

Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law

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A widely decried crisis confronts U.S. criminal law. Jails and prisons are overcrowded and violence plagued. Additional causes for alarm include the rate of increase of incarcerated populations, their historically and internationally unprecedented size, their racial disproportionality, and exorbitant associated costs. Although disagreement remains over the precise degree by which incarceration ought to be reduced, there is a growing consensus that some measure of decarceration is desirable.

With hopes of reducing reliance on conventional criminal supervision and incarceration, specialized criminal courts proliferated dramatically over the past two decades. There are approximately 3,000 specialized criminal courts in the United States, including drug courts, mental health courts, veterans courts, and reentry courts. The existing scholarly commentary on specialized criminal courts is largely trapped in the mode of advocacy, alternately celebratory or disparaging, and insufficiently attentive to the remarkable variation between different specialized criminal courts. In contrast, this Article takes a closer and more critical look at the marked expansion of these courts as a peculiar strategy to devise alternatives to conventional jail- and prison-based sentencing.

This Article reveals that specialized criminal courts have become significant terrain for a contest between competing criminal law reformist models and that different outcomes in this contest may portend starkly contrasting futures for U.S. criminal law and governance. More specifically, this Article introduces a typology and critical theoretical account of four criminal law reformist models at work in specialized criminal courts: a therapeutic jurisprudence model, a judicial monitoring model, an order maintenance model, and a decarceration model. Part II argues that, whereas the first three of these models threaten to

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aggravate existing pathologies in U.S. criminal law administration—expanding criminal supervision, diminishing procedural protections, and possibly even increasing incarceration despite opposite intended effects—the fourth, less predominant model, a decarceration model, holds the potential to bring about substantial transformative change in U.S. criminal law. On a decarceration model, specialized criminal courts function as experimental diversionary programs that assign otherwise jail- or prison-bound defendants mental health and drug treatment, job and housing placement, along with other services in lieu of incarceration. On this model, integration within social contexts outside criminal justice systems substitute for the surveilling function of criminal supervision and incarceration.

Part III provides a theoretical framework to capture the possibilities for criminal law reform opened by a decarceration model, which may cognitively reframe shared understandings of crime and punishment; engage in institutional reinvention, transforming criminal law administrative institutions into different configurations; and facilitate systemic change by spurring conceptual shifts and freeing resources from criminal law administration for other sectors. Part IV begins to explore the more general perils attending a specialized criminal courts law reform strategy, including excessive legalism; dilution of the retributive and deterrent features of criminal punishment; inefficient proliferating specializations; and legitimation of harshness in conventional courts and unfairness toward less sympathetic, racial minority, or otherwise stigmatized defendants.

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INTRODUCTION

Significant change is afoot in U.S. criminal law. There remain roughly seven million people incarcerated, on probation, or on parole in the United States¹—a quantum of criminal law oversight roundly condemned by commentators across the political spectrum and around the world.² But by the turn of the twenty-first

1. See, e.g., LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 1 (2011); PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009); see also Carol S. Steiker, *Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1, 1 (2011) (“The American rate of incarceration has increased more than fivefold since 1972 . . . [and] [t]he current rate is more than 700 per 100,000 The United States[’] . . . rate of incarceration [is] . . . higher than even the most violent societies and most oppressive regimes on the planet[.] . . . The change in American incarceration rates is a shift relative to a previously stable baseline that can only be described as revolutionary” (footnotes omitted)).

2. See, e.g., Charlie Savage, *Trend To Lighten Harsh Sentences Catches On in Conservative States*, N.Y. TIMES, Aug. 12, 2011, <http://www.nytimes.com/2011/08/13/us/13penal.html> (noting increasing support in traditionally conservative states for reduced incarceration, including on the part of prominent conservatives such as Edwin R. Meese III, Grover Norquist, and Asa Hutchinson); see also *Mass Incarceration in the United States: At What Cost?: Hearing Before the J. Econ. Comm.*, 110th Cong. 1–2 (2007) (opening statement of Sen. Jim Webb) (“[T]he United States now imprisons a higher percentage of its citizens than any other country in the world. . . . The growth in the prison population is only nominally related to crime rates. . . . The racial composition of America’s prisons is alarming. . . . [W]e are spending enormous amounts of money to maintain [the prison] system.”); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 3 (2010) (noting conservative support for eliminating mandatory minimums); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (“As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys’ offices and police departments. . . . In a criminal justice system that incarcerates two million people, criminal law is becoming a sideshow. It seems like, and is, an unhealthy state of affairs.”); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74, 74 (“[T]he joint rolling back of the stingy social state and rolling out of the gargantuan penal state . . . have remade the country’s stratification, cities, and civic culture, and are recasting the

century, largely in response to growing censure and in the face of escalating costs, states across the country committed to decrease reliance on incarceration.³ Alongside state-initiated reforms, federal prison conditions litigation contributed further incentives to decarcerate. Most notably, the U.S. Supreme Court in *Brown v. Plata* affirmed an order of a specially convened three-judge district court, which mandated that California reduce its prison population by 40,000 prisoners over two years to eliminate unconstitutional conditions.⁴ Yet, while pressures to decarcerate mount, it remains unclear how it will be possible to achieve the larger scale shifts necessary to reach and sustain markedly lower levels of criminal prosecution, criminal supervision, and incarceration.⁵

As one part of a broader effort to reduce reliance on conventional probation and carceral sentencing, beginning in the early 1990s, state court judges began to convene specialized criminal courts from Florida to California, Michigan to Texas: drug courts, mental health courts, veterans courts, and reentry courts, among others.⁶ These increasingly popular specialized criminal courts—of which there are approximately 3,000 in the United States and its territories—assume various legal institutional forms and divergent jurisprudential approaches.⁷ Nonetheless, despite considerable variation, what most of the courts share in common is the goal of reducing reliance on conventional jail- and

very character of ‘blackness’ itself.”); Newt Gingrich & Pat Nolan, Op-Ed., *Prison Reform: A Smart Way for States To Save Money and Lives*, WASH. POST, Jan. 7, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> (exploring the substantial potential of decarceration to reduce costs and crime).

3. See, e.g., JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, *Downscaling Prisons: Lessons from Four States* 1–2 (2010); see also David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011).

4. See 131 S. Ct. 1910, 1944–47 (2011); see also Solomon Moore, *California Prisons Must Cut Inmate Population*, N.Y. TIMES, Aug. 4, 2009, <http://www.nytimes.com/2009/08/05/us/05calif.html>.

5. See, e.g., Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109 (2011); Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, DÆDALUS, Summer 2010, at 124.

6. Several points of terminological clarification are in order. “Carceral” sentencing refers to prison- and jail-based criminal sanctions. I use the term “specialized criminal court” to refer to courts that specialize in a specific subset of criminal cases, such as matters in which defendants are veterans or the charged conduct is drug related. This specialization is distinct from that of many state trial courts that hear criminal cases exclusively and are specialized in that respect. See LAWRENCE BAUM, *Specializing the Courts* xi (2011). “Decarceration” refers to the consistent reduction of the number of people sent to prison or jail, with the ultimate aim of abandoning imprisonment as a dominant mechanism for achieving social order.

7. See, e.g., RACHEL PORTER ET AL., CTR. FOR COURT INNOVATION, *What Makes a Court Problem-Solving?: Universal Performance Indicators for Problem-Solving Justice* iii, 50–56 (2010). There is overwhelming bipartisan endorsement of specialized criminal courts and every state has at least one such court. See, e.g., RESOLUTION 22: IN SUPPORT OF PROBLEM-SOLVING COURT PRINCIPLES AND METHODS (Conference of Chief Justices & Conference of State Court Adm’rs, adopted July 29, 2004), <http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf>; see also GREG BERMAN & JOHN FEINBLATT, *Good Courts: The Case for Problem-Solving Justice* 9–10 (2005); Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125, 130 (2004) (“[T]hese courts have developed a new architecture—including new technology, new staffing, and new linkages—to improve the effectiveness of court sanctions, particularly intermediate sanctions . . .”). Criminal court specialization has also influenced criminal law administration abroad. See

prison-based sentencing in favor of problem-oriented alternatives.⁸ The courts also empower judges to adopt neo-realist problem-oriented roles, embrace less adversarial criminal procedures, and aspire to more effectively protect public safety and prevent crime.⁹

It is uncertain, though, what specialized criminal courts actually portend. Are these courts configured in a manner that is likely to facilitate the intended goals of reduced or more efficacious criminal supervision and reduced incarceration? Or, as some critics charge, do specialized criminal courts improve judges' experience in the courts by emphasizing anti-formalist, problem-oriented proceedings without tending to resolve the legal systemic and social problems the courts purport to address?¹⁰

This Article offers an account of how specialized criminal courts *may* enable substantially reduced reliance on incarceration as well as more general transformative criminal law reform by embracing a criminal law reformist framework, which I term a *decarceration* model. However, this Article will argue that, in their currently predominant institutional forms, specialized criminal courts threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration.

