

A Prosecutorial Duty to Seek Non-Custodial Sentencing

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INTRODUCTION

Mass incarceration, which caused the sharp increase in the American prison population over the last five decades, explains why America today comprises five percent of the world's population but houses twenty-five percent of the world's prisoners.¹ This widespread issue has led to many others, including prison overcrowding. American prisons are dramatically overcrowded, with 2,068,000 prisoners as of 2019.² Of those in federal prison, 42.1% are racial minorities.³ Of the fifty states and the District of Columbia, twelve of them have a prison population that is more than fifty percent Black, even though only 13.4% of the United States population is Black.⁴ Although many incarcerated people are in jail awaiting trial, the majority are incarcerated because they were sentenced there. Therefore, sentencing reform must be part of the solution.

The current ABA Criminal Justice Standards for the Prosecution Function (“the Standards”) declare the primary duty of the prosecutor to “seek justice within the bounds of the law, not merely to convict.”⁵ These Standards also give prosecutors full discretion in “filing, declining, maintaining, and dismissing criminal charges,” and provide sixteen factors the prosecutor *may* consider in their

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1. James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/B4BK-R9E4>]; *Criminal Justice Reform*, EQUAL JUST. INITIATIVE, <https://eji.org/criminal-justice-reform/> [<https://perma.cc/VP2H-C5DF>].

2. *United States of America*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-states-america> [<https://perma.cc/J98K-R4DE>] (last visited Jan. 9, 2022).

3. The races listed are Black, Asian, and Native American. *Inmate Race*, BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [<https://perma.cc/C8FX-FGR4>] (last visited Nov. 6, 2021).

4. The twelve states are Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia. *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT’G PROJECT 5 (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/D677-KBSS>]; 2021 CENSUS, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RH1225219#RH1225219> [<https://perma.cc/D3Y6-UXMS>] (last visited Feb. 2022).

5. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.2 (Am. Bar Ass’n 4th ed. 2017) (hereinafter STANDARDS).

decision and three that they should not consider.⁶ To clarify application of these guidelines to actual criminal cases, the Standards recommend that prosecutors' offices "establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted."⁷ Judges, in their turn, take prosecutors' recommendations into consideration when determining sentences.⁸ This Note will argue that prosecutors should have a duty to recommend non-custodial sentencing whenever feasible, and to otherwise pursue the lowest prison sentence available, because of 1) current overcrowding in prisons, 2) the impact of current COVID-19 protocols, and 3) the societal impact of incarceration.

Part I of this Note describes the issue of overcrowding in prisons and analyzes the driving forces behind this problem. Part II traces the impact of COVID-19 conditions and protocols on the courts and the prisons. It also recounts lessons that can be learned and possible steps moving forward. Part III explores the societal impact of incarceration, specifically with regard to sentencing disparities and the social effects of custodial sentences. Finally, Part IV discusses potential steps forward and puts forth the argument for adoption of the prosecutorial duty described above.

I. OVERCROWDING IN PRISONS

The official capacity of U.S. prisons is approximately 2.1 million people, while the total prison population is 2,068,800.⁹ While this does not as a whole result in a prison population over 100%, the population is not evenly distributed.¹⁰ Local jails in 2019 were 80.9% full, while state prisons operated at approximately 103.4% capacity and federal prisons at 130% capacity.¹¹ Overcrowding in prisons causes a multitude of problems for prisoners and authorities alike. Overcrowded prisons often do not meet the minimum space requirements according to international standards.¹² These standards were set to create minimally humane conditions for prisoners; to make imprisonment no more cruel than necessary to have its intended impact.¹³ Three of the primary causes of overcrowding are mandatory

6. *Id.* Standard 3-4.4.

7. *Id.* Standard 3-4.2.

8. *Plea Bargaining*, U.S. DEP'T OF JUST.: OFFS. OF THE U.S. ATT'YS, <https://www.justice.gov/usao/justice-101/pleabargaining> [<https://perma.cc/XL3M-Z9LL>] (last visited Jan. 9, 2022).

9. The exact number is 2,163,235. WORLD PRISON BRIEF, *supra* note 2.

10. The math here works out to 95.63%.

11. WORLD PRISON BRIEF, *supra* note 2.

12. *Overcrowding*, PENAL REFORM INT'L, <https://www.penalreform.org/issues/prison-conditions/key-facts/overcrowding/> [<https://perma.cc/54F2-8J6M>] (last visited Jan. 9, 2022).

13. This according to Jeremy Bentham on the proportionality of criminal punishment, declaring that "[t]he punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given." The rules he gives bend primarily toward utilitarian goals. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 86-88 (John Bowring ed., 1843).

sentencing requirements, the War on Drugs, and pre-trial or non-conviction incarceration.¹⁴

A. MANDATORY SENTENCING REQUIREMENTS

There are two main forms of mandatory sentencing requirements: mandatory minimums and habitual offender, or three-strikes, laws.¹⁵ Mandatory minimums exist in some form in all fifty states and the District of Columbia, and offenses with them attached account for more than half of federal cases.¹⁶ Three-strikes laws exist both federally and in more than half of the states.¹⁷ They vary from state to state but overall mandate a sentence of life without parole (LWOP) for habitual offenders on their third crime—even if all three crimes were, for example, \$500 thefts.¹⁸

These sentencing formulas drastically increase the prison population without showing much of an impact on their intended targets, because “incarceration is inherently criminogenic.”¹⁹ If the goal of a statute is to deter crime, then these are failing to meet that goal. Mandatory minimums fail to “promote community safety” and may tend to exacerbate the situation.²⁰ Three-strikes laws are intended to deter violent crime, but most violent crimes are committed on impulse and therefore offenders have no chance to weigh the possible consequences of their actions.²¹ Furthermore, most mandatory minimum and three-strike offenses are actually drug offenses or petty crimes.²² Both mandatory minimums and three-strikes laws are problematic for overcrowding *and* for society as a whole because they punish far beyond the severity of the crime.²³ As one judge puts it, they are “sledgehammers rather than scalpels.”²⁴ Justice cannot be one size fits all. Even *three* instances of petty theft, most people would argue, are not worth taking away someone’s freedom for the rest of their life.²⁵

14. See *Overcrowding and Overuse of Imprisonment in the United States*, ACLU 2 (May 2015); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/4NSD-4BXL>].

15. *Overcrowding*, *supra* note 14.

