

NOTES

The Interplay of Mass Incarceration and Poverty

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ABSTRACT

The United States has the highest incarceration rate of any country in the world, imprisoning over two million people. Not only does mass incarceration have great monetary costs for Americans as the United States spends over \$250 billion each year on incarceration, but the United States also faces significant social costs as a result of mass incarceration. Mass incarceration significantly drives poverty and hinders social progress by making it more difficult for formerly incarcerated individuals to find employment, vote, or access public benefits while also reducing the support, earning potential, academic success, and stability of spouses and children of incarcerated or formerly incarcerated individuals. Not only does mass incarceration drive poverty throughout the United States, but poverty itself exacerbates mass incarceration as the American criminal justice system criminalizes poverty and punishes people for being poor – by imprisoning people who are unable to pay small fees and fines, who cannot afford bail, who are experiencing homelessness, who cannot afford mental health treatment, or who engage in sex work. Thus, this Note will demonstrate the absolute necessity of de-criminalizing poverty in order to combat mass incarceration in the United States.

While there has been extensive research and literature on mass incarceration in the United States, there has been less of an emphasis on the interplay between mass incarceration and poverty. This Note explores this interplay by discussing (1) the driving forces of mass incarceration in the United States, (2) how the criminalization of poverty drives mass incarceration and how the impact of incarceration exacerbates poverty and hunger, and (3) recent trends in recent criminal justice reform. To encourage discourse and action to reduce mass incarceration and poverty in the United States, the Note will then offer several proposals for reform efforts to decriminalize poverty and refute the anticipated critiques of the reforms.

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INTRODUCTION

Cindy Rodriguez, a fifty-three-year-old woman who was dependent on disability payments after suffering serious neck and back injuries, never had a criminal record—not even a parking ticket.¹ However, in 2014, the state charged Cindy with shoplifting and assigned her a public defender. Cindy’s public defender directed her to plead guilty and accept probation, arguing that this was the best deal that Cindy would be offered, and that probation was nothing to worry about.

1. “Set Up to Fail”: *The Impact of Offender Funder Private Probation on the Poor*, HUM. RTS. WATCH (Feb. 18, 2018), <https://www.hrw.org/report/2018/02/21/set-fail/impact-offender-funded-private-probation-poor#page>.

Cindy soon found out she owed the court \$578 for probation fines and fees. Cindy's probation also subjected her to a \$35–45 monthly supervision fee and required her to pay the \$20 cost of the random drug tests the probation company made her take even though she was never charged with a drug-related offense. Cindy told the judge about her desperate financial situation and dependence on disability payments. The judge told her to just do the best she could in paying her probation fees. The one time she did not pay her fee on time, Cindy was jailed. When she left the jail, the officer told Cindy, "I'll see you next time. You'll violate [parole] again." Due to her inability to pay these fees, Cindy and her daughter had to go several nights without eating. She had to sell her van and became homeless due to her inability to pay her rent. She remains haunted by the debt, hunger, homelessness, and other trauma that has resulted from her time on probation. She has said, "No matter what I do, I can't get back up."²

Cindy's experience is not exceptional.³ As of February 2022, the poverty rate in the United States was about 14.4%.⁴ About 90% of people charged with felonies and misdemeanors must rely on a public defender for legal representation.⁵ About half of the people imprisoned in the United States make less than \$10,000 per year⁶ and cannot afford the fees, fines, and sanctions that remain such a fundamental feature of American criminal justice. This inability to pay often leads to additional fees, jail time, and a vicious cycle of the inability to "get back up" for many individuals each year. Many of these individuals have only violated minor traffic laws⁷—an act most Americans have committed. The United States'

2. *Id.*

3. See Tony Messenger, *Messenger: Missouri Courts Respond to Debtors Prison Ruling – a Tale of Two Judges*, ST. LOUIS POST DISPATCH (Apr. 7, 2019), https://www.stltoday.com/news/local/columns/tony-messenger/messenger-missouri-courts-respond-to-debtors-prison-ruling-a-tale-of-two-judges/article_6d87b1fd-efb6-53ce-84b9-02dc5d2f4d5a.html (telling the story of Leann Banderman who stole a bottle of nail polish from Walmart and was sentenced 30 days in jail. She was eventually charged \$1,400 for "jail board" fees for her time in jail. She was subjected to monthly appearances to make payments on this amount. When she was unable to pay, she was sent back to jail for two additional months and sent a new bill for \$2,100); see also Jessica Brand, *How Fines and Fees Criminalize Poverty: Explained*, APPEAL (July 28, 2018), <https://theappeal.org/the-lab/explainers/how-fines-and-fees-criminalize-poverty-explained/> (recounting the experience of a man in Georgia who stole a \$2 can of beer and was then ordered to wear an ankle monitor. The ankle monitor administration company charged the man with fees totaling over \$1000. When the man was unable to pay these fees, he was sent to jail).

4. *3.4 Million More Children in Poverty in February 2022 than December 2021*, CTR. ON POVERTY & SOC. POL'Y (Mar. 23, 2022), <https://www.povertycenter.columbia.edu/news-internal/monthly-poverty-february-2022#:~:text=Monthly%20poverty%20remained%20elevated%20in,pover%20rate%20of%2012.5%20percent>.

5. Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIA. RACE & SOC. JUST. L. REV. 1, 13 (2020).

6. *Id.*

7. See Kevin Thompson, *For-Profit Companies Are Helping to Put People In Jail For Being Poor: I Should Know, I was One of Them*, ACLU (Jan. 29, 2015), <https://www.aclu.org/blog/speakeasy/profit-companies-are-helping-put-people-jail-being-poor-i-should-know-i-was-one-them?redirect=blog/criminal-law-reform-racial-justice/profit-companies-are-helping-put-people-jail-being-poor-i-sh> (highlighting the story of Kevin Thompson, a nineteen-year-old, who was jailed for his inability to pay \$838 in traffic fines); see also Emily Reina Dindial & Ronald J. Lampard, *When a Traffic Ticket Costs \$13,000*, N.Y. TIMES (May

criminalization of poverty through the over-policing of poor communities and the use of bail, probation, fees, and fines results in many poor people facing jail time simply because they cannot afford to pay a specified amount. This criminalization of poverty drives mass incarceration and recidivism in the United States, while mass incarceration simultaneously exacerbates poverty. As a result, to meaningfully reform the criminal justice system, poverty must be decriminalized.

In five parts, this note explores the interplay between mass incarceration and poverty. Part I of this note will provide a background on mass incarceration and the driving forces behind mass incarceration in the United States, including (1) over-policing and overcriminalization, (2) mandatory minimums and harsh sentencing practices, and (3) community supervision and ongoing restrictions after release. Part II explores the interplay between mass incarceration and poverty, discussing how the impact of incarceration exacerbates poverty and hunger, but also how the criminalization of poverty drives mass incarceration. Part III explores trends in recent criminal justice reform. Part IV proposes reform efforts to decriminalize poverty, focusing on the reduction of overcriminalization, the restriction of the use fees, fines, bail, and pretrial detainment, and the reduction of collateral effects of incarceration. Lastly, Part V of this note rebuts the anticipated critiques of the proposed reforms offered in Part IV.

I. BACKGROUND

A. Mass Incarceration

The term “mass incarceration” refers to the exceptionally high rate of incarceration in the United States. Mass incarceration encompasses the significant number of Americans who are at an increased risk of being, who presently are, and who have already been incarcerated in jail, prison, or subjected to a court-ordered supervision term.⁸ As of January 2020, nearly one out of every one hundred individuals in the United States was incarcerated.⁹ In fact, the United States imprisons more individuals than any other Western nation. Although only 5% of the world’s population resides in the United States, the United States houses 20% of the world’s prison inmates.¹⁰ As of 2018, the United States’ imprisonment rate

27, 2019), <https://www.nytimes.com/2019/05/27/opinion/drivers-license-suspension-fees.html> (discussing the experience of Leah Jackson whose initial single traffic ticket turned into \$13,000 in debt that she could not afford); Brand, *supra* note 3 (explaining the arrest of a thirty-two-year-old Michigan man who was jailed for his inability to pay a \$772 traffic ticket. On his seventeenth day in prison, the man died because of seizures and convulsions related to drug withdrawal).