The existing scholarship on specialized criminal courts treats particular substantively specialized criminal courts—drug courts, for example—as a largely undifferentiated category, either celebrating or proposing the abandonment of specialized criminal law administration across the board. On the one hand, some commentators commend specialized criminal courts for facilitating “a quiet revolution among American criminal courts”¹¹ and the emergence of a new “criminal justice paradigm.”¹² Also among the courts' supporters are those who

JAMES L. NOLAN JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT (2009).

8. See BERMAN & FEINBLATT, *supra* note 7, at 6 (“[P]roblem-solving courts seek to reduce the criminal justice system’s reliance on incarceration”); John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 98 (2007).

9. See BERMAN & FEINBLATT, *supra* note 7, at 5–10.

10. See, e.g., JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001).

11. See BERMAN & FEINBLATT, *supra* note 7, at 3; NOLAN, *supra* note 10, at 185 (“What we are doing here is no less than a complete revolution in jurisprudence.” (quoting Judge Peggy Hora)).

12. See Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 463–64 (1999) (describing how drug courts work to “shift the paradigm” of legal processing of drug cases); see also DRUG STRATEGIES, DRUG COURTS: A REVOLUTION IN CRIMINAL JUSTICE 2, 5 (1999) (“[T]his entirely new approach has revolutionized traditional attitudes toward criminal justice.”). A separate body of empirical analyses focuses on how specialized criminal courts reduce costs and recidivism, though it is not always clear whether these studies adequately control for potential selection and attrition biases. See, e.g., SHANNON M. CAREY & MARK S. WALLER, NPC RESEARCH, OREGON DRUG COURT COST STUDY: STATEWIDE COSTS AND PROMISING PRACTICES (2011) (finding that Oregon drug courts have produced cost savings, and are projected to save taxpayers even

herald specialized criminal courts as “experimentalist governance” mechanisms enabling much-needed social and legal change not achievable through more conventional judicial or legislative intervention.¹³ On the other hand, the courts’ detractors—criminal law scholars and criminal defense lawyers alike—have called for the abandonment or marked scaling back of specialized criminal courts as “contraindicated” and anathema to the reformist goals the courts’ architects hoped to achieve, largely on account of procedural rights concerns.¹⁴ Both of these sharply divided responses approach each type of substantively specialized criminal court as internally homogeneous and either entirely praiseworthy or entirely dangerous. Accordingly, there has been insufficient attention both to the remarkable variation between specialized criminal courts and to the different consequences potentially associated with the courts’ divergent approaches.

This Article demonstrates, instead, that specialized criminal courts have become the locus of an ongoing contest between four primary competing models of reformist criminal law administration. These models are characterized by dissimilar legal institutional features and distinct ideological and theoretical commitments. And these divergent approaches push in quite different directions in terms of their likely effects on incarceration practices, levels of criminal supervision, and other desired criminal law reforms.

Consider this motley assortment of specialized criminal courts and the various criminal offenses, sentences, ideologies, and possible outcomes associated with each. First, the Veterans Court of Okemos, Michigan and the case of Staff Sergeant Brad Eifert, a veteran of the Iraq War. Armed with a .45-caliber pistol,

more in the future); Scott W.M. Burrus et al., *Show Me the Money: Child Welfare Cost Savings of a Family Drug Court*, JUV. & FAM. CT. J., Summer 2011, at 1, 10–11 & tbl.2 (finding that family drug court in Baltimore, Maryland reduced foster care-related expenditures); see also SHELLI B. ROSSMAN ET AL., URBAN INST., *THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS* 246–47 (2011) (concluding that “drug courts—while effective at reducing costly criminal offending—are also expensive enough to offset those costs”).

13. See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 883 (2000) (“The very existence of treatment courts is remarkable, their rapid diffusion, provisional successes, and continual experimentalist self-examination doubly so. . . . Surely there is hope for the renewal of our public institutions in this surprising success.”). Proponents of specialized criminal courts generally contend that conventional U.S. criminal law administration is deeply compromised, and specialized criminal courts may better address individual cases and improve criminal justice results overall. See, e.g., Brenda Bratton Blom et al., *Community Voice and Justice: An Essay on Problem-Solving Courts as a Proxy for Change*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 25, 36–37 (2010).

14. See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786, 830–35 (2008) (critically examining adverse consequences of drug courts and proposing instead that such courts be transformed into voluntary rehabilitation programs) (“Put concretely, drug courts are ‘contraindicated’ for genuine addicts. . . . The consequent adverse effects may be atypically long prison sentences for the very defendants that drug courts were supposed to keep out of prison and off of drugs.” (footnote omitted)); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57, 80–82 (2009); see also NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* (2009).

Eifert initiated a shoot-out with police in the woods adjacent to his home:

The police were out there somewhere and, one way or the other, [Eifert] was ready to die. He raised the gun to his head and then lowered it. Then he fired nine rounds.

....

Leaving his weapon, he ran into the driveway, shouting, "Shoot me! Shoot me! Shoot me!" The police officers subdued him with a Taser and arrested him. A few hours later, he sat in a cell at the Ingham County Jail, charged with five counts of assault with intent to murder the officers, each carrying a potential life sentence.

....

... Eifert, having pleaded guilty to a single charge of carrying a weapon with unlawful intent, a felony, will officially enter the veterans court program. . . . [In t]welve to 18 months[,] . . . if he adheres to the strict regimen of treatment through the Veterans Affairs hospital in Battle Creek and supervision set by the court, the charge could be dismissed or reduced to a misdemeanor.¹⁵

Compare Eifert's case and the Okemos Veterans Court to Florida's Broward County Mental Health Court. In the words of Broward County's Judge Ginger Lerner-Wren:

[T]he Mental Health Court [is] a "strategy" to bring fairness to the administration of justice for persons being arrested on *minor* offenses who suffer from major mental disability. . . . Persons with major psychiatric disorders and/or mental disabilities can live and thrive in the community with individualized care, treatment and community support.¹⁶

Whereas Eifert's case involved a more serious weapons charge carrying a potentially lengthy prison sentence, Judge Lerner-Wren's Mental Health Court concentrates on individuals accused of minor crimes. Yet, both the Broward County Mental Health Court and the Okemos Veterans Court rely on alternative sanctions that entail treatment primarily outside the specialized criminal court.

Other specialized criminal courts rely heavily on judicial monitoring as part and parcel of alternative sentencing, rather than primarily on referral to social services outside the criminal court, effectively tasking the judge with the work of a probation or parole officer. For example, the Syracuse, New York Drug Treatment Court significantly expands judicial surveillance of minor drug offenders and uses arrest and incarceration as routine sanctions for noncompliance with court mandates. As sociologist James Nolan explains, in one instance:

15. See Erica Goode, *Coming Together To Fight for a Troubled Veteran*, N.Y. TIMES, July 17, 2011, <http://www.nytimes.com/2011/07/18/us/18vets.html>.

16. DEREK DENCKLA & GREG BERMAN, CTR. FOR COURT INNOVATION, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 17 (2001) (emphasis added).

A participant in Judge McKinney's Syracuse, New York drug court lost his job. McKinney called the employer and learned that the client was regarded as a "damn good employee" and that the boss would "hire him back in a heartbeat" if the judge could guarantee that he was drug free and that he wouldn't miss any work. So the judge made a deal with the employer. He said to him: "Okay, I'll make a deal with you, you take him back and I'll add another weapon to your arsenal. If he doesn't come to work when he is supposed to, doesn't come to work on time . . . I'll put him in jail, on your say so." [The judge relayed the arrangement to the defendant,] telling him: "I'll get your job back for you, but you've got to promise you'll be at work when you are supposed to . . . Your employer is now on the team of people who are reporting to me. When he calls up and tells me that you are late, or that you're not there, I'm going to send the cops out to arrest you."¹⁷

This approach may extend criminal supervision into new domains such as the employment context and in so doing may increase levels of at least short-term incarceration. Quite distinctly, the mental health and veterans courts' approaches just related are characterized by a combination of diversionary treatment strategies that do not necessarily rely heavily on judicial surveillance or other forms of direct criminal supervision by the court.