16. Alison Siegler, *End Mandatory Minimums*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums> [<https://perma.cc/S3GH-XRU8>].

17. *Mandatory Minimums*, EQUAL JUST. UNDER LAW, <https://equaljusticeunderlaw.org/mandatory-minimums-1> [<https://perma.cc/4M9F-VLLE>] (last visited Jan. 9, 2022).

18. James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration> [<https://perma.cc/GGX8-GS6P>].

19. Siegler, *supra* note 16.

20. *Id.*

21. *10 Reasons to Oppose “3 Strikes, You’re Out,”* ACLU, <https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out> [<https://perma.cc/BFG3-5GJ3>] (last visited Jan. 9, 2022).

22. *Overcrowding*, *supra* note 14, at 3.

23. See generally Siegler, *supra* note 16.

24. *Id.*

25. Victims of crime overall prefer rehabilitation to punishment and “holding people accountable through options beyond prison.” *Crime Survivors Speak*, ALL. FOR SAFETY & JUST. 5, <http://allianceforsafetyandjustice>.

Furthermore, the incarceration of nearly 40% of the prison population lacks a public safety justification.²⁶ Even disregarding deterrence, the argument of imprisoning all offenders for public safety fails to hold water here for two reasons. First, most nonviolent offenders did not endanger society. They broke speed limits laws, used drugs, or committed nonviolent theft.²⁷ Many of these people do not endanger the public, and keeping them locked away from the rest of the world does not improve public safety. Second, age is one of the main predictors of violence (with risk inversely proportional to age) and those convicted of any crime are only getting older, not younger.²⁸ Therefore, the risk of violence with any potential recidivism will also only decrease. Mandatory minimums therefore fail to achieve their goals in either form.

B. THE WAR ON DRUGS

Beginning in 1971, the War on Drugs started by President Nixon has extended far beyond its original goals and has had the perhaps unintended, but certainly foreseeable, effect of impacting minority communities dramatically more than others.²⁹ The stated original intent of the War on Drugs was to “fight and defeat” the enemy of drug addiction.³⁰ The “soldiers” in this war, however, appear to have used only one tactic: incarceration.³¹ For many scholars, this effort marked the beginning of mass incarceration, as the new drug laws “were implemented with a stark racial bias, leading to unprecedented levels of mass incarceration for Black and brown men.”³² A Nixon advisor, John Ehrlichman, even stated that there was a racial motivation behind the War on Drugs.³³ More than one million drug possession arrests occur each year, and possession arrests occur six times as often as arrests for drug sales.³⁴ Furthermore, there are 450,000 people incarcerated for nonviolent drug offenses on any given day.³⁵

org/wpcontent/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf [https://perma.cc/JNG8-WPDC] (last visited Jan. 9, 2022).

26. James Austin, Lauren-Brooke Eisen, James Cullen & Jonathan Frank, *How Many Americans Are Unnecessarily Incarcerated?*, BRENNAN CTR. FOR JUST. 7 (2016), https://www.brennancenter.org/sites/default/files/201908/Report_Unnecessarily_Incarcerated_0.pdf [https://perma.cc/JL9Q-8U7S].

27. Sawyer & Wagner, *supra* note 14.

28. Austin et al., *supra* note 26.

29. *After 50 Years Of The War On Drugs, 'What Good Is It Doing For Us?'*, NPR: MORNING ED. (June 17, 2021), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us> [https://perma.cc/BC8N-M2RC] (hereinafter MORNING ED.).

30. *Id.*

31. The only tactics really mentioned are increasingly severe laws, new state and federal bureaucracies, and increased police funding. *See generally id.*

32. *Id.* See also James Cullen, *supra* note 1.

33. John Ehrlichman said in a 1994 interview, “[w]e knew we couldn’t make it illegal to be either against the [Vietnam] War or Black . . . [b]ut by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.” MORNING ED., *supra* note 29.

34. Sawyer & Wagner, *supra* note 14.

35. *Id.*

Public opinion of this fifty-year effort is at least demoralized, if not downright unfavorable.³⁶ After decades of laws and arrests, families (especially Black and brown families) feel no safer.³⁷ The drug war’s financial and human cost far outweighs its societal benefits as it punishes people, mostly minorities, for the illness of addiction.³⁸ The impact of the drug war also reaches far beyond the direct zone of impact on those arrested. The recent shooting of Breonna Taylor occurred during a drug raid in which she was not a suspect; at the trial of Derek Chauvin for the killing of George Floyd, his lawyer attempted to justify his aggressive tactics by pointing to “small amounts of fentanyl” in his victim’s body.³⁹ If the goal of this war is to stop drug addiction, and addiction is an illness and not simply a choice,⁴⁰ then wouldn’t the criminal justice system’s time and money be better spent getting to the root of the problem by rehabilitating drug users instead of imprisoning them, and pursuing only the dealers?

Furthermore, one of the prison system’s objectives is to “facilitate the successful reintegration of inmates into society,” but the system does not purport to help alleviate the mental health problems which “[a]n estimated 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates” struggle with.⁴¹ In many cases, it is responsible for aggravating mental health conditions and even causing them.⁴² A system built to punish, not to tend illness, cannot be expected to cure addiction. It will do only harm to imprison individuals struggling with addiction. They will return to society not better, but worse off than before the prison system compounded their preexisting mental health problems.

C. PRE-TRIAL INCARCERATION

In theory, the Constitution guarantees that no person in the United States shall lose their liberty without the due process of a trial.⁴³ This standard is widely espoused in our schools, in our society, and in our daily lives. From the common phrase “life, liberty, and the pursuit of happiness” to the Fifth Amendment’s

36. MORNING ED., *supra* note 29.

37. *Id.*

38. “Federal spending on drugs—much of it devoted to interdiction—is expected to top \$37 billion [in 2021].” *Id.*

39. *Id.*

40. *What Is a Substance Use Disorder?* AM. PSYCH. ASS’N., <https://www.psychiatry.org/patients-families/addiction/what-is-addiction> [https://perma.cc/UP28-25DH].

41. *Organization, Mission and Functions Manual: Federal Bureau of Prisons*, U.S. DEP’T OF JUST. (Oct. 27, 2021), <https://www.justice.gov/jmd/organization-mission-and-functions-manual-federal-bureau-prisons> [https://perma.cc/4CXE-V5M2]; KiDeuk Kim, Miriam Becker-Cohen & Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, URB. INST. (Mar. 2015), <https://www.urban.org/sites/default/files/publication/48981/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf> [https://perma.cc/FD6S-Q9DY].

42. Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration can cause lasting damage to mental health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> [https://perma.cc/YWJ2-WXKU].

43. U.S. CONST. amend. V, XIV.

assurance that no person shall “be deprived of life, liberty, or property, without due process of law,” this value is woven throughout American law and history.⁴⁴ In practice, this assumption is unmistakably incorrect. Jails and prisons routinely house people who have yet to be convicted of a crime. In 2020 alone, the nationwide total of people detained pre-trial was 555,000.⁴⁵ Of these, 470,000 were in local jails, which housed a total population of 631,000.⁴⁶ This amounts to 74% of the local jail population.⁴⁷ Of those who were incarcerated without a conviction, 82,000 were held for public order offenses, including traffic violations and “drunkenness/morals” charges.⁴⁸

One of the reasons those accused of a crime may be held in pre-trial detention is a failure to pay bail.⁴⁹ In 2020, the median bail for a felony was \$10,000,⁵⁰ which is the equivalent of eight months’ income for the typical person detained for an inability to post bail.⁵¹ The Eighth Amendment assures the American population of a freedom from excessive bail, and yet the current system punishes people who do not have eight months of income, *two-thirds* of their annual income, on hand.⁵² The current ABA prosecutor standards recommend that prosecutors “should consider whether a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure the defendant’s presence at court proceedings” in cases where the defendant is charged but not yet in custody.⁵³ Strengthening this policy and doing as this Note recommends by making this suggestion a duty, could greatly impact the number of people incarcerated and help the American system to truly earn the descriptor “criminal *justice*.”

II. THE IMPACT OF COVID-19 CONDITIONS AND PROTOCOLS

The COVID-19 pandemic that has ravaged the world has not left the United States’ incarcerated population unscathed. The close quarters of both prisons and jails, and the rapid turnover of the latter, have led to a dramatically worse case count in these environments compared to the rest of the country—and overcrowding only exacerbated this effect.⁵⁴ Jails and prisons have had more than 661,000 cases of the virus, with at least 2,990 deaths and an infection rate five times higher

44. U.S. CONST. amend. V.

45. Sawyer & Wagner, *supra* note 14.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. U.S. CONST. amend. VIII.

53. STANDARDS, *supra* note 5, Standard 3-4.2(d).

54. *New Study Finds Crowded Jails Seeded Millions of Covid-19 Cases*, EQUAL JUST. INITIATIVE (Sept. 7, 2021), <https://eji.org/news/new-study-finds-crowded-jails-seeded-millions-of-covid-19-cases/> [https://perma.cc/4LX8-VHVV].

than that of the nation as a whole.⁵⁵ Jurisdictions across the country took varying levels of steps to prevent and manage the spread of the virus. Forty-nine states, the District of Columbia, and the federal prison system have:

[A]dopted policies to reduce their incarcerated populations during the pandemic. Efforts range from police departments issuing summonses instead of making arrests for lower-level offenses to fast-tracking parole hearings to early releases for individuals who are nearing the end of their sentences or who have pre-existing medical conditions.⁵⁶

Furthermore, the governors of at least eleven states have blocked new transfers into prisons and/or allowed early release for some prisoners.⁵⁷ Judges, prosecutors, and public defenders at the county level have also come together to “release low-risk pretrial detainees and inmates serving sentences for nonviolent offenses.”⁵⁸ Home confinement has also grown within the federal prison system, which has shifted hundreds of its prisoners to that option instead of holding them in prison.⁵⁹

Overall, COVID-19 protocols and initiatives demonstrate that there are alternatives to mass incarceration. The very fact that some prisoners could be released early and that some arrests were practically deemed nonessential indicates that many jail and prison sentences are overly long and, in some cases, unnecessary altogether.

A. PROTOCOLS CURRENTLY IN PLACE

State governments and prisons implemented a wide variety of policies to combat the pandemic. The primary protocols fell into two main categories: those regarding detainment and those regarding incarceration.⁶⁰ In the detainment category, the prevailing protocols were issuing summonses or citations instead of arresting offenders, releasing nonviolent pretrial detainees, declining to prosecute certain low-level crimes, and decreasing or altogether eliminating fines, fees, and/or cash bail.⁶¹ Regarding incarceration, the predominant protocols were implementing early releases for groups with certain qualifications, blocking new

55. *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/> [<https://perma.cc/6BQB-QWJJ>].

56. *How criminal justice systems are responding to COVID-19*, CRIME & JUST. INST., <https://www.cjlinstitute.org/corona/> [<https://perma.cc/9XQ4-9KFK>] (last updated Dec. 12, 2022).

57. *Id.*

58. *Id.*

59. *Id.*

60. *See generally id.*

61. *See How criminal justice systems are responding to COVID-19*, *supra* note 56; Nazish Dholakia, Insha Rahman & Aaron Stagoff-Belfort, *Four Ways the Pandemic Made Us Rethink Our Criminal Legal System*, VERA INST. OF JUST.: THINK JUST. BLOG (June 9, 2021), <https://www.vera.org/blog/four-ways-the-pandemic-made-us-rethink-our-criminal-legal-system> [<https://perma.cc/2JGB-SHB7>].

transfers into facilities, fast-tracking parole hearings, and improving facility conditions for those who remained.⁶²

The Crime and Justice Institute report on criminal justice systems' responses to the pandemic details the reactions of forty-nine states, the District of Columbia, and the federal system.⁶³ Of these, the federal system primarily implemented early releases.⁶⁴ The states (and D.C.) primarily used the release of nonviolent pretrial detainees and the early release of nonviolent offenders, those with pre-existing medical conditions or otherwise at-risk, and those nearing the end of their sentences to curb incarceration numbers and implement COVID-19 protocols.⁶⁵ For example, Texas implemented every protocol here described at some point except for fast-tracking parole hearings.⁶⁶ Louisiana implemented at least three protocols, including the early release of both nonviolent offenders and those nearing the end of their sentences.⁶⁷ Massachusetts implemented at least four protocols, including declining to prosecute certain crimes.⁶⁸ Vermont did not implement any of the protocols described here, but did release some inmates in February 2020.⁶⁹ Ohio implemented three protocols, but released all three eligible populations: nonviolent offenders, those with pre-existing medical conditions or otherwise at-risk, and those nearing the end of their sentences.⁷⁰

62. See *How criminal justice systems are responding to COVID-19*, *supra* note 56; Dholakia et al., *supra* note 61.

63. The only state not included in the state-by-state portion of the report is Nebraska. *How criminal justice systems are responding to COVID-19*, *supra* note 56.