8. See generally Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (March 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (stating that probation leads to unnecessary incarceration).

9. Peter Wagner & Wanda Betram, “What Percent of the U.S. is Incarcerated?” (*And Other Ways to Measure Mass Incarceration*), PRISON POL’Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

10. *Id.*

was ten times the average rate of many developed nations.¹¹

B. Drivers of Mass Incarceration

The reasons for mass incarceration are nuanced and intertwined. They cannot be explicitly identified, separated, and listed. However, three drivers significantly contribute to mass incarceration in the United States.¹² These three drivers are (1) over-policing and overcriminalization, (2) mandatory minimum and generally harsher sentencing practices, and (3) community supervision and the ongoing restrictions formerly incarcerated individuals face after being released from prison.¹³

1. Over-Policing and Overcriminalization

The United States' criminal justice system equips law enforcement officers with a significant level of power to stop, search, seize, and arrest individuals for a wide range of offenses, including minor offenses.¹⁴ In 2021, police arrested an individual every three seconds, accounting for 10.5 million arrests each year. Of these arrests, 80% were low-level misdemeanor offenses, such as disorderly conduct.¹⁵ This drastic rate of arrest results both from over-policing and overcriminalization. Over-policing takes place when there is a disproportionate police presence in a community in relation to the community's rate of serious crime.¹⁶ Overcriminalization refers to the overwhelming number of acts that have been labeled as criminal.¹⁷ Over-policing and overcriminalization have resulted in significant increases in the arrests and incarceration rates, driving mass incarceration and, in turn, poverty.¹⁸

Over-policing often occurs in marginalized communities including low-income communities and communities with significant numbers of people of color. People of color face a higher risk of racial profiling, biased policing, discrimination, and violence.¹⁹ African Americans, Latinos, and Native Americans are between two to seven times more likely to be stopped, ticketed, or arrested

11. Marlysa D. Gamblin, *Mass Incarceration: A Major Cause of Hunger*, BREAD FOR THE WORLD INST. 3 (Feb. 2018), <https://www.bread.org/sites/default/files/downloads/briefing-paper-mass-incarceration-february-2018.pdf>.

12. *See id.* at 2.

13. *Id.*

14. *See* Nicholas Turner, *We Spend \$296 Billion Each Year On A Justice System That Doesn't Make Us Safer*, FORBES (July 1, 2021), <https://www.forbes.com/sites/forbeseq/2021/07/01/we-spend-296-billion-each-year-on-a-justice-system-that-doesnt-make-us-safer/?sh=4cf7ee9e7070>.

15. *Id.*

16. MASS INCARCERATION AND OVER-POLICING ARE HUNGER ISSUES, BREAD FOR THE WORLD INST. 3 (Feb. 2018), https://www.bread.org/sites/default/files/mass_inc_factsheet_sept2016.pdf.

17. Turner, *supra* note 14.

18. MASS INCARCERATION AND OVER-POLICING ARE HUNGER ISSUES, *supra* note 16; *see also* Karen Dolan & Jodi L. Carr, *The Poor Get Prison*, INST. FOR POL'Y STUD. 13 (Mar. 18, 2015), <https://ipsdc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf>.

19. Dolan & Carr, *supra* note 18. In 2011, one in every fifteen Black men and one in every thirty-six Latino men were incarcerated, while only one in every 106 white men were incarcerated. Further, one in every three Black men will be sentenced to prison throughout their lifetime, and Black individuals are almost four times more likely to experience the use of force when stopped by law enforcement.

than their white peers.²⁰ Generally, people living in over-policed communities face a significantly higher chance of being stopped by the police, increasing the likelihood of being cited, ticketed, and or arrested.²¹

2. Mandatory Minimums and Harsh Sentencing Practices

In the 1980s, Congress enacted the 1984 Sentencing Reform Act.²² The Sentencing Reform Act implemented mandatory minimum sentences for specific crimes and placed a significant focus on drug crimes.²³ The implementation of mandatory-minimum sentences has restricted judicial discretion to decide how to sentence different individuals. The implementation of mandatory-minimum sentences has required judges to sentence individuals to harsh, lengthy, mandatory sentences in an attempt to deter people from committing crimes.²⁴ Mandatory minimum sentences have resulted in sentences that are disproportionate to the offense and, sometimes, even in contradiction to what the judge believes is a fair sentence for the offense.²⁵

Mandatory minimum sentences have had dangerous consequences. Not only do they undermine judicial discretion, but they also expand prosecutorial discretion and power, permitting prosecutors to decide whether to bring charges, what charges to bring, and what plea deals to offer defendants.²⁶ Mandatory minimum sentences have equipped prosecutors with exceptional leverage over defendants.²⁷ The ability to bring charges with lengthy minimum sentences and then offer the defendant a plea deal with a much shorter sentence can incentivize defendants to plead guilty, even when innocent, to avoid the threat of unnecessary and severe sentences.²⁸ Thus, lengthy mandatory minimum sentences have increased the likelihood that an innocent person will be sentenced to prison and has significantly increased the prison population, despite not actually reducing crime.²⁹ In fact, the National Research Council determined that between 1980 and 2010,

20. *Id.*

21. *Id.*

22. Sentencing Reform Act of 1984, H.R. 5773, 98th Cong. (1984), <https://www.congress.gov/bill/98th-congress/house-bill/5773>.

23. *Mandatory Minimum Sentence Statistics*, FAIR FIGHT INITIATIVE, <https://www.fairfightinitiative.org/mandatory-minimum-sentence-statistics/> (last visited Feb. 22, 2023).

24. Jay Rorty, *The Human Cost of Mandatory Minimums*, ACLU (May 28, 2010), <https://www.aclu.org/blog/smart-justice/mass-incarceration/human-cost-mandatory-minimums>.

25. *Id.* (describing the experience of Hamedah Hasan, who received a life sentence for a first-time, nonviolent drug offense. Hamedah went to stay with her cousin in order to escape a physically abusive relationship. Her cousin convinced her into running errands for his drug conspiracy. Despite her lack of a criminal background, the judge was required to sentence her to the mandatory minimums for crack cocaine and within the sentencing guidelines for those minimums. Her sentencing judge has publicly advocated that Hamedah's sentence be commuted).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Mandatory Minimum Sentence Statistics*, *supra* note 23 (arguing that mandatory minimum sentences do not reduce crime and citing a study in the American Review of Political Economy that found that a 1% increase in the prison population increases violent crime by 28%).

50% of the 222% increase in the prison population resulted from longer sentencing terms because of mandatory minimum sentencing requirements.³⁰

3. Community Supervision and Ongoing Restrictions After Release

Community supervision includes pretrial supervision, probation, and parole. An individual can be sentenced to community supervision, specifically parole, instead of incarceration.³¹ While on its face parole may seem like a valuable alternative that can help reduce the prison population, community supervision has had a controversial effect on the criminal justice system and prison population. Often, community supervision has such stringent rules that individuals are set up to fail.³² These sentences usually include long supervision terms, various rules, difficult requirements, and continual supervision.³³ Further, individuals who are sentenced with parole, face significant obstacles and collateral effects of incarceration when paroled and trying to re-enter society. Because of their criminal records, paroled individuals can face significant discrimination in housing and employment opportunities.³⁴ Additionally, they may face various restrictions on what they are allowed to do. For example, some states bar voting while an individual is on probation or parole and some states fully disenfranchise individuals who have a criminal record.³⁵ These difficulties and restrictions paired with the stringent requirements of community supervision can make it difficult for the individual to completely adhere to the terms of their community supervision.³⁶ Even minor infractions, such as breaking curfew or failing to pay the costly supervision fees, are considered violations of an individual's community supervision terms.³⁷ Violating one's parole, even one time, can result in an individual being sent back to jail or prison.³⁸ In 2019, 153,000 or more people were incarcerated for "technical violations," or non-criminal violations of their parole or probation.³⁹ Thus, community supervision, especially parole, can result in unwarranted and excessive incarceration.⁴⁰

II. THE INTERPLAY OF MASS INCARCERATION AND RIOTS

Mass incarceration affects a significant amount of American society. As of 2018, mass incarcerated impacted more than 85 million Americans.⁴¹ In 2018,

30. *Id.*

31. Sawyer & Wagner, *supra* note 8.

32. *Id.*; see also Brand, *supra* note 3 (private probation companies, which have become increasingly more common, often assign fines and fees and then jail individuals for non-payment).