These examples illustrate some of the considerable diversity in the institutional configurations and conceptual orientations of specialized criminal courts. These courts may focus on more minor offenses or more serious ones. They may rely primarily on referrals to social service organizations or on direct judicial oversight. The court proceedings themselves may aim to facilitate behavioral modification, or social service intervention may occur entirely outside the court context. And diversion may take place pre-plea, post-plea, or as a post-conviction sentencing alternative.

To begin to make sense of this diverse landscape, this Article introduces a typology and critical theoretical account of four criminal law reformist models at work in specialized criminal courts:

- (1) a therapeutic jurisprudence model;
- (2) a judicial monitoring model;
- (3) an order maintenance model; and
- (4) a decarceration model.¹⁸

The first three of these models, I argue, possess characteristics that pose a considerable risk of deepening and extending existing pathologies in criminal law administration, exacerbating overcriminalization and potentially expanding

17. See James L. Nolan, Jr., *Therapeutic Adjudication*, 39 *SOCIETY* 29, 32 (2002).

18. See *infra* Part II.

incarceration. But the fourth model—a decarceration model—promises to begin to reduce levels of criminalization and incarceration and to develop experimentalist and sociologically informed alternatives to criminal law intervention.

These four models consist of generally interconnected institutional features and ideological commitments on which the courts draw. Although numerous courts reflect some characteristics of more than one model, the models are prototypes to which existing courts roughly adhere. In identifying these basic contrasting approaches, this typology serves to illuminate some of the underappreciated variation between and among different specialized criminal courts, thereby distinguishing the specific risks associated with distinct bundles of legal institutional and ideological features, facilitating more informed empirical analysis and clarifying the contours of various possible reform agendas being tested in the specialized courts context.

Before delving in greater depth into the four models and their associated aspirations, risks, and limitations, a brief overview of each model will help to set the stage for the analysis to follow. Courts operating on a *therapeutic jurisprudence* model adopt a neo-rehabilitative approach, convening courts to therapeutically treat offenders (and in some instances victims).¹⁹ On a therapeutic jurisprudence model, the judge personally attempts to facilitate a therapeutic process in court through routine proceedings, intermediate sanctions, and in some instances jail- or prison-based sentencing. Substantial efforts are devoted to making *court proceedings themselves* part of ongoing psychotherapeutic interventions aimed at behavioral modification.

The second model relies upon intensive *judicial monitoring*, focusing on deterrence, defendant accountability, and expanded judicial surveillance as an alternative or adjunct to incarceration.²⁰ A court operating solely in conformity with a judicial monitoring model eschews the court-centered rehabilitative psychotherapeutic ambitions that are central to the therapeutic jurisprudence model and instead emphasizes deterrent judicially administered surveillance.

A third model, emphasizing *order maintenance*, operates largely in community courts, which address relatively minor public order violations through locally administered intermediate sanctions such as community service.²¹ Courts reflecting an order maintenance model are characterized primarily by their focus on low-level quality-of-life offenses inspired by a “broken windows” theory of policing and do not necessarily embrace either therapeutic or judicially surveillant features.

Then, there is the fourth, less common model, the theoretical orientation and reformist potential of which this Article will elaborate: a *decarceration* model. Specialized criminal courts adopting a decarceration model are experimental diversionary programs that assign otherwise likely jail- or prison-bound defen-

19. See *infra* section II.A.

20. See *infra* section II.B.

21. See *infra* section II.C.

dants mental health and drug treatment, job and housing placement, along with other services in lieu of incarceration.²² On a decarceration model, integration within social institutions outside the criminal court substitutes for the surveilling function of criminal supervision and incarceration.²³ The significant reformist possibility in a decarceration model arises principally from its directly diversionary orientation coupled with rigorous ongoing empirical monitoring of court experimentation to establish whether and, if so, how non-carceral sentencing may be applied in particular contexts without undue risk to public safety.²⁴

The models are distinct from, though often overlapping with, the self-definitions and names of the courts. In other words, the models are composed of bundles of legal institutional and ideological features identified through my research in preparation of this Article—through site visits, analysis of archived interviews, and a review of quantitative and qualitative empirical studies—not exclusively, or even primarily, in reference to the self-descriptions of the various courts. So while a drug court might conform to an order maintenance model or a therapeutic jurisprudence model, in either instance the court may still be called simply a drug court. Likewise, a mental health court might reflect features of a judicial monitoring model but be referred to plainly as a mental health court. Courts adopting a diversionary decarceration approach are similarly not called decarceration courts but are identified as drug courts or mental health courts—and for reasons of political expedience, avoiding the decarceration terminology may be prudent. Other courts with characteristics corresponding to a therapeutic jurisprudence model may tailor the courts' names to reflect their therapeutic orientation, as in a therapeutic drug court or drug treatment court. Even though multiple institutional models may coexist in one court, one or another model generally predominates in any given specialized criminal court.

22. A decarceration model is potentially applicable to any specialized criminal court—a mental health court, veterans court, drug court, or reentry court—which is organized in significant part to decrease reliance on incarceration and to devise more effective and humane sentencing alternatives. See *infra* sections II.D–IV.

23. See *infra* section II.D.

24. A notable feature of many specialized criminal courts, and one common to courts adopting a decarceration model, is the incorporation of resident or external researchers within the courts' institutional design. Internal and external empirical monitoring entities generate extensive information regarding the courts' operations. See, e.g., Dorf & Sabel, *supra* note 13, at 833 (“What makes the drug courts distinctive and innovative . . . is the novel form of monitoring, and governance more generally, upon which they rely.”). But see David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008) (critically analyzing democratic experimentalism for mistakenly assuming consensus, reliable metrics for measuring success, and costless deliberation, among other problems). A decarceration model of specialized criminal law administration aims to take on board some of Super's critiques of democratic experimentalism and, at the same time, to embrace institutional flexibility and ongoing empirically informed self-evaluation, with attention to building consensus on the substantive ends of reducing reliance on incarceration through alternative forms of social integration.

Model	Defining Characteristics	Theory
Therapeutic Jurisprudence	Judge seeks to fulfill therapeutic function, personally addressing psychosocial motivation to offend through therapeutically attuned court proceedings	Neo-rehabilitative, Therapeutic Jurisprudence
Judicial Monitoring	Judge fulfills surveillant role akin to probation or parole officer	Deterrence through Judicial Surveillance
Order Maintenance	Court provides forum for prosecuting quality-of-life offenses that would otherwise receive little attention in conventional criminal courts	“Broken Windows” Order-Maintenance Hypothesis: Reducing low level quality-of-life offending will improve respect for law and decrease crime overall, thereby reducing incarceration
Decarceration	Court aims primarily to reduce reliance on carceral sentencing by referring defendants to mental health, public health, job training, and other sectors that serve substitute surveilling function, and outcomes are monitored to demonstrate possibility of expanding non-carceral approach	Structural/Systemic Origins of Overcriminalization & Overincarceration: Social integration fulfills informally surveillant function, a preferable substitute for incarceration in wide range of cases

The following table illustrates the defining characteristics and theoretical bases of each of the four models.

This Article’s core argument is that the therapeutic jurisprudence, judicial monitoring, and order maintenance models may fall short in reducing criminal supervision and incarceration and threaten to produce otherwise harmful outcomes; a decarceration model, however, stands to facilitate broader transformative criminal law reform, setting in motion change processes that could over time reduce reliance on criminal prosecution and incarceration as a way of regulating an array of complex social problems. The risks attributed by critics to any one particular type of specialized criminal court—drug courts, for instance—are thus better understood as potential problems with particular models (bundles of legal institutional and ideological features) of reformist criminal law administration, certain of which may even tend to extend surveillance, diminish procedural protections, and expand incarceration.²⁵

Due to this variation, coming to terms with the shifts in criminal law manifest in specialized criminal courts will not be achieved either by simply embracing

25. Cf. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 14; Bowers, *supra* note 14.

or by rejecting the turn to criminal court specialization. Rather, the effects of specialized criminal courts will depend on an ongoing competition over the shape and ambition of these courts. And a decarceration-focused criminal law reform agenda—emerging in specialized criminal courts that attempt to navigate the perils and harness the possibilities identified in the pages to follow—holds the promise of enabling a form of criminal law administration more narrowly tailored to address that conduct for which criminal law intervention is most suited, allocating to other sectors the management of a range of social concerns from addiction to mental illness.

Importantly then, the impact of these reformist models reaches beyond the context of specialized criminal courts. At this moment of increasing bipartisan interest in criminal law reform aimed at reducing incarceration, the models at work in specialized criminal courts are likely to take on wider significance, informing more general criminal law reform strategies. For this reason, attention to these contrasting reformist approaches at work in specialized criminal courts merits the sustained attention of criminal law scholars and others concerned about the steep costs—economic and human—of the status quo in U.S. criminal law administration and about the harms endemic in our carceral institutions.