64. *Id.*

65. This result was determined by reviewing state-by-state data on protocols and counting the states with instances of each policy. "Nonviolent offenders" indicates inmates who were convicted of nonviolent crimes. *Id.*

66. *Id.* States selected for individual detail here represent a statistically significant incarceration rate or total population in the country. As of 2019, Texas had the highest number of incarcerated individuals (154,000) in the country. *State-by-State Data: State Imprisonment Rate*, SENT'G PROJECT (2019), <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> [<https://perma.cc/9DTB-KZNG>].

67. The other protocols implemented were issuing summonses or citations instead of making arrests and releasing nonviolent pretrial detainees. *How criminal justice systems are responding to COVID-19*, *supra* note 56. Louisiana has the highest incarceration rate (1,094 per 100,000 people) in the country. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/P3W2-F9PQ>].

68. The other protocols Massachusetts implemented were issuing summonses or citations instead of making arrests, releasing nonviolent pretrial detainees, and releasing those who were nearing the end of their sentences early. *How criminal justice systems are responding to COVID-19*, *supra* note 56. Massachusetts has the lowest incarceration rate (275 per 100,000 people) in the country. Widra & Herring, *supra* note 67.

69. *How criminal justice systems are responding to COVID-19*, *supra* note 56. Vermont has the lowest number of incarcerated people (1,137) in the country. *State-by-State Data: State Imprisonment Rate*, *supra* note 66.

70. The other protocols Ohio implemented were issuing summonses or citations instead of making arrests and releasing nonviolent pretrial detainees. *How criminal justice systems are responding to COVID-19*, *supra* note 56. Ohio falls exactly in the middle of the country in terms of incarceration rates. It is tied with Pennsylvania at 659 incarcerated people per 100,000 people, and is included here instead of Pennsylvania simply because none of the other states included were from the Midwest. Widra & Herring, *supra* note 67.

1. COVID-19 PROTOCOLS REGARDING DETAINMENT

a. Issuing Summonses or Citations Instead of Making Arrests for Lower-Level Offenses

The rationale behind this protocol is essentially that by issuing a summons or citation, law enforcement avoids adding people into the very jails that are working to decrease their populations. By electing to take this path with lower-level crimes, states may be able to leave the spaces in their jails for violent or other higher-level crimes. At least eighteen states implemented this protocol during the pandemic.⁷¹

b. Releasing Nonviolent Pre-Trial Detainees

At least twenty-eight states released nonviolent pretrial detainees during the pandemic.⁷² Most states included those accused of nonviolent misdemeanors in the releases and many declared those “charged with domestic violence-related offenses, drunken driving, failure to appear in court, or felony offenses” ineligible.⁷³ Those detained pretrial have *not* been convicted of a crime but remain in jail when they are not either released or able to make bail.⁷⁴ However, these detainees are:

[M]ore likely to plead guilty, be sentenced to jail or prison, and to have future contact with the criminal legal system compared to their counterparts who were released or made bail. Incarceration for even a few days can mean losing one’s job, housing, children, and access to education. . . even a few days in jail is so destabilizing to people’s lives that it makes more likely they will be arrested again in the future.⁷⁵

So, as a result of their inability to post bail, those detained before trial are punished even before they have been found guilty or been sentenced. By releasing those who are not violent, the legal system decreases its negative impact on non-guilty persons and strengthens its claim to being a system of justice.

c. Not Prosecuting Certain Crimes

At least fourteen states declined to prosecute certain crimes as part of their efforts to decrease their incarcerated populations.⁷⁶ Police in some jurisdictions made fewer traffic stops, and other jurisdictions produced lists of crimes that they would pause or entirely stop prosecuting.⁷⁷ Baltimore, for example, stopped

71. See *How criminal justice systems are responding to COVID-19*, *supra* note 56.

72. See *id.*

73. Alabama is an example of this specific policy. *Id.*

74. Dholakia et al., *supra* note 61.

75. *Id.*

76. *How criminal justice systems are responding to COVID-19*, *supra* note 56.

77. Dholakia et al., *supra* note 61.

prosecuting several low-level offenses like possession, prostitution, and trespassing.⁷⁸ Brooklyn “suspended prosecution of nonviolent offenses like driving without a license and shoplifting” and Chicago “stopped prosecuting minor drug possession cases.”⁷⁹ According to the Vera Institute, approximately eighty percent of arrests are for low-level, nonviolent offenses.⁸⁰ A recently released study from Massachusetts’ Suffolk County demonstrates that the impact of declining to prosecute such offenses substantially reduced “the likelihood of future criminal justice involvement. . .with no apparent increase in local crime rates.”⁸¹

d. Amending Bail, Fines, and Fees

When at least sixteen states decreased or eliminated bail, fines, and fees, they not only permitted many people charged with crimes to get out of jail before their trial but also freed a significant number of others from the weight of debts to the court or the state.⁸² Some areas eliminated specific fees, like Baltimore County.⁸³ Others included nonpayment of fines or fees in the list of crimes law enforcement issued summonses or citations for, instead of making arrests.⁸⁴ Still others vacated warrants or eliminated driver’s license suspensions for unpaid fines and fees.⁸⁵ The effect of policies like these can be seen in Dane County, Wisconsin, which eliminated these debts “for people currently and formerly incarcerated” in May 2021 for a total of \$149,828.⁸⁶ Where unpaid fines and fees are a jailable offense, they can press people into a cycle of moving between jail time and time spent trying to pay the fees incurred by the time in jail. By amending these rules to end imprisonment for unpaid fees and therefore stop the accumulation of debt, justice systems can give those stuck in the cycle the support they need to get out.

2. COVID-19 PROTOCOLS REGARDING INCARCERATION

a. Early Releases

During the pandemic, many states implemented early release programs for certain subsets of inmates: nonviolent offenders, those with pre-existing medical

78. *Id.*

79. *Id.*

80. *Id.*

81. Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* (Nat’l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), <https://www.nber.org/papers/w28600> [<https://perma.cc/HDF6-XDZD>].

82. *See How criminal justice systems are responding to COVID-19*, *supra* note 56.