33. Sawyer & Wagner, *supra* note 8.

34. *Id.*

35. *Voting Rights for People with a Felony Conviction*, NONPROFIT VOTE (Aug. 2021), <https://www.nonprofitvote.org/voting-in-your-state/voting-as-an-ex-offender/>.

36. *Id.*

37. Sawyer & Wagner, *supra* note 8.

38. Gamblin, *supra* note 11.

39. Sawyer & Wagner, *supra* note 8.

40. *Id.*

41. Gamblin, *supra* note 11.

one in every three adults in the United States had a criminal record of some kind—whether an arrest without a conviction, a felony conviction, or a conviction for a minor offense.⁴² One of the most significant drivers of mass incarceration is the criminalization of poverty. As policing efforts are often focused on low-level offenses and maintaining systems of money bail, fees, and fines, the United States' criminal justice system punishes individuals for being poor.⁴³ As a result, poverty serves as a meaningful predictor of an individual's entanglement within the criminal justice system.⁴⁴ However, poverty does not only increase the likelihood that an individual will become entangled with the criminal justice, but poverty also often becomes the result of such an entanglement.⁴⁵ The effects of incarceration have long-lasting consequences that increase the likelihood of poverty for those who have been incarcerated as well as their families and communities.

A. Mass Incarceration Exacerbates Poverty and Hunger

Mass incarceration has a significant impact on the United States as individuals, families, and communities are negatively impacted for years, if not a lifetime, following incarceration. Thus, mass incarceration is a significant obstacle to ending U.S. hunger and poverty by 2030—a goal that the United States announced it planned to achieve in 2015.⁴⁶ In fact, United States poverty levels would have decreased by 20% between 1980 and 2004 if not for mass incarceration.⁴⁷ Mass incarceration does not only impede poverty reduction, it also actually exacerbates poverty and hunger throughout the United States.

1. The Impact of Incarceration During Imprisonment

Incarceration has a direct impact on the individual being incarcerated as well as his family and community in many ways. First, incarceration leads to an increased risk of hunger, food insecurity, nutritional deficiencies, and malnutrition.⁴⁸ Incarcerated individuals are at risk for hunger, poor nutrition, and health issues during their incarceration. Unhealthy diets and poor medical care in prison can cause health complications for these individuals later in life.⁴⁹

Second, families with an imprisoned family member often suffer from increased financial strain and are at a greater risk of becoming impoverished and hungry. These families often must pay significant fines and court fees related to incarceration as they owe, on average, \$13,000 in fines—more than half the gross

42. *Id.*

43. Sawyer & Wagner, *supra* note 8.

44. *Id.* at 26.

45. *Id.* at 26.

46. Gamblin, *supra* note 11, at 1.

47. *Id.*

48. *Id.* at 5.

49. *Id.*

income of a family of four below the poverty line in 2018.⁵⁰ Further, incarceration increases the financial strain on families as the family loses the income of the incarcerated individual.⁵¹

Third, incarceration also negatively impacts communities. The community loss of parents and working-aged adults to incarceration can negatively impact community economics and disturb social ties.⁵² Children in communities with high rates of incarceration tend to be greatly affected. Communities with high levels of incarceration see an increase in child poverty rates and worsened cognitive outcomes for reading comprehension, math problem solving, and memory and attention-related activities.⁵³ Additionally, the overall health of communities with high levels of incarceration often suffers. High levels of community incarceration greatly increase the likelihood of community members contracting sexually transmitted infections.⁵⁴ Some studies have even indicated that high levels of incarceration can also negatively impact the cardiometabolic, lung, and mental health of the community members.⁵⁵

High levels of community incarceration can also have a significant negative economic impact on communities. Incarceration makes families more vulnerable to eviction, causing communities to lose residences.⁵⁶ Additionally, home values in neighborhoods decrease as prospective buyers do not want to live somewhere where many people have criminal records.⁵⁷ As such, mass incarceration costs communities \$11 billion in decreased property values.⁵⁸ This makes it even harder for impoverished communities and families to save for the future as the value of their property declines.⁵⁹ Further, high rates of incarceration can negatively impact communities by and by shifting public resources from health and social programs to the criminal justice system.⁶⁰

50. *Id.*

51. *Id.*

52. Elizabeth J. Gifford, *How Incarceration Affects the Health of Communities and Families*, N.C. MED. J. (Nov. 2019), <https://ncmedicaljournal.com/article/55082>.

53. *Id.*

54. *Id.* (explaining that such a consequence is a particular risk for Black women as a result of the increased exposure of men to STIs in prison and the smaller sexual partner network that results when men are removed from the community for incarceration).

55. *Id.* (Black individuals in Atlanta, Georgia neighborhoods with high levels of incarceration had worse cardiometabolic profiles even after controlling for crime and other factors; In New York City, asthma was more common in communities with high levels of incarceration, and in Detroit, members of communities with high levels of incarceration were more likely to fit the requirements for major depressive disorder and generalized anxiety disorder).

56. Gamblin, *supra* note 11, at 5.

57. *Id.*

58. *Id.*

59. *Id.*

60. Gifford, *supra* note 52.

2. The Impact of Incarceration After Release

Incarceration negatively impacts individuals, families, and communities even after an individual reenters society. Mass incarceration makes it harder for previously incarcerated individuals—one-third of the population—to secure jobs, housing, and other resources after incarceration.⁶¹ Formerly incarcerated individuals often face negative stigma associated with their incarceration and criminal record.⁶² Landlords and employers may discriminate against a person with a criminal record even after that person fulfilled the requirements of his sentence.⁶³ In fact, over 50% of employers say that they are reluctant to hire employees that have a criminal history.⁶⁴ Many job applications explicitly ask individuals about previous convictions. Often, when an individual indicates that he has a previous conviction, he is disqualified for consideration from the position⁶⁵ even if he is an otherwise strong candidate for the position. Unfortunately, only about half of the approximately 70% of employers who require background checks allow applicants an opportunity to explain prior arrests.⁶⁶

State and federal laws and regulations seriously restrict the activities of formerly incarcerated individuals and people with previous convictions.⁶⁷ These collateral consequences impact the previously incarcerated individual's employment, housing, and economic opportunities as well as the social services that they receive. In many states, social safety net programs that assist unemployed people and families exclude formerly incarcerated individuals.⁶⁸ These individuals may also be partially or completely banned from the Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), affordable housing opportunities, Medicaid/Medicare, and Pell Grants for specific periods of time, or life.⁶⁹ Further, certain professions ban formerly incarcerated individuals outright. For example, in some states formerly incarcerated individuals may not work as barbers.⁷⁰ By subjecting formerly incarcerated individuals to these negative collateral consequences and denying them assistance, the United States is increasing the likelihood that the individual and their families will become hungry, food insecure, and impoverished, thus, negatively impacting poverty reduction and national economic growth.⁷¹

61. Gamblin, *supra* note 11, at 4–6.

62. *Id.* at 4.

63. *Id.*

64. Dolan & Carr, *supra* note 18, at 13.

65. Gamblin, *supra* note 11, at 6; *see also* Dolan & Carr, *supra* note 18, at 13 (describing that the chance of a callback interview for an entry-level position decreases by 50% for applicants that have an arrest or conviction history).

66. *See* Dolan & Carr, *supra* note 18, at 13.

67. Gamblin, *supra* note 11, at 5–7.

68. *Id.*

69. *Id.*

70. *Id.*; *see also* Dolan & Carr, *supra* note 18, at 13.