This Article consists of four parts. Part I situates the contemporary explosion of specialized criminal courts within a range of ongoing criminal law reforms implemented to reduce levels of criminal supervision and incarceration. Part I proposes that, as states and the federal government aim to decrease reliance on incarceration, specialized criminal courts contribute an array of criminal law reformist frameworks that may inform the wide-ranging, largely ad hoc changes occurring more generally in U.S. criminal law.

Part II provides a typology and critical analysis of four criminal law reformist models reflected in the rapidly multiplying assortment of specialized criminal courts. Part II considers not only whether these models are likely to fulfill their stated purposes but also some of their possible broader effects. An implication of the analysis in Part II is that the study of specialized criminal courts ought to proceed in a different way than it has to date, by attending carefully to the legal institutional and conceptual differences between the various criminal law reformist models that the typology introduced here identifies. Part II contends that, in certain legal institutional configurations, specialized criminal courts may well thwart the courts' overarching shared ambition of countering overcriminalization and overincarceration, and that they may cause other underappreciated harms. Yet, if differently configured, the courts contain considerable broader reaching reformist possibilities.

Part III explores three strategies that may enable a decarceration model to realize its reformist potential to reduce reliance on conventional criminal supervision and incarceration as well as to facilitate other transformative shifts in U.S. criminal law. Part III proposes that, though it is unlikely and possibly

undesirable that specialized criminal courts would be brought to scale,²⁶ even in relatively small numbers a decarceration model may effect farther reaching reform by facilitating cognitive reframing of particular categories of crime and punishment, engaging in institutional reinvention, and enabling systemic change. Finally, Part IV considers the perils of a specialized criminal courts law reform approach more generally and begins to respond to anticipated objections.

The analysis in Parts I through IV is informed by observation of proceedings in an array of specialized criminal courts; archived interviews with specialized court judges, court administrators, and court participants; a review of hundreds of the courts' promotional materials; additional primary source material concerning a national range of specialized criminal courts; the legal academic and sociological literature on the courts; and previously unexamined studies of the courts conducted by government agencies and independent research entities.²⁷

I. A SHIFTING CRIMINAL LAW

Dissatisfaction with the status quo in U.S. criminal law administration has led to a range of attempts to establish alternatives. The precise contours of what such alternatives should entail are uncertain. This Part will first take stock of the broad shifts ongoing in U.S. criminal law. Although these shifts lack an orienting conceptual framework, specialized criminal courts have become grounds for elaborating different criminal law reformist models, four of the most significant of which are explored in Part II.

Preliminarily, what does the status quo in conventional U.S. criminal law administration entail? A powerful body of criminal law and social theoretical scholarship bears witness to the tremendous expansion and deepening harshness of U.S. criminal law administration during the latter decades of the twentieth and beginning of the twenty-first centuries: to the harms and economic burdens caused by both overcriminalization and overincarceration;²⁸ to the “culture of control” these practices engendered;²⁹ and to the United States’ “harsh justice” regime,³⁰ under which “the poor” and “urban outcasts” suffer most,³¹ and

26. See, e.g., PORTER ET AL., *supra* note 7, at 8 (“The potential for bringing the [specialized criminal] problem-solving court model to scale . . . remains largely unrealized . . .”).

27. See *infra* Parts I–IV.

28. See, e.g., BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); see also John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

29. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

30. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

31. LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009); LOIC WACQUANT, *URBAN OUTCASTS: A COMPARATIVE SOCIOLOGY OF ADVANCED MARGINALITY* (2008); WESTERN, *supra* note 28.

through which we all are “governed through crime.”³² As substantive criminal law expanded dramatically, prosecutorial power mushroomed and so did case load pressures and reliance on plea-bargaining.³³ During the 1980s and 1990s, a range of causal forces pushed toward a form of governance in the United States that relied heavily on conventional criminal law administration to maintain social order, in large part through policing, arrest, prosecution, probation, and often lengthy prison sentences.³⁴ The results have been disastrous, exceedingly expensive, and inhumane: racial and class disproportion in U.S. criminal courts, jails, and prisons is staggering, with African-American men incarcerated at a rate six times greater than that of white men and nearly one in three young African-American men without a high school education living behind bars.³⁵ Prison and jail overcrowding is a persistent crisis.³⁶ Sexual assaults in detention settings are daily occurrences.³⁷ Even for those not subject to violent physical or sexual abuse, what Charles Dickens wrote of American jails and prisons well over a century ago remains true today: “[T]his slow and daily tampering with the mysteries of the brain . . . [visits] ghastly signs and tokens . . . not so palpable to the eye and sense of touch as scars upon the flesh . . .”³⁸ “[T]hese frustrations,” in the words of sociologist Gresham Sykes in his path-breaking study, *The Society of Captives*, “carry a . . . profound hurt . . . directed against the very foundations of the prisoner’s being. The individual’s picture of himself as a person of value—as a morally acceptable, adult . . . who can present some claim to merit in his material achievements and his inner strength—begins to waver and grow dim.”³⁹

32. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

33. See William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2550 (2004) (“The greater the territory substantive criminal law covers, the smaller the role that law plays in allocating criminal punishment.”).

34. See, e.g., SIMON, *supra* note 32; LOIC WACQUANT, *PRISONS OF POVERTY* 5 (2009).

35. See HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, *PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 2* (2010) (“Black non-Hispanic males . . . were incarcerated at a rate more than 6 times higher than white non-Hispanic males . . .”); Bruce Western et al., *Crime, Punishment, and American Inequality* 7 (June 2003) (unpublished working paper), available at <http://inequality.princeton.edu/papers/western-crime.pdf> (“Incredibly, 29 percent of black male dropouts under age 40 were behind bars on an average day in 2000.”); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); WESTERN, *supra* note 28; Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004).

36. See, e.g., JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS* 23, 26–27 (2006).

37. See, e.g., HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS*, at v. 63 (2001); see also Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2 (2011) (“[I]t is well recognized that people who are gay or transgender face heightened vulnerability to sexual victimization behind bars.” (footnotes omitted)).

38. CHARLES DICKENS, 1 *AMERICAN NOTES FOR GENERAL CIRCULATION* 239 (Chapman & Hall 2d ed. 1842).

39. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 79 (1958).

Of the approximately 13.5 million people who spend time in U.S. prisons or jails over the course of a year, ninety-five percent return to communities outside. They bring with them the psychic toll of living amidst violence and despair and the heightened risk of having acquired contagious diseases, impacting the public health and public safety of communities around the country.⁴⁰ Further, costs to maintain high levels of incarceration—with one in thirty-one adults in the United States under some type of correctional control⁴¹—have become exorbitant and particularly politically unpopular during a period of significant fiscal constraints.⁴²

As these costs of managing a range of social ills through criminal law and punishment have become increasingly apparent, the hold of these practices is slowly loosening.⁴³ This poses anew a long-standing question of how to attempt differently to achieve some measure of social order, whether through reformed criminal law administration, the market economy, and/or reconfigured social welfare policies.⁴⁴

Even absent widely shared alternative conceptual frameworks to address this question, legislatures and courts, cognizant of the problems posed by expansive criminalization and incarceration, have begun to intervene to scale back the reach of criminal law, at least with regard to certain categories of offenses and offenders. Crime rates have remained relatively low, including violent crime rates, generating greater openness to less punitive, less prison-focused approaches.⁴⁵ The following sections briefly review the range of contemporary criminal law reform efforts, first in the arenas of legislation, law enforcement, and litigation, and then in the context of specialized criminal courts, which will be the focus of the remainder of this Article.

40. See, e.g., GIBBONS & KATZENBACH, *supra* note 36, at 11.

41. See PEW CENTER ON THE STATES, *supra* note 1, at 1 (also noting that among certain demographics correctional supervision rates are even starker—for example, one in eleven African-Americans are under correctional control).

42. See, e.g., JOHN SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 2, 10 (2010).

43. See, e.g., Mary Bosworth, *Penal Moderation in the United States?: Yes We Can*, 10 CRIMINOLOGY & PUB. POL'Y 335, 335–36 (2011).

44. See Shelley Johnson Listwan et al., *Cracks in the Penal Harm Movement: Evidence from the Field*, 7 CRIMINOLOGY & PUB. POL'Y 423, 450 (2008).