83. Baltimore County eliminated fees for those in home detention, most of whom are awaiting trial regarding a nonviolent offense, because of the financial burdens created for many by the pandemic. *Id.*

84. *How criminal justice systems are responding to COVID-19*, *supra* note 56 (referencing the Apr. 14, 2020 entry for Kentucky).

85. Dholakia et al., *supra* note 61.

86. The county also eliminated several other fines and fees in December 2020 for a total at that time of over one million dollars vacated. *Id.*

conditions or otherwise at risk, and those nearing the end of their sentences.⁸⁷ Such policies had the dual benefit of moving people out of an environment with a high risk of coronavirus exposure while simultaneously decreasing the population density of that environment. The release of nonviolent offenders back into society presented one of the lowest community risks available, and while releasing at-risk populations was mostly necessary for their own health, it also likely presented a relatively low risk to the community because a significant proportion of the at-risk population are those over sixty years old and criminal behavior trends toward a sharp decrease with age.⁸⁸ In releasing inmates nearing the end of their sentences, prisons simply sped up a process already in motion.

States had various methods of releasing their inmates. Some released them on parole or furlough, while some released them to home confinement or on a temporary reprieve. Home confinement in particular may help inmates reenter society more smoothly as they transition from prison to a much less restrictive environment that still is not entirely free. As the pandemic conditions change, some of the released inmates will be required to return to prison to finish out their sentences.⁸⁹

b. Blocking New Transfers

At least six states had policies blocking new transfers into or between their facilities.⁹⁰ By preventing these transfers and maintaining their “bubbles” (as they have come to be known through the pandemic), states hoped to essentially avoid the further spread of the virus between facilities. This protocol was especially relevant because of this virus’ incubation period and the general dearth of knowledge regarding it.⁹¹ A facility could be on the brink of an outbreak without knowing it, so a transfer into or out of that facility could either endanger the transferred person or the entire receiving facility.

87. Twenty-eight states released nonviolent offenders, twenty released those with pre-existing conditions or otherwise at risk, and twenty-three released those nearing the end of their sentence. *See How criminal justice systems are responding to COVID-19*, *supra* note 56. These policies overlap in some ways with compassionate release policies. However, compassionate release (the release of someone facing imminent death and posing no public threat) was not designed for large groups or pandemic conditions and is difficult to achieve regardless. *See generally* Widra & Bertram, *Compassionate release was never designed to release large numbers of people*, PRISON POL’Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/> [<https://perma.cc/K62J-HK67>].

88. The number of arrests by age group tends to peak between eighteen and forty years old; by sixty years old the numbers are twelve percent that of twenty-five to twenty-nine-year-olds. *Uniform Crime Report 2019*, FED. BUREAU OF INVESTIGATION (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-38> [<https://perma.cc/RA5M-AECK>].

89. Dholakia et al., *supra* note 61. *See also How criminal justice systems are responding to COVID-19*, *supra* note 56 (referencing the “Federal” section entry for Feb. 8, 2021).

90. *How criminal justice systems are responding to COVID-19*, *supra* note 56.

91. The incubation period of the SARS-CoV-2 virus is between two and fourteen days. *Studying the disease*, CDC (July 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/science/about-epidemiology/studying-the-disease.html> [<https://perma.cc/5YFE-LL88>].

c. Fast-Tracking Parole Hearings

At least seven states had policies fast-tracking parole hearings, although many others also referred petitions for early release to their parole boards.⁹² Speeding up the process was intended to facilitate the early release of those already eligible for parole, thereby freeing up space for social distancing and quarantine while simultaneously removing parolees from the heightened risks of the prison environment. As long as the process is fully completed, moving eligible inmates through the parole system more quickly can only be a good thing. Inmates eligible for parole are on the path out of prison and await only the decision of the parole board. Delaying the decision, when not out of necessity, does unjustifiable harm to people who have served their sentence as determined by the law.

d. Improving Facility Conditions

It is worth acknowledging that there have been attempts to improve the facilities' conditions for those who must remain inside.⁹³ The CDC published a series of extensive, detailed guidelines on its website and has continued to update them as conditions change.⁹⁴ The site notes that “[t]he guidance may need to be adapted based on individual facilities’ physical space, staffing, population, operations, and other resources and conditions.”⁹⁵ One clear example of a factor requiring such adaptation is the level of security maintained at the facility. The CDC recommends that inmates practice “good hand hygiene” by washing their hands regularly “especially after coughing, sneezing, or blowing your nose; after using the bathroom; before eating; before and after preparing food; before taking medication; and after touching garbage.”⁹⁶ This recommendation, with its ideal of soap, water, and twenty seconds, is solidly based in medical research evidence.⁹⁷ However, that does not mean its implementation is feasible in all settings—particularly those in which the movements and actions of occupants are strictly controlled, like a maximum security prison, where inmates may not have access to a sink with soap and water every time they cough or sneeze.

One of the CDC recommendations with the largest potential impact is social distancing.⁹⁸ This is also likely the hardest to implement. In a country where

92. *How criminal justice systems are responding to COVID-19*, *supra* note 56.

93. *The most significant criminal justice policy changes from the COVID-19 pandemic*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/5NM2-E38A>] (last updated Dec. 23, 2021).

94. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (June 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [<https://perma.cc/SK3B-8QAM>].

95. *Id.*

96. The CDC further recommends this washing be done with soap and water for at least twenty seconds. *Id.*

97. *See Show Me the Science – How to Wash Your Hands*, CDC (Aug. 10, 2021), <https://www.cdc.gov/handwashing/show-me-the-science-handwashing.html> [<https://perma.cc/Z2QJ-MY8U>].

