eli Hager, *At Least 61,000 Nationwide Are in Prison for Minor Parole Violations*, MARSHALL PROJECT (Apr. 23, 2017), <https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations> [<https://perma.cc/KT3J-FZUP>].

making them less likely to succeed in society once released from prison.²⁵⁹ Minneapolis criminal defense attorney Kelly Keegan highlights the unfairness of sex offender registration by stating “every third degree criminal sexual conduct case where the defendant is 18 or 19 and having sex with a 15 year old. I think the punishment should still be there, but is **WAY** too harsh to brand these kids sex offenders for the rest of their lives.”²⁶⁰ Sex offender registration requirements can make it nearly impossible for offenders to find a place to live, have a support system, and keep a job.²⁶¹ Consequently, these registration requirements actually increase the likelihood of reoffending.²⁶²

Regardless of the offense, having a criminal record of any kind can prevent people from gaining employment.²⁶³ In 2015, Minnesota addressed this problem by expanding its expungement laws to allow more people the possibility of getting their criminal records cleared.²⁶⁴ Widely acclaimed as a “second chance law,” the new expungement framework gives offenders better opportunities to secure jobs.²⁶⁵ In addition to misdemeanor and gross misdemeanor offenses, Minnesota’s law allows for statutory expungement of fifty different felonies.²⁶⁶ Still, there are hurdles associated with the new law, such as significant waiting periods for the expungement of more serious crimes.²⁶⁷ Nonetheless, the new law is an important starting point in true reintegration for offenders, giving them a better chance to lead productive lives and avoid additional offenses.

259. Justin P. Rose, *Where Sex Offender Registration Laws Miss the Point: Why a Return to an Individualized Approach and a Restoration of Judicial Discretion in Sentencing Will Better Serve the Governmental Goals of Registration and Protect Individual Liberties from Unnecessary Encroachments*, 38 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 1, 34 (2017).

260. Interview with Attorney Kelly Keegan, Sept. 18, 2018, on file with author.

261. Rose, *supra* note 259 at 35 (“With increasingly fewer options, registrants are forced to live in isolation, unable to make the social and emotional connections necessary to live and rehabilitate post-confinement.”).

262. Jefferson C. Knighton et. al, *How Likely is “Likely to Reoffend” in Sex Offender Civil Commitment Trials?*, 38 L. & HUM. BEHAV. 239, 300 (2014).

263. Sharyn Jackson, *New Minnesota Law Makes It Easier to Expunge Criminal Records*, STAR TRIB. (Jan. 30, 2015), <http://www.startribune.com/new-minnesota-law-makes-it-easier-to-expunge-criminal-records/289846451/> [<https://perma.cc/PD8V-CVA6>].

264. *Id.*

265. Jackson, *supra* note 263.

266. See MINN. STAT. § 609A.02 subd. 3(b) (2018).

267. See *State v. S.A.M.*, 891 N.W.2d 602, 608 (Minn. 2017) (holding that a felony conviction deemed a misdemeanor after successfully completing a stay of imposition is not eligible for statutory expungement).

V. CONCLUSION

To truly reverse the mass incarceration problem in the United States, prison abolition is the best strategy. The recent sentencing reform efforts are well intended but will not necessarily significantly decrease the United States' incarceration rates.²⁶⁸ Even more important than the rates of incarceration are the laws preventing offenders from being treated in a humane way.²⁶⁹ Further, the current "prison-backed policing" system is broken, as it primarily focuses on retribution and punishment.²⁷⁰ To reverse the course of our country's incarceration history, the United States must reevaluate its priorities and strive to live in a just world.²⁷¹ Prison abolition does not mean tearing down all prison walls immediately; it means preventing crime in the first place, making prisons and local jails unnecessary.²⁷² To meet this goal, adopting practices to decrease incarceration—such as rehabilitation, reintegration, education, and decriminalization—will be more effective than a retributive justice system.²⁷³ The blueprint is there; we just have to follow it.

He believed that there were two kinds of laws in this world, those that are made by a higher power, and those that are made by man. And it's not until those that are made by man are consistent with the laws that are made by the higher power that we will live in a just world.²⁷⁴

268. *See generally supra* Part II.

269. *See generally supra* Part II.

270. *See generally supra* Part I.

271. *See generally supra* Part III.

272. *See generally supra* Part III.

273. *See generally supra* Part III.

274. Simon Sinek, *How Great Leaders Inspire Action—the Golden Circle*, TED (Sept. 2010), <https://life.engineering/how-great-leaders-inspire-action-the-golden-circle/> [<https://perma.cc/8DQE-6YSX>].

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