45. See, e.g., Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489 (2010); Allison Klein, *Drop in Violent Crime in D.C. Area and Some Other Major Cities Puzzles Experts*, WASH. POST, July 20, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/19/AR2009071902154.html>; Evan Perez, *Violent Crime Falls Sharply*, WALL ST. J., May 25, 2010, <http://online.wsj.com/article/SB10001424052748704113504575264432463469618.html>; see also FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 57–98 (2007) (critically analyzing the tendency to attribute crime decline to any single explicit policy change); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 170–83 (2004) (explaining the decline in crime in terms of legalized abortion, increased police presence, more incarceration, and decrease in crack cocaine use).

A. REFIGURING HARSH JUSTICE: LEGISLATION, LAW ENFORCEMENT, LITIGATION

There is an increasing openness on the part of legislatures, courts, and the public to experiment with criminal law administrative alternatives, but across the numerous contexts of ongoing reform there is no common conception of how an alternative social-order-maintenance regime may operate without extensive reliance on conventional criminal law enforcement. Importantly as well, the ad hoc shifts in criminal law administration are occurring in the absence of an account of how current shifts will be sustained in the event that one egregious crime causes popular punitive sentiment to rise again.

Generally, recent legislation has shortened prison terms,⁴⁶ recharacterized some of what were previously felonies to misdemeanors,⁴⁷ and reduced sentences for nonviolent offenses.⁴⁸ Additional measures divert people charged with lower-level drug offenses from carceral sentences, apply graduated sanctions to those who violate the rules on probation or parole, and focus resources on reentry so as to avoid reincarceration.⁴⁹

At the state level, along with other criminal law reforms, mandatory minimums have been eliminated in multiple jurisdictions. Michigan, for example, has done away with mandatory minimum sentences for the vast majority of drug offenses.⁵⁰ Kansas revised its sentencing guidelines to mandate treatment rather than prison for persons convicted of drug possession.⁵¹ In 2009, New York repealed the Rockefeller drug laws, which mandated sentences of at least

46. See, e.g., N.Y. CORRECT. L. §§ 270–273 (McKinney 2003 & Supp. 2012) (providing authority to counties and the city of New York to convene “local conditional release commissions” to consider candidates for early release); 61 PA. CONS. STAT. ANN. §§ 4503–4506 (West 2010) (permitting a reduction of up to twenty-five percent of non-violent offender’s sentence to encourage offender to engage in rehabilitative programming); see also Kirk Mitchell, *First 10 Felons Set Free Under Colorado Early-Release Initiative*, DENVER POST, Oct. 15, 2009, http://www.denverpost.com/ci_13564285; Riley Yates, *Release Plan for Convicts Starts Slow*, PITTSBURGH POST-GAZETTE, Sept. 26, 2010, at A14. The Commonwealth of Pennsylvania has estimated that its Recidivism Risk Reduction Incentive (RRRI) program—created by the statutory provisions cited above—saves the state nearly \$10,000 per RRRI inmate, for a total savings of more than \$11 million over the first two years of the program’s existence. BRET BUCKLEN & JACQUELINE YOUNG, PA. DEP’T OF CORR., RECIDIVISM RISK REDUCTION INCENTIVE 2010 REPORT 1 (2011).

47. See, e.g., Jessica Fender, *More Rehab, Less Jail in Drug-Reform Measure*, DENVER POST, Feb. 24, 2010, http://www.denverpost.com/ci_14459351 (reporting on Colorado legislation reducing offense of possession of between eight and twelve ounces of marijuana from a felony punishable by up to six years in prison to a misdemeanor); see also Debi Brazzale, *HB10-1352: Lawmakers Unite Behind New Approach to Drug Offenders*, STATE BILL NEWS (Feb. 24, 2010), <http://www.statebillnews.com/2010/02/hb10-1352-lawmakers-unite-behind-new-approach-to-drug-offenders/> (reporting on the same Colorado legislation).

48. See, e.g., Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. (forthcoming 2012) (working paper draft at 2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1804539.

49. GREENE & MAUER, *supra* note 3, at 1.

50. *Id.* at 3.

51. *Id.* Subsequently, Michigan achieved a twelve percent reduction in its prison population and Kansas a five percent reduction. See *id.* at 2.

fifteen years for possession of as little as four ounces of a narcotic drug.⁵² California Senate Bill X3 18, passed in 2009, introduced numerous changes to reduce reliance on imprisonment, including authorizing nonrevocable parole, increasing the minimum dollar quantity for some felony-level property crimes, and raising the number of “good-time credits” prisoners are eligible to earn through educational programs, treatment participation, or firefighting work.⁵³

At the federal level, the Second Chance Act of 2007 provides federal funding to the states for new criminal justice initiatives aimed at reducing recidivism and reincarceration.⁵⁴ The legislation supports appropriations for state and federal programs providing employment assistance, substance abuse treatment, and housing along with other services for individuals with criminal convictions.⁵⁵ And, in 2010, Congress passed a bill to reduce the disparity in crack and powder cocaine sentencing from 100:1 to 18:1.⁵⁶

Accompanying these legislative changes, police departments are increasingly participating in diversionary programs at the preindictment stage, seeking to reduce reliance on arrests, prosecution, and prison- and jail-based punishment.⁵⁷ Some police departments have transitioned to a “problem-oriented” or “predictive policing” model, which focuses police energies on particular areas where certain crimes are believed to be likely to occur.⁵⁸ The focus is on understanding crime patterns in neighborhoods where a car theft or burglary has taken place and allocating resources to prevent similar future acts in significant

52. See, e.g., JUDITH GREENE, JUSTICE STRATEGIES, POSITIVE TRENDS AND BEST PRACTICES IN CRIMINAL JUSTICE REFORM: A NATIONAL OVERVIEW 12–15 (2009); Casey Seiler, *Paterson Signs Drug Law Reform*, CAPITOL CONFIDENTIAL (Apr. 24, 2009, 11:22 AM), <http://blog.timesunion.com/capitol/archives/13869/paterson-signs-drug-law-reform/> (quoting release from the governor’s office regarding repeal of the Rockefeller Drug Laws and relating “three significant pieces of the new laws,” including first that “they create a drug treatment program to be administered by drug court judges”). From 1999 to 2009, New York reduced its prison population by twenty percent. GREENE & MAUER, *supra* note 3, at 5.

53. See Rosemary Gartner et al., *The Past as Prologue?: Decarceration in California Then and Now*, 10 CRIMINOLOGY & PUB. POL’Y 291, 296, 319 (2011); see also CAL. CITIES GANG PREVENTION NETWORK, 18TH BULLETIN (2010), available at <http://www.ccgpn.org/Publications/CA%20Cities%20Bulletin%2018.pdf> (discussing SB X3 18). Interestingly, the California Correctional and Peace Officers Association did not publicly work against SB X3 18, though this may be due to the legislation’s limited anticipated effects on prison reliance. See Gartner et al., *supra*, at 319.

54. Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 18 and 42 U.S.C.). Like other legislative reforms enabling alternatives to incarceration, Second Chance Act programs must establish that they are “evidence-based,” requiring an evaluation using “evidenced-based methodology and outcome measures.” *Id.* § 101(d)(3); see also *id.* §§ 3(a)(3), 113, 201(c)(2)(D), 231(d)(3)(B), 241(b)(6).

55. *Id.* §§ 111, 112.

56. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; see also Jim Abrams, *Congress Passes Bill To Reduce Disparity in Crack, Powder Cocaine Sentencing*, WASH. POST, July 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072802969.html>.

57. See, e.g., DAVID M. KENNEDY, DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA (2011) (documenting Professor Kennedy’s implementation of his “Operation Ceasefire” program in cities throughout the United States, with the cooperation of local police departments).

58. See, e.g., Erica Goode, *Sending the Police Before There’s a Crime*, N.Y. TIMES, Aug. 15, 2011, <http://www.nytimes.com/2011/08/16/us/16police.html>.

measure through design interventions such as improved lighting and visibility, or more frequent patrols.⁵⁹

Shifts are also reflected in Supreme Court case law. Rehabilitation—for decades largely rejected as a theory of punishment—was invoked by the Court in its 2010 opinion in *Graham v. Florida*, which extended proportionality review in the noncapital context to restrain penal severity.⁶⁰ The Court categorically invalidated the sentence of life imprisonment without parole for juveniles for nonhomicide offenses on the grounds that the sentence rejected “altogether the rehabilitative ideal,” providing “no chance for reconciliation with society, no hope” for one who committed a crime while still “a child in the eyes of the law.”⁶¹ And in *Brown v. Plata*, a majority of Supreme Court justices joined an opinion upholding a specially convened three-judge district court’s prison population reduction order and decrying the inhumane conditions for mentally ill and infirm inmates in California’s prisons.⁶²

These developments are in line with recommendations to reduce dependence on incarceration and criminal supervision urged by liberal criminal law scholars and criminologists since at least the mid-1990s.⁶³ Many of these reforms have more recently been embraced by political conservatives as well.⁶⁴

Although these changing approaches and attitudes have affected every level of criminal law administration from policing to parole and probation, there is nonetheless a more general, persistent uncertainty about how better to administer criminal law so as to depart significantly from current practices—and perhaps more critically, how to *expand* and *sustain* support for alternatives to incarceration and conventional criminal supervision. Part of what is lacking is what criminologist Mary Bosworth describes as a “coordinated conceptual framework to help shift not only penal institutions and practices but also those more subtle structures of feeling and belief that have proven so effective in ratcheting up punitive practice.”⁶⁵

Specialized criminal courts are engaged in the work of shaping coordinated

59. See, e.g., RONALD V. CLARKE, U.S. DEP’T OF JUSTICE, SHOPLIFTING 20 (2002), available at <http://www.cops.usdoj.gov/pdf/e10011345.pdf>; see also Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1041–42 (2002); Cecelia Klingele et al., Essay, *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 975–76.