98. *Interim Guidance*, *supra* note 94.

federal prisons are at 130% capacity,⁹⁹ further spreading out the already-overcrowded populations may not be possible and, even if it is possible, it is not *likely*. The social distancing recommendation states an ideal distance of six feet between all individuals.¹⁰⁰ Some specific areas the CDC flags are the common areas, recreation spaces, meal times, group activities, and housing.¹⁰¹ For common areas, the recommendation is to “enforce increased space between individuals in holding cells as well as in lines and waiting areas such as intake.”¹⁰² This seems difficult, if not impossible, in an overcrowded facility. For recreation and meals, the CDC recommends creating space for individuals to spread out, staggering time in the spaces and both cleaning and disinfecting them between groups, and restricting usage of the areas to one housing unit at a time to avoid superfluous contact between populations.¹⁰³ For group activities, the CDC recommends limiting their size, increasing space between individuals, and either suspending closer-contact programs or considering alternatives where they can be outside or spread out.¹⁰⁴ The housing guidance suggests spreading bunks out, arranging them “so that individuals sleep head to foot to increase the distance between their faces,” minimizing the number of people per room, and rearranging schedules to avoid mixing housing areas.¹⁰⁵ This recommendation in particular seems questionable in terms of enforcement, especially since the typical cell is the size of a typical parking space,¹⁰⁶ but many others do as well. To succeed in social distancing, one must rely on a sense of community and social responsibility among the occupants of the relevant space—here, the inmates. Such qualities may exist in many prisons, but their existence is not a given. Therefore, the success of social distancing protocols is questionable at best.

In terms of protocol upon a positive COVID-19 test, the CDC makes several specific recommendations but the most important is that of medical isolation.¹⁰⁷ This isolation is intended to prevent the further spread of the virus among inmates and staff. However, such an environment is commonly used in prisons as a punitive measure (i.e., solitary confinement) and would likely be regarded as such by inmates—especially if the prison must utilize the same facilities for both practices. The CDC therefore recommends that prisons “ensure that medical isolation for COVID-19 is distinct from punitive solitary confinement of incarcerated/

99. WORLD PRISON BRIEF, *supra* note 2.

100. *Interim Guidance*, *supra* note 94.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Furthermore, overcrowding means that prisoners may not even have this much space in their cells, let alone the hallways and common areas. See Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Examining Prisons Today*, VERA INST. OF JUST. (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/examining-prisons-today> [https://perma.cc/V663-VGL5].

107. *Interim Guidance*, *supra* note 94.

detained individuals, both in name and in practice” to avoid generating hesitation in inmates to report symptoms.¹⁰⁸

The second step in this protocol is contact tracing, in which the environment of a prison is dualistic.¹⁰⁹ On the one hand, the controlled nature of the prison is favorable to tracking the individuals that a person may have had contact with over the course of any time period—for example, if inmates are in meal groups, then prison officials will know who could possibly have had contact with the sick individual at that time. On the other hand, the crowded environment and the common divide between prisoners and staff may impair contact tracing efforts.

Finally, the other effects of some of the most impactful recommendations must be considered, especially the likely effect on inmates’ mental health. For example, the guidance notes that “if group activities are discontinued, it will be important to identify alternative forms of activity to support the mental health of incarcerated/detained persons.”¹¹⁰ Many of the simplest changes to implement, like restricting non-essential visitors, discouraging contact visits with inmates if possible, and “consider[ing] suspending or modifying visitation programs, if legally permissible,” all serve to further remove inmates from the outside world.¹¹¹ This distance is both the goal and the consequence of the policies. By removing a significant number of the visitors to the prison, officials are decreasing the chance of outside contamination. However, they are also severing many of the inmates’ few remaining connections to their loved ones and to the outside world. In doing so, prison officials risk imperiling the mental health of their charges.

108. *Id.* To some, it may logically follow that if isolation is the best form of prevention then it would make sense to place as many individuals as possible in as isolated positions as possible. This, however, would be not only difficult (if not impossible) to implement but would have a deeply negative impact on the mental health of the inmates. Solitary confinement as a punishment is widely recognized as having a destructive effect on inmates. See Kayla James & Elena Vanko, *The Impacts of Solitary Confinement*, VERA INST. OF JUST. (Apr. 2021), <https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf> [<https://perma.cc/9H35-ZM8T>]; Tiana Herring, *The research is clear: Solitary confinement causes long-lasting harm*, PRISON POL’Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/ [<https://perma.cc/S667-X59E>]; Sadie Dingfelder, *Psychologist testifies on the risks of solitary confinement*, 43 AM. PSYCH. ASS’N: MONITOR ON PSYCH. 10, 10 (2012), <https://www.apa.org/monitor/2012/10/solitary> [<https://perma.cc/EAV3-S3UY>].

109. *Interim Guidance*, *supra* note 94.

110. *Id.*

111. *Id.* For example, “[i]n-person visitation is incredibly beneficial, reducing recidivism and improving health and behavior.” Leah Wang, *Research roundup: The positive impacts of family contact for incarcerated people and their families*, PRISON POL’Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ [<https://perma.cc/8TR9-Z7DK>]. These conditions can also be compared to solitary confinement, which has a demonstrated negative impact on mental health. Luke Johnson, Kerry Gutridge, Julie Parkes, Anjana Roy & Emma Plugge, *Scoping review of mental health in prisons through the COVID-19 pandemic*, BMJ OPEN, May 2021, at 1, 2, <https://bmjopen.bmj.com/content/11/5/e046547> [<https://perma.cc/Y58B-LL83>]; James & Vanko, *supra* note 108; Herring, *supra* note 108.

B. MOVING FORWARD

As the country moves out of a masked and quarantined world, the question remains: what changes can and should prevail post-pandemic? Applied to the protocols put in place for correctional facilities, the question remains the same but perhaps with more controversy in the relevant spheres of policy and politics. Some will advocate on behalf of the victims of crime: do the crime, do the time; early release and the fast-tracking of parole hearings trivializes the victims' losses. Some will advocate for prisoners' rights: if the procedures are carefully written and implemented, then why should people be denied their constitutional right to liberty?

Jeremy Bentham writes that "punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given."¹¹² Those rules boil down to: 1) the punishment must be of adequate severity to deter its relevant crime, 2) the greater the harm of the offense, the greater expense may be permissible to deter it, 3) once an individual has resolved to commit a crime the punishment should be serious enough that it will "induce [them] to do no more mischief than what is necessary for [their] purpose," and 4) the circumstances surrounding a punishment should always be taken into account.¹¹³ If Bentham's rule of "no. . . more than what is necessary" is rephrased to say that a punishment should do as little harm as possible while still having the desired effect, then many of the pandemic protocols should remain in effect.