71. Gamblin, *supra* note 11, at 7.

Even if an individual is arrested and never convicted, the individual faces an increased risk of poverty and hunger. While being detained and awaiting trial, individuals who have been arrested usually lose their jobs, and sometimes their homes. People who are unable to post bail may wait for anywhere from forty-eight hours to several years awaiting their trial depending on the jurisdiction.⁷² Seventy percent of formerly incarcerated adults return home to children who need to be cared and provided for.⁷³ Around 80% say that their family was denied housing because of their criminal record.⁷⁴ Any record of arrest, even without convictions, also significantly reduces potential earnings for men even when they can secure employment.⁷⁵ For these reasons, mass incarceration greatly harms many members of society and exacerbates hunger and poverty.

B. Criminalization of Poverty Drives Mass Incarceration

Not only does mass incarceration exacerbate and fuel poverty and hunger, but mass incarceration is also fed by the criminalization of poverty. Over-policing often occurs in marginalized and impoverished communities.⁷⁶ Over-policing and the increased vulnerability of poor and marginalized communities make these community members more likely to face arrest or citations than other people.⁷⁷ Members of these communities often cannot afford the many fees and fines associated with arrests or citations.⁷⁸

There are three categories of fees: punitive fines —such as traffic ticket fees — restitution fees to compensate victims, and fees that source the functioning of mass incarceration.⁷⁹ Fees that source the functioning of mass incarceration include jail book-in fees, bail investigation fees, drug testing fees, DNA testing fees, public defender application fees, court costs, felony surcharges, and public defender recoupment fees.⁸⁰ Inmates are charged for costs of imprisonment in forty-one states, and for parole and probation costs in forty-four states.⁸¹ People living in poverty are not usually able to pay these fees and fines, which can lead to increased fines or penalties, a parole violation, or more incarceration.⁸² Furthermore, many individuals who are arrested are granted bail. Because bail prices are usually extremely high, people living in poverty usually spend more time in prison while awaiting trial.⁸³

72. *Id.* at 4.

73. *Id.* at 6.

74. *Id.*

75. *Id.*

76. *Id.* at 2.

77. *Id.*

78. *Id.*

79. T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS, A HANDBOOK FOR JEWISH COMMUNITIES FIGHTING MASS INCARCERATION 36 (Rabbi Lev Meirowitz Nelson ed. 2016), <https://www.truah.org/wp-content/uploads/2016/10/MI-Handbook-complete-web.pdf>.

80. *Id.*

81. *Id.*

82. *Id.* at 36–37.

83. *Id.* at 35.

Cash bail can also incentivize individuals to plead guilty to receive a lesser or suspended sentence.⁸⁴ Such an incentive is particularly apparent to individuals who cannot afford to sit in jail during a trial because they are responsible for taking care of their family or bringing money in for their household.⁸⁵ These realities often result in harsher punishments for poor individuals and more lenient punishments than their wealthier peers who commit the same crime.⁸⁶ Further, these realities demonstrate the dangerous cyclic relationship between incarceration and poverty. The longer it takes for an individual to pay off debts imposed by the criminal justice system, the longer he will remain on probation or incarcerated and the more likely employers will deem him unemployable, increasing his likelihood to re-offend.⁸⁷

III. REFORM EFFORTS

In recent years, many states have worked to enact criminal justice reform efforts to reduce mass incarceration. However, many of these solutions have, on some level, ignored the interplay between mass incarceration and poverty.⁸⁸ While criminal justice reform efforts in recent years have certainly resulted in important changes, mass incarceration remains a significant issue in the United States. To truly address mass incarceration and bring about meaningful change to the criminal justice system, criminal justice reform must adopt a lens of poverty reduction and poverty decriminalization.

In 2021, many states enacted key criminal justice reforms. Many states worked to address excessive sentencing practices, racial disparities, incarceration stemming from parole and probation violations, and some of the collateral effects of incarceration.⁸⁹ For instance, California adopted a series of reforms to address California's sentencing policies.⁹⁰ Ultimately, this series of reforms: restricted the use of sentencing enhancements for gang crimes while scaling back the effect of other enhancements; repealed mandatory minimum sentences for certain heroin, cocaine, opioids, and other specific drug offenses; allowed for the retroactive repeal of sentence enhancements for prior prison or county jail felony terms; and required prison officials to identify incarcerated individuals who are eligible for a second look review of their sentences.⁹¹ Several states authorized the use of racial impact statements to analyze the racial impact of proposed and enacted criminal

84. *See id.* at 35.

85. *Id.*

86. *Id.* at 35.

87. *Id.*

88. *See infra* Part III.

89. *See* Nicole Porter, *Success in Criminal Legal Reforms, 2021*, THE SENTENCING PROJECT 2 (Dec. 8, 2021), <https://www.sentencingproject.org/publications/successes-in-criminal-legal-reforms-2021/>.

90. *Id.* at 1.

91. *Id.*

justice legislation.⁹² In 2021, several lawmakers restricted prison admission for parole and probation violations. Several states also enacted legislation to reduce prison time as an incentive for incarcerated individuals' good behavior and engagement in rehabilitative programs.⁹³ New York passed Senate Bill 1144 to restrict incarceration for technical parole violations and to implement a thirty-day maximum jail term for technical violations.⁹⁴ Virginia limited misdemeanor probation terms to one year and felony probation terms to five years or fewer under House Bill 2038.⁹⁵ Several states, including Connecticut, New York, and Washington, also worked to address the collateral effects of incarceration by addressing voter suppression of formerly incarcerated individuals.⁹⁶

Many of these reforms have helped work to reduce mass incarceration and its negative consequences.⁹⁷ However, more reform is needed. To fully address mass incarceration, poverty must be decriminalized.

IV. PROPOSED REFORM

There are several reform efforts that adopt a lens of poverty reduction and decriminalization that can be beneficial in reducing mass incarceration as well as poverty. First, legislation must pursue opportunities to reduce overcriminalization. Second, there must be a restriction on the use of fines and fees as a form of punishment. Third, there should be the introduction of a method to expunge criminal records after an extended period for individuals who have not reoffended. Lastly, there must be a rethinking of and upgrade to prison programming to better assist offenders in re-entering society.

A. Reducing Overcriminalization

Often, meaningful reform begins with legislation. To combat the interplay of mass incarceration and poverty, it is crucial to seek out opportunities to reduce overcriminalization. There are several avenues to reducing overcriminalization. These avenues include: (1) the decriminalization of the possession of drugs; (2) the decriminalization of sex work; (3) the decriminalization of mental health crises; and (4) the decriminalization of homelessness.

1. The Decriminalization of the Possession of Drugs

The criminalization of drugs, specifically the harsh sentences and mandatory minimums that resulted from the "war on drugs," has played a significant role in driving mass incarceration throughout the United States.⁹⁸ By the end of 2018,

92. *Id.* at 2–3.

93. *Id.* at 3.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 4.

98. Leslie E. Scott, *Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework for Ending the "War on Drugs,"* 48 N. KY. L. REV. 267, 268–69 (2021).

1,249,700 individuals were sentenced to state prisons.⁹⁹ Fourteen percent or 176,300 of these individuals' most serious offense was a drug offense.¹⁰⁰ Drugs are overwhelmingly criminalized among marginalized and poor populations, posing a significant risk of driving mass incarceration and poverty. Some research has suggested that there is a correlation between poverty and drugs.¹⁰¹ However, over-policing of impoverished and marginalized communities may also account for the disparities in drug-related arrests between individuals living in poverty and individuals who are not.¹⁰² In fact, some police departments target low-income neighborhoods because the police officers feel that they can arrest individuals more easily there because individuals in low-income communities lack the political power, financial power, and capital that other communities may have.¹⁰³ Easier arrests result in an increase in arrests and the more federal funding, being granted to the police department.¹⁰⁴ This funding is often issued in the form of grants to combat drugs.¹⁰⁵

Decriminalizing drug possession is good policy. Such decriminalization will remove a major source of incarceration of marginalized groups. It will also help people receive proper drug treatment and lead to a potentially better allocation of law enforcement resources as the resources spent on policing drug possession can be used elsewhere.¹⁰⁶ While some punishment may be necessary for drug offenses, a rollback on harsh mandatory-minimum drug sentences is crucial to minimize the role drug offenses play in driving mass incarceration and poverty. Such harsh sentences are not necessary. Long, unnecessary sentences have not deterred drug use or addiction.¹⁰⁷ Rather, these unnecessary, lengthy sentences intensify collateral effects and deny courts the ability to implement drug or mental health court programs.¹⁰⁸ Thus, mandatory minimum drug sentences have made society less safe,¹⁰⁹ while also hurting incarcerated individuals, their families, and their communities while increasing poverty.