60. 130 S. Ct. 2011, 2028–33 (2010).

61. *Id.* Subsequently, in its 2011 opinion in *Tapia v. United States*, the Court rejected rehabilitation as a ground on which to impose a lengthier federal prison sentence. 131 S. Ct. 2382, 2393 (2011) (holding that “a court may not impose or lengthen a prison sentence . . . to promote rehabilitation”).

62. 131 S. Ct. 1910, 1944–47 (2011).

63. See, e.g., PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 23–40 (2009) (citing studies exploring harms associated with high levels of incarceration); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–97 (2004) (citing and discussing scholarship focused on incarceration-related harms).

64. Perhaps most prominently, the right-wing criminal law reform campaign, “Right on Crime,” is committed to markedly reducing reliance on incarceration. See, e.g., Savage, *supra* note 2.

65. See Bosworth, *supra* note 43, at 336; see also ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 21 (2003) (“The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor.”).

conceptual and institutional frameworks to inform criminal law reform processes, and there are at least four distinct reformist approaches represented in existing specialized criminal courts. The following section explores the emergence of contemporary specialized criminal courts—their heterogeneous and common ambitions, histories, and ambits—before turning in the following Part to a typology and critical analysis of four reformist models at work in these courts.

B. CRIMINAL COURT REFORM: SPECIALIZED CRIMINAL COURTS

The contemporary specialized criminal courts movement was spearheaded by state court judges dismayed with the miscarriages of justice they witnessed daily in their courts. Although the progenitors of specialized criminal courts sought initially only to devise different solutions for their respective local jurisdictions, the specialized courts approach took off and the courts' influence expanded nationally. As specialized criminal courts spread across the United States, the courts came to reflect considerable institutional diversity.

Of the approximately 3,000 specialized criminal courts in the United States, the original and most numerous are drug courts. Beginning in the late 1980s and early 1990s, judges dissatisfied with their role in processing drug cases began to convene drug courts to reduce reliance on incarceration in favor of treatment and other monitoring processes for drug-related offenses. Among the first contemporary adult specialized criminal courts, the Miami-Dade Drug Court was established in 1989 to reduce reliance on jail and prison in dealing with low-level drug offenders.⁶⁶ To promote these initiatives, state court judges collaborated with prosecutors, public defense counsel, and ultimately state legislatures and the federal government. Former Attorney General Janet Reno, when she was a local prosecutor in Florida, was instrumental in establishing the Miami-Dade Drug Court; and then, when Reno became Attorney General of the United States, she used her control over federal criminal justice spending to urge other states to adopt similar initiatives.⁶⁷ Subsequently drug courts have received overwhelming bipartisan support.⁶⁸

66. BERMAN & FEINBLATT, *supra* note 7, at 9; *see also* NOLAN, *supra* note 10, at 134. Although addiction itself cannot be criminalized, coerced treatment may serve as a response to conviction for possession of narcotics in lieu of a jail or prison sentence. *See* *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding unconstitutional a California statute criminalizing narcotics addiction as cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments). *But see* *Powell v. Texas*, 392 U.S. 514, 532–33 (1968) (plurality opinion) (holding that the Texas statute rendering public intoxication criminal did not constitute cruel and unusual punishment). The Nixon Administration's Treatment Alternatives to Street Crime (TASC) program, a predecessor to the drug court movement, also provided for diversion from adjudication to drug treatment. But TASC differed in that it diverted cases from the courts for treatment, whereas drug courts generally supervise the treatment process itself. *See* NOLAN, *supra* note 10, at 36.

67. BERMAN & FEINBLATT, *supra* note 7, at 203 n.3.

68. *See* ROBERT V. WOLF, CTR. FOR COURT INNOVATION, 'A NEW WAY OF DOING BUSINESS': A CONVERSATION ABOUT THE STATEWIDE COORDINATION OF PROBLEM-SOLVING COURTS 12 (2009) [hereinafter WOLF, A NEW WAY] ("[P]ositive evaluations have generated bipartisan support, allowing [Maryland's] statewide

At the National Drug Court Conference in 1998, Judge Jeffrey Tauber, Oakland, California's first drug court judge and then-President of the National Association of Drug Court Professionals, addressed his audience of more than 2,500 drug court professionals, predicting the growing influence that drug courts would wield in coming years: "[W]e have clearly proven through the work that we've done, through our numbers, through the effectiveness of our courts, that this field, this movement, this organization is ready to take center stage, is ready to move its own agenda forward on . . . the local, state, and national levels."⁶⁹

Indeed, in the years to follow drug courts sprung up around the country. As the number of drug courts increased, their institutional configurations came to vary substantially. Like the first Miami-Dade Drug Court program, drug courts generally aim to help narcotics-involved offenders to stay off drugs by offering the opportunity to enter drug rehabilitation rather than incarceration, but many drug courts increasingly address a range of other crimes presumably associated with drug use, such as shoplifting, prostitution, and burglary.⁷⁰ Some drug courts admit defendants with lengthy and serious felony records, while others limit eligibility to those with nonviolent minor charges.⁷¹

Shortly after the advent of the drug court movement, mental health courts, community courts, domestic violence courts, and, later, veterans courts, sex offense courts, and reentry courts emerged in jurisdictions around the United States. Each of these categories of specialized criminal courts represents a largely judicially innovated attempt to work around perceived inadequacies in the conventional criminal law administrative approach in the area in question—whether arrests and prosecutions of mentally ill individuals, veterans, persons accused of domestic violence, alleged sex offenders, or parolees.

Criminal law administration within specialized criminal courts generally adopts a neo-realist jurisprudence, which its proponents call problem-solving justice or, to my mind more accurately, problem-oriented justice.⁷² This has led

problem-solving committee to influence public policy" (paraphrasing Judge Jamey Hueston of the Maryland Problem-Solving Courts Commission)); ROBERT V. WOLF, CTR. FOR COURT INNOVATION, NEIGHBORHOOD KNOWLEDGE: COMMUNITY PROSECUTION IN WASHINGTON D.C. 3-4 (2001) (noting that, during the Clinton administration, Eric Holder, then deputy attorney general, championed community prosecution); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 84-85 (2002) (noting that Republican New York Mayor Rudy Giuliani introduced certain problem-solving courts as part of a broader order-maintenance crime control policy); *see also America's Oldest War: The Efficacy of United States Drug Policy*, 30 FORDHAM URB. L.J. 401, 411 (2003) ("But we should have new ideas and support things that work, such as drug courts that have treatment with accountability for those with addiction problems" (statement of Asa Hutchinson, former Republican legislator and then-Administrator of the Drug Enforcement Administration)); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 369 (2005).

69. *See* NOLAN, *supra* note 10, at 43-44.

70. *See id.* at 143.

71. *See* BERMAN & FEINBLATT, *supra* note 7, at 8.

72. Although many commentators refer to the problem-oriented approach of specialized criminal courts as "problem-solving justice," I prefer the term "problem-oriented justice" because most of the

some commentators to label all specialized criminal courts interchangeably, “problem-solving courts,”⁷³ a term that connotes an aim on the part of the courts to address problems both in the legal system and in the lives of defendants appearing before the courts.⁷⁴

It is noteworthy that judges themselves have been the primary driving force behind the specialized-criminal-courts movement, working cooperatively with prosecutors, defense counsel, and other interested elected officials to convene specialized criminal courts. As criminal law enforcement expanded during the latter decades of the twentieth century and many more cases entered the criminal courts, dockets swelled.⁷⁵ More cases meant more pressure on judges to resolve cases quickly, leading to reduced judicial morale.⁷⁶ In response to their deep dissatisfaction with their own role in criminal law administration, judges sought to devise an alternative legal institutional framework for at least some categories of criminal cases, obtaining initially the support of locally elected prosecutors and, subsequently, as the specialized-criminal-court initiatives expanded, broader legislative support.⁷⁷ In promoting specialized court programs as a criminal law reform standard, judges and other court advocates increasingly have collaborated with specialized court consultants, such as the

relevant “problems” are unlikely to be “solved” by the courts and because the conceptual origins of this approach lie in problem-oriented policing. See Greg Berman & Aubrey Fox, *The Future of Problem-Solving Justice: An International Perspective*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1 (2010) (exploring the emergence of the rubric of problem-solving justice and the nature of some of the profound problems the courts aim to address).