If one assumes that the desired effect is maintenance and ideally decline in local crime rates, then Massachusetts' Suffolk County is an example of success in new policy because it saw "no apparent increase in local crime rates" upon deciding to decline prosecuting certain low-level crimes.¹¹⁴ If the desired effect of prosecution was to deter crime, and if stopping prosecution had no impact on the local crime rate, then it follows (given this information) that prosecution was not deterring crime. Similarly, in the Santa Barbara County Jail, 476 individuals were granted early release in the first half of 2020.¹¹⁵ Of those, twelve percent were rearrested, and all crime rates except for larcenies declined or stagnated over that time period.¹¹⁶

In 2021, data from Colorado's four largest counties showed that "the jurisdictions saw their [incarcerated] populations fall between 22% and 52% without significantly impacting public safety during the pandemic."¹¹⁷ In December 2021, the Denver District Attorney "reported that data tracked by her office showed about 20% of people granted early release or lower bail during the pandemic

112. BENTHAM, *supra* note 13.

113. *Id.*

114. Agan et al., *supra* note 81.

115. *How criminal justice systems are responding to COVID-19*, *supra* note 56.

116. *Id.*

117. *Id.*

were charged with a new offense, compared to 11% of people who did not receive any pandemic-related concessions.”¹¹⁸ This gap between groups may be larger than zero, but when viewed in the grand scheme of potential wholesale recidivism, it is less than decisive.

Given the successes discovered and the newly found paths to decarceration, many of these protocols should remain in place post-pandemic. However, this is not the end. If so many people could be released or funneled into alternative measures, or simply not prosecuted in the first place, then it is worth considering *why* that was the case. If such a significant number of people in the prison system could be released without substantially impacting the health and safety of the community, then perhaps they did not need to be imprisoned in the first place. And even if prison was “well-deserved” at their sentencing, whatever amount of their sentences remained at the time of their releases clearly was not necessary for public safety. Therefore, prosecutors should have a duty to use their power of sentence recommendation for the benefit of all. They should pursue non-custodial sentencing whenever possible, and the minimum sentence adequate when not.¹¹⁹

III. SOCIETAL IMPACT OF INCARCERATION

A. SENTENCING DISPARITIES

“Black men are six times as likely to be incarcerated as white men and Latinos are 2.5 times as likely.”¹²⁰ This is but the start of the sentencing disparities in America. Black male offenders across the United States receive, on average, sentences 19.1% longer than their white male counterparts.¹²¹ Courts also tend to apply the death penalty more often when there is a white victim, since “[m]ore than 75% of death row defendants who have been executed were sentenced to death for killing white victims, even though in society as a whole about half of all homicide victims are African American.”¹²² Biased prosecution due to broad prosecutorial discretion leads to over-representation of minorities as defendants from the very beginning of the criminal process. This naturally leads to an imbalance in sentencing. Furthermore, disproportionate sentencing rules¹²³ and a lack

118. *Id.*

119. This is keeping with Bentham’s principle of doing the least harm necessary to achieve the desired effect. BENTHAM, *supra* note 13.

120. *Criminal Justice Facts*, SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/E4BW-4T4Z>].

121. Glenn R. Schmidt, Louis Reedt & Kevin Blackwell, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report 2*, U.S. SENT’G COMM’N (Nov. 2017).

122. *Race and Death Penalty by the Numbers*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers> [<https://perma.cc/6FSB-6SGQ>].

123. According to an ACLU report:

[D]istribution of just 5 grams of crack cocaine carries a minimum 5-year federal prison sentence, while for powder cocaine, distribution of 500 grams – 100 times the amount of crack cocaine – carries the same sentence. . . Because of its relative low cost, crack cocaine is more accessible for poor

of mechanisms to combat implicit bias¹²⁴ in the severity of sentencing result in racial disparities in sentencing and ultimately incarceration. This divide in sentencing outcomes also has the wide-reaching effect of generating a disparate impact on minority communities, because it means they suffer the societal consequences of incarceration discussed below to a greater degree than other communities.¹²⁵

Prosecutors are among the few members of the criminal justice system in a position to address this disparity. The professed intent of the legal system is justice. A system in which members of one race are punished more severely than those of another simply for the color of their skin, regardless of intent or ignorance of the punisher, is not a just one. Attorneys have a “special responsibility for the quality of justice,”¹²⁶ and therefore this injustice cannot be borne.

B. THE SOCIAL EFFECTS OF CUSTODIAL SENTENCES

The incarceration of one individual can have staggering impacts on their family, community, and society as a whole. For example, “children with incarcerated parents are more likely to drop out of school, to develop learning disabilities, and to suffer from migraines, post-traumatic stress disorder, homelessness, and depression, among other health issues.”¹²⁷ The immense expense of the prison system also draws financial support away from other initiatives that may have a stronger, more positive impact.¹²⁸ For families, “the risk of falling below the poverty line increases by 38% when a father is incarcerated,”¹²⁹ and “180,000 women in the 12 most impacted states have been banned for life from receiving cash welfare assistance due to a felony drug conviction.”¹³⁰ A broader societal consequence that deeply impacts the nature of American democracy is that of felon disenfranchisement. As a result of this policy, which exists in almost all states in

Americans, many of whom are African Americans. Conversely, powder cocaine is much more expensive and tends to be used by more affluent white Americans.

Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, at i, ACLU (Oct. 2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> [<https://perma.cc/5CLZ-3AQC>].

124. Implicit biases are “the attitudes or stereotypes that affect our understanding, decisions and actions in an unconscious manner. These implicit biases we all hold do not necessarily align with our own declared beliefs.” Karen Steinhauser, *Everyone Is a Little Bit Biased*, ABA (Mar. 16, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/ [<https://perma.cc/A6DD-JSMT>].

125. One example of such an impact is that “[c]lose to one in ten African American students have an incarcerated parent; one in four have a parent who is or has been incarcerated.” Lauren-Brooke Eisen & Courtney M. Oliva, *Reimagining a Prosecutor’s Role in Sentencing*, 32 FED. SENT’G REP. 195, 195 (2020).

126. MODEL RULES OF PROF’L CONDUCT Scope (2018).

127. Eisen & Oliva, *supra* note 125, at 195.

128. The system costs approximately \$270 billion per year. *Id.*

129. *Id.* at 198.