99. *Id.* at 269.

100. *Id.*

101. German Lopez, *These Maps Show the War on Drugs is Mostly Fought in Poor Neighborhoods*, Vox (Apr. 16, 2015), <https://www.vox.com/2015/4/16/8431283/drug-war-poverty>.

102. *Id.*

103. *Id.* (Former Maryland police major, Neil Franklin, explaining that to get more federal funding police officers would be sent out to make as many drug arrests as possible and would often go to communities of color and impoverished communities because “impoverished people are always in the street” and “they have no political power or capital or no financial power, so there’s also little pushback.”)

104. *Id.* Note: the federal government has worked to eliminate this financial incentive by changing a significant law enforcement funding program to stop using arrest numbers as a measure of accountability. *Id.*

105. *See id.*

106. *See id.*

107. *The Case Against Mandatory Minimum Sentences*, FAMM, <https://famm.org/wp-content/uploads/The-Case-against-Mandatory-Minimum-Sentences.pdf> (last visited Feb. 22, 2023).

108. *Id.* at 2.

109. *Id.* (explaining that mandatory minimum sentences waste expensive prison resources on individuals who may not even need to be incarcerated to keep the public safe, reducing the funds that can actually be used to prevent crime).

To make a somewhat meaningful difference in reducing the prison population, criminal justice reform policies need to address all the individuals who are already incarcerated for drug offenses. This can be done through the initiation of a second-look process that focuses on the presumption of release for people who have been sentenced to life without parole for drug offenses.¹¹⁰ It will also require the retroactive application of any drug offense-related changes in the law.¹¹¹

The criminalization of drug possession is particularly dangerous for those living in poverty because drug-related arrests carry significant collateral effects. The collateral effects of a drug violation include denial of child custody, voting rights, employment, loans, public housing, and other public assistance programs to people who have criminal convictions.¹¹² The collateral effects of incarceration make it increasingly more difficult for impoverished individuals to move above the poverty line or to end generational poverty.¹¹³ Rather, the collateral effects of incarceration create cycles of multigenerational poverty.¹¹⁴ Thus, to adequately address the effect of incarceration on poverty, it is necessary to address how people incarcerated for drug-related offenses are negatively impacted after their incarceration. To reduce the exacerbation of poverty that results from collateral effects of a drug offense, it is necessary to end policies that exclude people with drug offenses from public benefits and opportunities, such as public housing and employment opportunities.¹¹⁵

2. The Decriminalization of Sex Work

Another avenue to reduce overcriminalization is through the decriminalization of sex work. Decriminalizing sex work will help reduce both mass incarceration and poverty. The criminalization of sex work leads to the unnecessary incarceration of individuals for nonviolent offenses. It also exacerbates poverty and stigmatizes a valid form of work for many people, including some of the most vulnerable members of society.¹¹⁶ As a result, many of the people arrested for sex work fall further into poverty as they are unable to pay fees, fines, and other monetary demands associated with an arrest. Further, an arrest for sex work

110. Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs>.

111. *Id.*

112. DRUG POL'Y ALL., *THE DRUG WAR, MASS INCARCERATION AND RACE 2* (June 2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf.

113. Jaboa Lake, *Criminal Records Create Cycles of Multigenerational Poverty*, CAP (Apr. 15, 2020), <https://www.americanprogress.org/article/criminal-records-create-cycles-multigenerational-poverty/>.

114. *Id.*

115. DRUG POL'Y ALL., *supra* note 112.

116. Alanna Vagianos, *Rep. Ayanna Pressley Calls To Decriminalize Sex Work In Criminal Justice Resolution*, HUFFPOST (Nov. 14, 2019), <https://pressley.house.gov/media/in-the-news/huffpost-rep-ayanna-pressley-calls-decriminalize-sex-work-criminal-justice> (“sex work is often the only form of work for certain marginalized communities who are most vulnerable to housing and employment discrimination.”).

results in negative collateral effects, including reductions in access to housing, employment, health care, and other services.¹¹⁷

Sex work already serves as a valid form of work for many impoverished and marginalized individuals.¹¹⁸ It often pays more than minimum wage and can equip individuals with the power and resources to lift themselves out of poverty.¹¹⁹ Decriminalization of sex work officially recognizes the work as valid and reduces the stigma, discrimination, and potential collateral effects of such work, thus, aiding poverty reduction. “Decriminalizing sex work recognizes the ways in which people are being pushed to the margins, the ways in which people are being criminalized for surviving.”¹²⁰ Ultimately, decriminalizing sex work is a step toward decriminalizing poverty, a crucial step to reducing mass incarceration.

To fully decriminalize sex work and work towards decriminalizing poverty, legislators should decriminalize all consensual sex work among adults. Such legislation would require the abolition of all criminal punishments for both buyers and sellers of sex work. To better address issues of mass incarceration, such legislation should be retroactive, allowing the expungement of the criminal records of individuals who have been charged with sex-work offenses.¹²¹ Legislators should also enact legislation that promotes health, safety, and equal opportunities for sex workers. The police funding originally allocated for policing sex work can be reallocated to invest in policies and community resources to promote safety, health, and economic opportunities for communities that have been significantly impacted by the criminalization of sex work.¹²² Sex workers themselves can provide recommendations to drive these policies.

To promote the health and safety of sex workers, legislators should enact legislation that prohibits discrimination by service providers, especially health-care providers, against sex workers.¹²³ Legislators should also enact policies to guarantee consequences against people who engage in violence, physical, or sexual abuse against sex workers. Such policy will require that victims of abuse have access to healthcare, mental health services, and support throughout the assault and abuse reporting process.¹²⁴ Lastly, legislation should abolish any remaining barriers to sex workers’ ability to access public benefits, employment opportunities, and housing that have stemmed from the criminalization and stigmatization

117. Bryn Greenwood, *Sex work encompasses more than what we see on TV, and it saved me from poverty*, LILY (Aug. 27, 2019), <https://www.thelily.com/sex-work-encompasses-more-than-what-we-see-on-tv-and-it-saved-me-from-poverty/>.

118. Vagianos, *supra* note 116.

119. *Id.*

120. *Id.* (quoting Saye Joseph, a member of Decrim NY).

121. ACLU, IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US 18 (2020), <https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us> [hereinafter Sex Work Decriminalization].

122. *Id.* at 19.

123. *Id.* at 20.

124. *Id.*

of sex work.¹²⁵ Again, legislators can speak and work directly with sex workers to determine what benefits have been withheld and to formulate effective policy.

3. The Decriminalization of Mental Health Crises

Another crucial avenue for reducing overcriminalization is to decriminalize mental health crises. Mental illness is overwhelmingly prevalent in impoverished communities as well as the prison population.¹²⁶ Mental illness can, and often does, stem from trauma.¹²⁷ Trauma can change the way that the brain chemically and psychologically operates.¹²⁸ Trauma associated with marginalization and extreme poverty can lead to increased cases of mental illnesses in these vulnerable communities.¹²⁹ Mental illnesses can make it more difficult to succeed in school or work, often reducing employment and housing prospects and exacerbating poverty.¹³⁰ Individuals suffering from the negative economic consequences of mental illness may resort to crime to pay for food and other necessities.

Similarly, an overwhelming number of people in prison suffer from mental illness because of the current criminalization of mental illness. Often when someone is suffering a mental health crisis, especially in a lower-income community, the first responders are police officers, even though they are often not trained to effectively deal with complex mental health episodes. People who are suffering from a serious mental illness are often incarcerated instead of receiving the treatment they need.¹³¹ Often people do not receive the proper treatment for their mental health illnesses in prison.¹³² The lack of effective treatment further exacerbates the mental illness, drives mass incarceration, and hurts families and communities. Almost 40% of people in prison have been diagnosed with a mental illness.¹³³ Approximately two million people who are arrested each year have been diagnosed with a serious mental illness.¹³⁴ When incarcerated, people with mental health issues stay almost double the length of time as other similarly charged individuals.¹³⁵

125. *Id.*

126. *The Undeniable Link Between Mental Illness and Mass Incarceration*, GoSo (May 10, 2021), <https://www.gosonyc.org/2021/05/10/undeniable-link-mental-illness-mass-incarceration/>.