73. See, e.g., PAMELA M. CASEY & DAVID B. ROTTMAN, NAT’L CTR. FOR STATE COURTS, *PROBLEM-SOLVING COURTS: MODELS AND TRENDS* (2003); JUSTICE POLICY INST., *ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES* 2 (2011).

74. BERMAN & FEINBLATT, *supra* note 7, at 5 (“[A] case is a problem to be solved, not just a matter to be adjudicated.”); GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, *PROBLEM-SOLVING COURTS: A BRIEF PRIMER* 3 (2001) (“Problem-solving courts use their authority to forge new responses to chronic social, human and legal problems—including problems like family dysfunction, addiction, delinquency and domestic violence—that have proven resistant to conventional solutions.”); NOLAN, *supra* note 10, at 141 (“[T]he issue of guilt/innocence is not of concern.” (quoting Judge McKinney)); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1127 (2005) (“Problem-oriented approaches challenge law enforcement personnel to abandon their traditional reactive orientations in favor of proactive efforts to solve social problems . . .”). Public defenders have also proposed more problem-oriented advocacy, focusing on “holistic” client-centered defense rather than on victory in a particular case. See, e.g., Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender’s Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 124 (2004).

75. See BERMAN & FEINBLATT, *supra* note 7, at 23–24.

76. Criminal law reformers convened specialized criminal courts as thousands of new cases entered the system. The greatest increase in case filings was in the area of domestic relations where, between 1984 and 1998, cases increased by seventy-five percent. These increases were caused in part by expanding criminal law enforcement, which resulted in more police officers and more cases went forward due to expanded prosecutorial funding and “‘no-drop’ prosecution policies.” See *id.* at 23–26.

77. See Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 955–56 (2003) (quoting Justice Kathleen A. Blatz of Minnesota’s Supreme Court and citing BERMAN & FEINBLATT, *supra* note 74). The Honorable Jonathan Lippman, Chief Judge of the New York Court of Appeals, has likewise described New York’s specialized criminal courts as “a judicially-created, statewide architecture.” Jonathan Lippman, *How One State Reduced Both Crime and Incarceration*, 38 HOFSTRA L. REV. 1045, 1053 (2010).

Center for Court Innovation, a New York City-based organization, and with legal academics.⁷⁸

State legislatures and the U.S. Congress have endorsed the specialized courts approach by incorporating diversionary specialized court sentencing into statutory provisions and by authorizing state and federal funding for specialized criminal courts. In this regard, the specialized courts movement may be understood as a widely endorsed work-around of political process defects: whereas “tough on crime” norms make decriminalization or other downscaling of punishment less available, specialized criminal courts allow officials to appear “smart” rather than “soft” on crime. For example, in 2000 Congress enacted America’s Law Enforcement and Mental Health Project, which authorized federal funds for states and counties to develop mental health courts and diversion programs rather than more directly tackling the overincarceration of mentally ill persons.⁷⁹ Financed with a combination of state and federal funding, mental health courts aim to address the disproportionate number of persons with mental illness under criminal supervision and to reduce reliance on incarceration in responding to the conduct of mentally ill individuals. Although the first generation of mental health courts largely excluded persons charged with violent offenses, some mental health courts now accept individuals facing violent felony charges.⁸⁰ Also in 2000, the Office of Justice Programs’ Reentry Court Initiative funded reentry courts to facilitate ex-convicts’ returns from prison to their respective communities of residence.⁸¹ Reentry courts convene team-based efforts that typically involve a judge, a social worker, and a mental health professional, who design a diversionary social service supervisory regimen for parolees and help to facilitate access to employment and housing.⁸²

Veterans courts, convened beginning in the mid-2000s, are specialized courts established to address socially disruptive behavior on the part of veterans, many of whom are suffering mental health problems arising from combat-related post-traumatic stress disorder.⁸³ Those accused of violent crimes are in some instances able to participate in veterans courts, which rely on alternative sentences involving predominately mental health and medical treatment along with

78. See, e.g., CTR. FOR COURT INNOVATION, www.courtinnovation.org.

79. Pub. L. No. 106-515, 114 Stat. 2399 (2000).

80. See Henry J. Steadman et al., *From Referral to Disposition: Case Processing in Seven Mental Health Courts*, 23 BEHAV. SCI. & L. 215, 220 (2005); Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 112 (2007).

81. See JUSTICE POLICY INST., *supra* note 73, at 18.

82. See ROBERT V. WOLF, CTR. FOR COURT INNOVATION, REENTRY COURTS: LOOKING AHEAD 11–12 (2011); *Reentry Courts: An Emerging Trend*, REENTRY POLICY COUNCIL (Sept. 20, 2005), http://reentrypolicy.org/announcements/reentry_courts_emerging_trend.

83. See Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 563–70 (2010); William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Those Who Served To Help Troubled Vets Regain Discipline*, *Camaraderie*, ABA J., Nov. 2011, at 42–48.

other services.⁸⁴

In contrast to drug courts, mental health courts, and veterans courts, domestic violence courts and sex offense courts generally operate with less reference to rehabilitative goals. Instead, domestic violence and sex offense courts, for the most part, seek to provide individually tailored monitoring of defendants charged and/or convicted in domestic violence or sex offense cases and, in some instances, more meaningful service provision for complainants. But some domestic violence and sex offense courts also seek to reduce reliance on incarceration. Domestic violence and sex offense courts with an incarceration-reduction mission intend for monitoring and services to serve as an alternative to jail- or prison-based sentencing and to work to break preexisting cycles of violence and abuse so as to limit levels of reincarceration. As Brooklyn's Felony Domestic Violence Court Judge John Leventhal explained:

I saw people going to jail for two years for not paying child support, which is a condition of their order of protection . . . [and] I was . . . surprised to see such a large violation and probation calendar. I wanted to cut that down. How do we cut that down? We bring them back while they're on probation, before they're really violating in a bad way, to keep them on the right track. . . . For the first four years or five years that we were doing it, we had half the violation rate of the general probation population—which is incredible considering that you have targeted victims and people who know each other. Since then I think our violation rate has gone down even further.⁸⁵

So in domestic violence courts, such as Judge Leventhal's, judicial monitoring aims to reduce carceral sentencing, reoffending, and reincarceration, even though these goals were not the explicit initial motivations for convening most domestic violence courts.

Likewise, sex offense courts have been promoted to more effectively monitor persons accused or convicted of sex offenses.⁸⁶ Yet, some of these courts simultaneously seek to shift criminal law administration in sex offense cases to

84. See, e.g., Megan McCloskey, *Veterans Court Takes a Chance on Violent Offenders*, STARS & STRIPES (Sept. 14, 2010), <http://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182>; see also Kathleen Kreller, *Idaho Court Would Assist Veterans Who Land in the Legal System in Getting Help—Instead of Hard Time*, IDAHO STATESMAN (Apr. 17, 2011), <http://www.idahostatesman.com/2011/04/17/1612614/idaho-considers-veterans-court.html>.

85. Interview by Carolyn Turgeon with Judge John Leventhal, Brooklyn Felony Domestic Violence Court (Feb. 2005), available at <http://www.courtinnovation.org/research/judge-john-leventhal-brooklyn-felony-domestic-violence-court>.