130. Marc Mauer & Virginia McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, SENT’G PROJECT (Nov. 4, 2013), <https://www.sentencingproject.org/publications/a-lifetime-of-punishment-the-impact-of-the-felony-drug-ban-on-welfare-benefits/> [<https://perma.cc/KJS8-HSKE>].

some form, 5.2 million Americans cannot cast a vote.¹³¹ Prison sentences are getting longer,¹³² but not more effective.¹³³ Prosecutors *must* remember that “sentencing does not occur in a vacuum.”¹³⁴

IV. RECOMMENDATIONS

The United States claims that people possess an inalienable right to life and liberty,¹³⁵ and yet the State takes both away from its citizens on a regular basis. A shift away from incarceration and toward solving the root of the problems would align much more closely with those ideals. Since the pandemic started, there has been an approximately eight-percent reduction in the national prison population.¹³⁶ This marks a substantial decrease in the number of incarcerated people in this country, given the pre-pandemic total of at least two million.¹³⁷ Incarceration is not always the best solution to crime—in fact, a recent report states that long prison sentences have negative social consequences and a minimal impact on crime prevention.¹³⁸ Mass incarceration “tears apart communities, creates vast racial disparities, and perpetuates cycles of intergenerational poverty.”¹³⁹ As an avowed beacon of liberty, the United States must seek to remedy each of these effects to maintain its claim.

Many alternatives to incarceration exist but have only been partially explored in the United States, if at all.¹⁴⁰ The Standards adopt no duty to pursue alternatives to incarceration,¹⁴¹ and yet diversion to rehabilitation and mental health treatment, social support solutions, and “penal sanctions within the community”¹⁴² are all evidence-based alternatives. International organizations, like the UN, contend that imprisonment should be a sentence of last resort.¹⁴³ The primary

131. The only jurisdictions which do not have some form of felon disenfranchisement, including for those currently incarcerated, are Maine, Vermont, the District of Columbia, and Puerto Rico. Eleven states do not permit former felons to vote even upon completion of their probation or parole. Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENT’G PROJECT (July 28, 2021), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [https://perma.cc/5L8A-KL8B].

132. “[S]entence lengths have been climbing in recent decades.” Eisen & Oliva, *supra* note 125, at 196.

133. “[L]ong prison sentences do not make communities safer and can, in fact, leave people at risk for future criminal involvement.” *Id.* at 199.

134. *Id.* at 198.

135. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

136. *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUST. (Jan. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> [https://perma.cc/57CX-YKN8].

137. *Criminal Justice Facts*, *supra* note 120.

138. Eisen & Oliva, *supra* note 125, at 195.

139. *Id.*

140. *See infra* note 141-42.

141. *See generally* STANDARDS., *supra* note 5.

142. *Why promote prison reform?* UNITED NATIONS: OFF. ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html> [https://perma.cc/4LTR-EURZ].

143. *See generally* G.A. Res. 45/110 (Dec. 14, 1990).

source of this authority comes from the Tokyo Rules, also known as the United Nations Standard Minimum Rules for Non-Custodial Measures.¹⁴⁴ In these standards, the key parts of the second rule, which covers the “scope of non-custodial measures,” state that:

In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. . . Non-custodial measures should be used in accordance with the principle of minimum intervention.¹⁴⁵

Rule 8.2 lists the options for non-custodial sentences as:

(a) Verbal sanctions, such as admonition, reprimand and warning; (b) Conditional discharge; (c) Status penalties; (d) Economic sanctions and monetary penalties, such as fines and day-fines; (e) Confiscation or an expropriation order; (f) Restitution to the victim or a compensation order; (g) Suspended or deferred sentence; (h) Probation and judicial supervision; (i) A community service order; (j) Referral to an attendance centre; (k) House arrest; (l) Any other mode of non-institutional treatment; (m) Some combination of the measures listed above.¹⁴⁶

Policies including such sentencing alternatives are already in action in some American jurisdictions.¹⁴⁷ In Brooklyn, New York, the District Attorney declared that “the vision of Justice 2020 [his plan moving forward] is for every [assistant DA] in every case to first seek out non-conviction, non-jail resolutions, and to think through all the available options before reaching a determination that a conviction or incarceration is necessary.”¹⁴⁸ Policy shifts such as this reflect a balance of holding people accountable for their actions while minimizing the impact of a sentence beyond what is necessary in the service of justice.

Within the current Standards, there exists space for the creation of such a duty. The Standards declare that “[t]he prosecutor should be familiar with relevant sentencing laws, rules, consequences and options, including alternative non-imprisonment sentences.”¹⁴⁹ Additionally, “[i]f the defendant is not in custody when charged, the prosecutor should consider whether a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure the defendant’s

144. *Id.* at No. 1.

145. G.A. Res. 45/110, annex, The Tokyo Rules, Rule 2.3 (Dec. 14, 1990); *Id.* at Rule 2.6.

146. *Id.* at Rule 8.2.

147. Jurisdictions include Suffolk County, MA; Kings County, NY; Cook County, IL; Philadelphia, PA; San Francisco, CA; the Delaware Attorney General; and Washington, D.C. Eisen & Oliva, *supra* note 125.

148. Eisen & Oliva, *supra* note 125, at 195 (quoting the District Attorney’s statement).

149. STANDARDS, *supra* note 5, Standard 3-7.2(b).

presence at court proceedings.”¹⁵⁰ These provisions appear to create some small space for prosecutors to consider non-custodial options.

The most compelling factors, however, are the fourth and sixteenth of those “which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge”: “the impact of prosecution or non-prosecution on the public welfare” and “whether the public’s interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.”¹⁵¹ On the existing information described in this Note, consideration of non-custodial options may well be in the interest of the public welfare, and those non-custodial options would likely “appropriately vindicate []” the public’s interests.¹⁵²

When the evidence indicates, as it does here, that there is little to lose and much to gain by implementing a change, then it is incumbent upon the leaders in the profession to give that change due consideration. Current domestic policy trends, international standards, and existing research all indicate that those responsible for setting prosecutorial standards, from individual jurisdictions to the ABA, should consider adopting such a duty under their prosecutorial rules.

CONCLUSION

In a country that ranks first in incarceration rates against other countries with populations of at least 500,000 people, it is worthwhile and even the duty of the legal profession to review current practices and seek out paths for change.¹⁵³ Creating a prosecutorial duty to pursue non-custodial sentencing whenever feasible, and a duty to pursue the lowest sentence available when not, would improve the quality of justice in the United States and take a much-needed step toward supporting existing efforts in solving mass incarceration.

150. *Id.* at Standard 3-4.2(d). The prosecutor is also supposed to favor pretrial release. *Id.* at Standard 3-5.2(a).

151. *Id.* at Standard 3-4.4(a).

152. *Id.*

153. The United States’ incarceration rate is currently 664 per 100,000 people. Widra & Herring, *supra* note 67.