127. *Mental Illness and Mass Incarceration*, FAIR FIGHT INITIATIVE, <https://www.fairfightinitiative.org/mental-illness-and-mass-incarceration/#:~:text=At%20the%20Fair%20Fight%20Initiative,at%20no%20cost%20to%20them> (last visited Feb. 22, 2023).

128. See *The Undeniable Link Between Mental Illness and Mass Incarceration*, *supra* note 126.

129. *Id.*

130. *Id.*

131. *Id.* (explaining that because the first responders to a mental illness crisis are often police who are not trained to effectively deal with the complex nature of a mental health episode, the individual who is suffering a mental health crisis is more likely to be arrested).

132. *Id.*

133. *Id.*

134. *Id.*

135. NAMI, DECRIMINALIZING MENTAL ILLNESS 1 (2017), https://www.nami.org/getattachment/Get-Involved/NAMI-National-Convention/Convention-Program-Schedule/Hill-Day-2017/FINAL-Hill-Day-17-Leave-Behind-_De-Criminalizing-Mental-Illness.pdf.

Investment in community-based treatment is needed to decriminalize mental illness. Such an investment would save taxpayers money as they would be spending less money to incarcerate those suffering from mental illness. The money saved can be reallocated into the further development of community resources and counseling services, the funding of social workers to equip them to respond to mental health crises, and the training of police officers and law enforcement agencies to help them de-escalate crises and promote safety in times in which they may have to respond to an individual suffering a mental health crisis.¹³⁶ Such policies would promote better access to necessary care for those suffering from mental illnesses while also reducing the prison population and poverty levels.

4. The Decriminalization of Homelessness

To reduce overcriminalization it is also essential to decriminalize homelessness. Mass incarceration and poverty are driven by the fines, citations, and arrests associated with homelessness and crimes of necessity that arise out of homelessness. There are much more effective ways to address issues stemming from homelessness than criminalization. These methods are not only effective, but they help prevent homelessness from serving as a driver of mass incarceration and they also will work towards the decriminalization of poverty.

One proposed reform is the establishment of homeless courts. Individuals use homeless courts when the individual facing charges is currently living in a state of homelessness. The individual goes to a homeless court and works with a shelter caseworker to work towards self-sufficiency through various programs.¹³⁷ These programs help the individual experiencing homelessness avoid incarceration and avoid the return to homelessness.¹³⁸ Next, legislators must repeal any legislation that punishes people experiencing homelessness for sleeping, eating, or drinking in public areas, that punishes people for helping people experiencing homelessness, or that punishes people experiencing homelessness to a greater extent.¹³⁹ In order to address the criminalization of poverty itself, it is also essential to institute programming to research and address the root causes of homelessness. Money originally spent policing homelessness can be spent to research the causes of homelessness and to create programs to provide stable housing, counseling, and professional development programs to combat homelessness. For example, the city of Austin uses diverted funds to convert hotels into permanent supportive

136. *Id.*

137. *About Homeless Courts*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_interest/homelessness_poverty/initiatives/homeless-courts/about-homeless-courts/ (last visited Feb. 22, 2023).

138. *Id.*

139. *Commission on Homelessness and Poverty*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/homelessness_poverty/policy-resolutions/106-decrim-of-homelessness.pdf (last visited Feb. 22, 2023).

housing units for individuals living in a state of homelessness.¹⁴⁰ The residences grant individuals access to mental health and substance use counseling, workforce development, and job placement services.¹⁴¹ Such a program can serve as a model for decriminalizing and addressing homelessness.

B. Restricting the Use of Fines, Fees, Money Bail, and Pretrial Detainment

One way to combat mass incarceration and poverty is through the restriction of the use of fines, fees, money bail, and pretrial detainment. In the past forty years, the use of monetary sanctions in the criminal justice system has significantly increased.¹⁴² This increase runs parallel to the escalation of mass incarceration, while mass incarceration itself has been used by legislators to justify the increase in fees and fines.¹⁴³ Such a justification implies that these fees and fines will be used primarily, if not exclusively, for the criminal justice system, however, legislators have used these fines and fees as revenue-raising devices to fund government services completely unrelated to the criminal justice system.¹⁴⁴ Such use has resulted in increased fines that the majority of Americans in the criminal justice system cannot afford,¹⁴⁵ often resulting in additional fines, increased debt, and jail time for individuals who are unable to pay.

Fines and fees serve different functions in the criminal justice system. Fines are often imposed when a person is found to have violated the law.¹⁴⁶ Fines can be issued for minor infractions, such as traffic offenses, instead of jail time. However, they can also be issued in addition to jail time or probation.¹⁴⁷ Fees, on the other hand, are additional monetary sanctions imposed by state and local governments for individuals to access services or for funding different government systems.¹⁴⁸ Courts, probation departments, and prosecutors are often granted discretion to impose different fees to reimburse the costs to local governments for probation, diversion programs, or imprisonment.¹⁴⁹ Fees follow at every stage of the criminal justice system. Before a person is arrested, he may be subjected to

140. Alia Nahra & Hernandez D. Stroud, *There Is No One Answer to Over-Policing and Mass Incarceration — There Are Many*, BRENNAN CTR. FOR JUST. (Nov. 15, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/there-no-one-answer-over-policing-and-mass-incarceration-there-are-many>.

141. *Id.*

142. Foster, *supra* note 5, at 5.

143. *Id.*

144. Foster, *supra* note 5, at 5, 7–8 (explaining that in New Jersey, fees on traffic tickets are used to fund Autism research; in Arizona surcharges imposed on civil and criminal fines are used to fund statewide elections; in California the \$390 additional fees added to the \$100 violation associated with running a red light is used to fund the Fish and Game Preservation Fund, the Office of Emergency Services, and the Traumatic Brain Injury fund).

145. *Id.*

146. *Id.* at 5.

147. *Id.*

148. *Id.*

149. *Id.* at 7.

warrant fees.¹⁵⁰ At arrest, fees include booking and bond fees. At the conviction stage, fees include fees for prosecution, public defense, DNA testing, and court security. During incarceration, fees include fees for room and board, phone calls, and medical visits or care. Lastly, probation results in probation and drug testing fees,¹⁵¹ like those experienced by Cindy Rodriguez.¹⁵²

When an individual is not able to pay, fines may be increased or the person may face incarceration, further perpetuating the cycle of mass incarceration and poverty.¹⁵³ Similarly, the use of money bail and pre-trial detainment significantly impairs those already living in poverty, while driving mass incarceration. While money bail and pre-trial detainment have been used to ensure that a defendant shows up to their court date, and in some cases, promote public safety.¹⁵⁴ However, these facets of the criminal system criminalize the poor and drive mass incarceration by discriminating against poor individuals. Money bail and pre-trial detainment keep poor individuals in prison, simply because they cannot pay the specific bail amount. When an individual is not able to post bail, he may be detained pretrial even though he may still be legally innocent. In fact, over 400,000 people in the U.S. are currently being held in pretrial detainment.¹⁵⁵ Days spent in prison can result in lost wages, loss of employment, and other economic consequences—further exasperating poverty.

With the introduction of new legislation, the use of fines and fees can be reduced, restricted, or completely abolished.¹⁵⁶ Fines can be made affordable and equitable by basing fines on an individual's income rather than issuing uniform fines for everyone and by making fines proportional to the offense. Legislation should ban police from enforcing payments, thus reducing unnecessary police contact and over-policing. Legislators should also completely abolish the issuance of warrants, penalties, and incarceration for failure to pay.¹⁵⁷ Similarly, legislation should be enacted to allow for pretrial release, without bail, for misdemeanors and low-level offenses if the individual is not a threat to public safety.¹⁵⁸ Such policy will greatly reduce the prison population, restrict the criminalization of an individual's inability to pay, and restrict the incarceration of individuals before being proven guilty.

150. *Id.*

151. *Id.*

152. *See supra* Introduction.

153. Emily Dindial & Nicole Zayas Fortier, *Stop Criminalizing Poverty*, ACLU OF MINN. (June 14, 2021), <https://www.aclu-mn.org/en/news/taxation-citation-3>.

154. Miriam Aroni Krinsky & Christian Gossett, *With Money Bail, System Continues to Criminalize Poverty*, USA TODAY (July 27, 2017), <https://www.usatoday.com/story/opinion/policing/2017/07/28/alternatives-bail-police-policing-the-usa-money/513032001/>.

155. *Pretrial Detention*, PRISON POLY INITIATIVE, https://www.prisonpolicy.org/research/pretrial_detention/ (last visited Feb. 22, 2023).

156. *Id.*

157. *Id.*

158. Emily Bazelon, *If Prisons Don't Work, What Will?*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/opinion/mass-incarceration-sentencing-reform.html>.

To further decriminalize poverty and reduce mass incarceration, low-level offenses and traffic violations should also be decriminalized. These offenses result in a significant number of fines and arrests when an individual is unable to pay. For example, the ACLU published a report of an individual who was fined \$175 for illegally tinted windows.¹⁵⁹ The individual faced additional court fees that were added to the ticket, totaling over \$1,000. When the individual could not afford the fine, he lost his driver's license, faced an arrest warrant, incarceration, and faced additional charges—which added up to thousands of dollars. He lost his job and health insurance, hurt his credit score, and began to suffer from anxiety attacks that required hospitalizations.¹⁶⁰

C. Reducing Collateral Effect of Incarceration

To fully address and reduce the interplay between poverty and mass incarceration, it is crucial to work to address the negative impact prison has on individuals, families, and communities after an individual's incarceration. The collateral effects of incarceration greatly impact individuals, families, and communities by resulting in significant challenges, discrimination, and restrictions for the previously incarcerated individual. Collateral effects make poverty reduction significantly more difficult, may increase poverty levels, and may drive mass incarceration as the collateral effects can increase the likelihood of parole and probation violations and recidivism. Thus, meaningful criminal justice reform must also address the collateral effects of incarceration and ensure that people are not being criminalized for any poverty resulting from or exacerbated by these effects.

1. Establish a Method to Expunge Criminal Records After an Extended Period of Time for Individuals Who Do Not Re-offend

To address the collateral effect of incarceration it is necessary to establish a method to expunge the criminal records of individuals who have not reoffended after a specific period. Pennsylvania's Clean Slate Act, introduced in 2018, could potentially serve as a model for this method.¹⁶¹ The Clean Slate Act expunges any record for which an individual was not convicted, even if charged for other charges in the case. The law also requires the automatically sealing of records of a conviction after 10 years for most misdemeanors.¹⁶² This law helps to combat the collateral effects and discrimination that individuals with criminal records face, especially in securing employment, housing, and other economic opportunities. By restricting the effects of a criminal record and incarceration on an

159. ACLU, RECKLESS LAW MAKING: HOW DEBT-BASED DRIVER'S LICENSE SUSPENSION LAWS IMPOSE HARM AND WASTE RESOURCES 18 (2021), https://www.aclu.org/sites/default/files/field_document/reckless_lawmaking_aclu_final_4.19.21.pdf.

160. *Id.*

161. Michael Tanner, *Poverty and Criminal Justice Reform*, CATO INST. (Oct. 21, 2021), <https://www.cato.org/study/poverty-criminal-justice-reform>.

162. *Id.*

individual's economic opportunities, the effect of mass incarceration on the poverty cycle can be restricted. Further, by limiting the effects of incarceration on poverty through the reduction of collateral effects on individuals who are re-entering society, the likelihood of an individual's recidivism will also likely be restricted. Thus, this solution has a clearly cyclic positive effect on mass incarceration and poverty.

Additional methods of reducing the collateral effects of incarceration should include the introduction of programming to educate employers and landlords about the minimal risk of hiring or housing people with criminal records.¹⁶³ Additionally, legislators could further encourage the hiring of previously incarcerated individuals by enacting legislation to guarantee that employers will not face liability for hiring people with criminal records.¹⁶⁴ Money saved from the resultant reduced recidivism and incarceration rates can be redirected to fund programs and incentives, such as tax write-off incentives or funding, for landlords and employers who hire and house formerly incarcerated individuals. Lastly, the enactment of legislation can better protect the privacy of people who have been convicted of certain crimes. For instance, privacy rights can be increased for people convicted of minor offenses by enacting a policy that prevents the public release of the names of people convicted of minor offenses.¹⁶⁵ Such a policy would allow these individuals to avoid some of the discrimination associated with having a criminal record without threatening public safety.

2. Upgrade Programs within the Prison System to Better Prepare Offenders to Transition into Society

To combat the challenges associated with the collateral effects of incarceration, it is crucial to better equip incarcerated individuals to re-enter society when they are released. The lack of resources, guidance, and opportunities presented to previously incarcerated individuals trying to re-enter society poses a significant risk of recidivism. Fifty percent of previously incarcerated individuals are unable to find stable jobs within a year of re-entry and are ten times more likely to be homeless. This presents people with limited options: they may re-offend to survive.¹⁶⁶ Upgrading prison programming to better rehabilitate and prepare incarcerated individuals to re-enter society at the end of their sentence can greatly reduce the risk of recidivism. For instance, incarcerated individuals who receive an education in prison are 43% less likely to re-offend.¹⁶⁷ Educational programming can also result in increased employment opportunities after incarceration, further reducing recidivism.¹⁶⁸ Increased employment opportunities and reduced recidivism rates will ultimately save taxpayers money in the long run and as they

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Dolan & Carr, *supra* note 18, at 14.

are not paying to incarcerate as many people.¹⁶⁹ These savings can be used to fund additional programs to aid previously incarcerated individuals in their transition.

Introducing and upgrading prison programming itself is not sufficient to combat high recidivism rates. Even when there are beneficial programs in prison, some individuals choose not to participate if their sentences are very long, and they do not see the point in participating in such programs, such as getting a GED, if they will not be getting out for fifty years.¹⁷⁰ Thus, it will also be important to incentivize incarcerated individuals to participate in these programs. For instance, an incentive could be that incarcerated individuals can get time off their sentences for participating in these programs or can get recognized for good behavior. Prisons can institute programs where formerly incarcerated individuals who have re-entered society come speak or serve as mentors for individuals currently incarcerated to help guide them through the re-entry process and stress the importance of participating in these programs while individuals are still in prison. The individuals who have gone through the re-entry process themselves will be able to emphasize the importance of these programs and honestly tell currently incarcerated individuals what they need to do while in prison to prepare themselves for release.¹⁷¹ Similarly, previously incarcerated individuals who have already gone through the re-entry process can serve as some of the best advisors to prison programming personnel in the development of programs to best equip incarcerated individuals to successfully re-enter society in the future.¹⁷²

There are a series of ways to upgrade prison programming to help encourage rehabilitation and successful re-entry. First, improvements need to be made to ensure adequate educational, substance abuse, mental health, and career programming in prison. Second, it is crucial to implement and connect prisoners with re-entry programs that help individuals navigate re-entering society. These programs should help prisoners to address practical obstacles presented in the re-entry process, such as obtaining social security cards, birth certificates, and licenses; helping with navigation and transportation from the prison to the place the individual will be staying; connecting formerly incarcerated individuals with publicly-funded counseling services to continue treatment for addiction and substance abuse; dealing with the overstimulation associated with re-entry and other common challenges re-entry presents; and equipping formerly incarcerated individuals with necessary life skills. For example, counselors can spend sessions working with formerly incarcerated individuals to work on conflict resolution skills to equip individuals to be able to handle challenges in the home, in relationships,

169. *Id.* (explaining that it costs over \$80 billion annually in the United States to maintain the prison system and that unemployment for individuals with criminal records lowers the GDP by up to \$65 billion per year).

170. Tyrone Walker, Presentation on Incarcerated Individual's Re-Entry into Society, Georgetown Law Criminal Justice Reform, Shon Hopwood (Feb. 16, 2022).

171. *Id.*

172. *Id.*

and in the workplace. Additionally, prisons need to implement programming that will connect formerly incarcerated individuals with career service providers to help them find stable employment or apply for unemployment or other public benefits. This will help the individuals avoid discrimination in seeking employment but will also equip them with resources to survive if they become unemployed, reducing their need to re-offend to survive. Implementing these programs will help combat high recidivism rates, reduce mass incarceration, and reduce the collateral effects of incarceration on poverty.

V. REBUTTALS

The solutions proposed in this discussion are not sufficient alone to end mass incarceration. Decriminalizing certain crimes, reducing sentences, or exempting nonviolent offenses from incarceration is not enough to end mass incarceration because violent offenders make up most of the prison population.¹⁷³ However, many of the proposed reforms can expand to violent offenders too if prisons work to improve rehabilitative programs in prison. Criminology and the reasons an individual commits a crime are nuanced. It is logical to reconsider an individual's, even a violent individual's, sentence after they have spent time in prison and have participated in rehabilitative programs. For example, some people commit crimes at very young ages, some commit crimes to survive, some commit crimes to get money to feed an addiction, and some commit crimes for various other reasons. Upgraded prison programming that provides more adequate rehabilitation and treatment, paired with the adoption of a poverty reduction lens in sentencing, criminal justice reform, and legislation, may make it possible to directly address why someone originally committed a crime and prevent them from reoffending.

To truly end mass incarceration, it is essential to keep researching and addressing the causes of crime, the interplay between crime and poverty, and the impact of incarceration on individuals, families, and communities. Consequentially, it is crucial to address the consequences the proposed solutions may have on society. Many people may argue that reform that restricts harsh sentences and decriminalizes certain behavior poses threats to public safety or exacerbate criminal behavior; however, this is likely not the case for the many solutions proposed throughout this discussion.

In proposing to decriminalize drugs or expel mandatory minimum sentences for drug offenses, some individuals are likely to argue that such reforms will increase drug use. However, this is not necessarily true. There is not always an exact link between outlawing behavior and the actual behavior occurring. For instance, the prohibition period did not decrease alcohol consumption.¹⁷⁴ Criminalizing drugs does not necessarily decrease drug consumption. However, it does increase the number of people facing criminal charges and incarceration for

173. Bazelon, *supra* note 158.

174. Mark Thornton, *Alcohol Prohibition was a Failure*, CATO INST. (July 17, 1991), <https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure>.

using drugs.¹⁷⁵ Individuals may also argue that decriminalizing drugs poses a threat to public safety as it encourages drug dealing. Drug dealers do pose a threat to public safety as the dealing of drugs can lead to fatal batches in the form of laced drugs or people overdosing. However, the legalization and regulation of drugs may work to reduce fatal batches of drugs.¹⁷⁶

Similarly, opponents of the decriminalization of sex work will likely argue that it will subject people, especially sex workers, to unsafe conditions. Criminalizing sex work keeps sex workers in “hidden” environments where they can be subjected to abuse. The legalization of sex work can lead to safer environments and conditions for sex workers.¹⁷⁷ Further, legislators can work directly with sex workers to develop policies that help sex workers feel safe. For instance, legislators could repeal laws and policies that prohibit online screenings of clients for sex workers.¹⁷⁸ These screenings provide a crucial method for reducing the risk of engaging with a dangerous or exploitative client.¹⁷⁹ Additionally, repealing these policies will also remove an obstacle to using these platforms to identify and find victims of trafficking.¹⁸⁰

While opponents to these reforms may try to argue that the decriminalization of mental illness or homelessness poses a risk to public safety, such an argument is unwarranted. There is no evidence that the criminalization of homelessness—charging someone for eating, drinking, sleeping, or living in public spaces—will make society any safer. If the public is concerned that people experiencing homelessness are dangerous, it makes sense to address the root causes of homelessness to reduce the number of people experiencing it. Similarly, if the public believes that people experiencing mental crises are dangerous, it is more beneficial to directly address mental illness by equipping people with treatment and resources that ensure that their illnesses will not become dangerous crises. Besides, it is unlikely that increasing police training or funding for social workers to better respond to mental illness crises will pose a greater threat to public safety than continuing to allow inadequate responses that often escalate the risk of danger.

Opponents may argue that reducing fines and fees will limit government funds. It is true that the government uses fines and fees associated with minor offenses and traffic violations to raise money to maintain and fund the criminal justice system. However, it is also true that government services completely unrelated to the criminal justice system receive funding from these fines and fees.¹⁸¹ Further, reducing fines and fees will reduce the prison population, which is costly

175. Scott, *supra* note 98.

176. Note: The federal regulation of drug dealing and consumption can negatively impact the earning potential of people who currently sell drugs to survive. Such an effect may have negative consequences on poverty reduction. Such considerations are beyond the scope of this paper but are worth exploring elsewhere.

177. Vagianos, *supra* note 116.

178. Sex Work Decriminalization, *supra* note 121, at 20.

179. *Id.*

180. *Id.*

181. Foster, *supra* note 5, at 5, 7.

to maintain. The funds saved by incarcerating fewer people will mitigate the loss of funds resulting from reduced fines and fees. Further, reducing the number of people imprisoned because of unpaid fines will help these prisoners' families and communities avoid the consequences that can result from incarceration, including lost wages. For every one dollar spent on prison education, taxpayers save five dollars because such programming lowers recidivism and the public is not forced to pay the cost of trials and incarceration.¹⁸² By reducing the prisoner population, the government can reallocate funds from prisons to other programs that receive funds from fines and fees.

Similarly, opponents of the restriction of money bail and pre-trial detainment may argue that such restrictions will pose a threat to public safety. However, there is no proven correlation between a person's ability to pay bail and whether that person is likely to cause harm to another person while out on bail.¹⁸³ Further, the pre-trial detainment system already restricts bail for people who are thought to be dangerous or a flight risk. Thus, pre-trial detainment serves no purpose for non-violent or non-dangerous individuals. Rather, limiting pre-trial detainment is more in accordance with the constitutional liberty to be free from such detainment unless proven guilty.¹⁸⁴

Improving prison programming to better rehabilitate and prepare formerly incarcerated individuals to re-enter society does not pose a public safety risk. However, some individuals may argue that such programs will cost taxpayers money. With a reduced prisoner population, the government may reallocate funds to upgrade prison programming and services outside of prison to decrease recidivism and minimize the collateral effects of incarceration. Opponents of such reform may argue that expunging the criminal records of previous offenders will pose a public safety risk, but this argument is unlikely to succeed for two reasons. First, the proposed reform would initially only apply to non-violent offenders who do not pose a public safety risk. If the government extends the reform to violent offenders, it would only apply to violent offenders who have spent significant periods out of prison without re-offending. If the government improves programming and services in and out of prison, the public is more likely to believe that formerly incarcerated individuals have been rehabilitated and do not pose a threat to public safety.

CONCLUSION

Mass incarceration is a demanding problem that will take many years, continued research, and continued reform to fully address. However, to effectively work towards ending mass incarceration, criminal justice reform must require the

182. Professor Shon Hopwood, Georgetown Law, Criminal Justice Reform Seminar (Feb. 16, 2022).

183. Susan Guidry, *Why is bail more closely tied to wealth than risk?*, VERA INST. OF JUST., (Sept. 4, 2015), <https://www.vera.org/news/justice-in-katrin-as-wake/why-is-bail-more-closely-tied-to-wealth-than-risk>.

184. U.S. CONST. amend. VII.

decriminalization of poverty. Poverty has such a great impact on mass incarceration that it will be impossible to fully address mass incarceration without adopting a poverty reduction approach to criminal justice reform. Further, mass incarceration has such a great impact on poverty that it is necessary to address the causes of each phenomenon in tandem. While there is no perfect solution to mass incarceration, poverty, or the interplay between the two, many of the solutions proposed in this discussion are essential to moving towards a reduction in both incarceration and poverty. While there are likely many opponents who will argue against these proposed reforms, the research indicates that these proposed reforms do not pose a threat to public safety and, if enacted effectively, can significantly improve our criminal justice system as well as the lives and well-being of many individuals, families, and communities.