86. When asked what he thought the future of the sex offense courts would be, Judge James McCarthy of the Oswego County Sex Offense Court replied: "I think you will find a sex offender court in every county in New York and every state in this country. Sex offender courts are going to expand because the public wants to see compliance and monitoring by the criminal justice system of sex offenders that are in the community." Interview by the Center for Court Innovation with Judge James McCarthy, Oswego County Sex Offense Court, available at <http://www.courtinnovation.org/research/james-mccarthy-judge-oswego-county>.

make the criminal supervisory regime more reasonable and less likely to result in reincarceration for technical violations. Contrary to public perception, most convicted sex offenders receive little prison time in their initial sentence and are subject primarily to terms of probation or a short carceral sentence followed by parole.⁸⁷ Still, in many jurisdictions the vast majority of convicted sex offenders—even those charged only with an offense stemming from public exposure or sex with a person just a few years younger than the accused—are subject to sex offender registration and residential restrictions that make life extremely difficult and may encourage criminal behavior by socially isolating sex offenders.⁸⁸ Sex offense courts permit modifications of certain of these restrictions where doing so is thought to be reasonable, so that the response to persons charged and convicted of sex offenses may unfold with greater moderation and rationality.⁸⁹ As Judge James McCarthy, the first presiding judge of the Oswego County Sex Offense Court in New York has explained, the ambition of his court in offering a more individualized monitoring regime for convicted sex offenders is in part to make it such that “the sex offender can live somewhere and work somewhere, without being demonized, while still being closely supervised.”⁹⁰ The sex offense courts may also be conceptualized in some instances, then, as an attempt to work around existing criminal law regimes that appear to judges and other interested persons to be irrational or excessively harsh, where more thoroughgoing legislative modification is unavailable. The courts aim to devise an alternative regime to mitigate the perceived ill effects of the conventional processes and to develop a different approach that may have as an important side effect reduced reliance on incarceration in response to technical violations.⁹¹

There are, as of this writing, in jurisdictions across the United States, approximately 300 mental health courts,⁹² 200 domestic violence courts, and thirty community courts, more than 2,000 drug courts, and in excess of 500

87. See, e.g., REBECCA THOMFORDE-HAUSER & JULI ANA GRANT, CTR. FOR COURT INNOVATION, SEX OFFENSE COURTS: SUPPORTING VICTIM AND COMMUNITY SAFETY THROUGH COLLABORATION 1–2 (2010); see also LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997).

88. See, e.g., Sarah E. Agudo, Comment, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 NW. U. L. REV. 307, 308–11 (2008); see also Fourth Amended Complaint, *Whitaker v. Perdue*, No. 4:06-cv-140-CC (N.D. Ga. Oct. 14, 2008), available at <http://www.schr.org/files/post/FILED%20FAC.pdf> (challenging Georgia’s sex offender registry on behalf of a class of convicted sex offenders, the named plaintiff of which is twenty eight-year-old Wendy Whitaker, who is on the registry because at the age of seventeen she engaged in a single consensual act of oral sex with a fifteen-year-old boy).

89. See, e.g., THOMFORDE-HAUSER & GRANT, *supra* note 87, at 5–6.

90. See Interview by the Center for Court Innovation with Judge James McCarthy, *supra* note 86.

91. A technical violation is a probation or parole rule infraction—such as a missed curfew, missed probation counseling appointment, or dirty urine analysis—which does not rise to the level of a criminal offense.

92. See, e.g., PAUL HIGGINS & MITCHELL B. MACKINEM, PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? at ix (2009).

other specialized criminal courts including sex offense and veterans courts.⁹³ Those states with numerous specialized criminal courts span the country, including jurisdictions as diverse as Alaska, California, Indiana, and New York.⁹⁴ There is no single foundational document to which all specialized criminal courts refer, and no unified theory that captures their complicated interrelationships and diverse projects. But although the initial impetuses for convening specialized criminal courts differed, most of their founders share in common the hope of devising better substantially non-carceral approaches to criminal law administration, at least for certain categories of offenders.⁹⁵

Specialized criminal courts have now reached some measure of maturity and there are at least four legal institutional and conceptual reformist models to which the existing courts roughly correspond. In fact, what may make specialized criminal courts politically palatable is also what makes their eventual outcome uncertain: their form is sufficiently open so as to incorporate any or several of these four often quite divergent reformist approaches.⁹⁶ As a result, what specialized criminal courts ultimately portend for U.S. criminal law remains ambiguous, a matter over which there should be much more rigorous and reasoned debate than has occurred to date.

II. FOUR REFORMIST MODELS AT WORK IN SPECIALIZED CRIMINAL COURTS

This Part introduces a typology and critical theoretical analysis of four criminal law reformist models at work in specialized criminal courts—(a) a therapeutic jurisprudence model; (b) a judicial monitoring model; (c) an order maintenance model; and (d) a decarceration model—with particular emphasis on the models' respective aspirations, potential unintended harms, and reformist possibilities. This Part argues that, whereas the first three more predominant models possess characteristics that threaten a range of unintended and harmful consequences, the fourth model—a decarceration model—holds considerable promise to facilitate broader transformative criminal law reform.⁹⁷ The following Part, Part III, explores in greater detail three criminal law reform strategies that a decarceration model may set in motion.

93. See, e.g., PORTER ET AL., *supra* note 7, at 1.

94. See *id.*

95. BERMAN & FEINBLATT, *supra* note 7, at 6.

96. See Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 145–48 (2007) (arguing that law and policy innovations that contain multiple meanings, or are “expressively overdetermined,” are most likely to be taken up).

97. In contrast to the typology introduced here, political scientist Lawrence Baum identifies three types of specialized criminal courts: those courts convened to administer criminal law with (1) more harshness; (2) more lenity and/or treatment; or (3) both. See BAUM, *supra* note 6, at 96–97. My analysis permits closer understanding of the mechanisms that may drive particular outcomes across different specialized criminal courts.

A. THERAPEUTIC JURISPRUDENCE MODEL

Specialized criminal courts adopting a therapeutic jurisprudence model are at work in every state in the country and increasingly in a wide range of foreign jurisdictions.⁹⁸ This model draws heavily on a theoretical framework developed by law professors David Wexler and Bruce Winick.⁹⁹ Wexler and Winick's fundamental premise is that law may operate in ways that are therapeutic or anti-therapeutic so as to improve or undermine people's psychological well-being.¹⁰⁰ According to Wexler and Winick, all other things being equal, legal actors should seek to promote therapeutic outcomes over anti-therapeutic ones. In urging attention to the therapeutic consequences of legal arrangements, Wexler and Winick recommend: "[W]e should . . . see if the law could be reshaped to make it into more of a healing force, a therapeutic force."¹⁰¹

In a certain respect, in the criminal law context a therapeutic jurisprudence model is a repackaging of a rehabilitative theory of sentencing that also borrows from restorative justice approaches, but therapeutic jurisprudence is farther reaching.¹⁰² The judge in a therapeutic specialized criminal court does not simply assign a sentence that aims to rehabilitate or serve a therapeutic or restorative function. Instead, the court proceedings themselves—whether through the judge's warm encouragement or "tough love"—are intended to promote therapeutic outcomes. The entire legal process—in fact, the entire institutional operation of the court as such—is to be reconceived on the therapeutic model. Although Wexler and Winick make clear that therapeutic concerns ought not necessarily take precedence over other considerations, they do not provide any concrete manner to evaluate or rank therapeutic priorities relative to other matters, leading their adherents in therapeutic criminal courts to prioritize therapeutic concerns over others in at least certain contexts when conflicts between contending values emerge.¹⁰³ Accordingly, to the extent earlier critiques leveled against rehabilitative punishment and indeterminate sentencing may apply to a therapeutic jurisprudence model, they apply with even greater force because, on a therapeutic jurisprudence model, the rehabilitative or therapeutic ambition stretches beyond sentencing and punishment to nearly every

98. See, e.g., NOLAN, *supra* note 7; see also NOLAN, *supra* note 10.

99. See, e.g., Hora et al., *supra* note 12, at 439; Peggy Fulton Hora & William G. Schma, *Therapeutic Jurisprudence*, 82 JUDICATURE 8 (1998); David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, NAT'L INST. JUST. J., July 1999, at 12, 14–15.

100. See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 645, 648 (David B. Wexler & Bruce J. Winick eds., 1996).

101. Bruce J. Winick, Panel Remarks, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 FORDHAM URB. L.J. 1809, 1809 (2002).

102. See JAMES L. NOLAN, JR., THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END 80–83 (1998).

103. See, e.g., E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. (forthcoming 2012).

aspect of the court proceedings.¹⁰⁴

Once a defendant opts into a specialized therapeutic criminal court, “all of the major players in the courtroom—judge, prosecutor, and defense attorney—explicitly acknowledge that the goal is to change [the defendant’s] behavior, moving [the defendant] from addiction to sobriety and from a life of crime to law-abiding behavior.”¹⁰⁵ In contrast to the traditional adversarial model of the disengaged, dispassionate judge whose primary task is to decide cases fairly and impartially,¹⁰⁶ therapeutic judges are active and engaged, invested in acquiring expertise regarding the problems they address. On a therapeutic model, the specialized criminal court judge—whether in a drug court, mental health court, therapeutic sex offense court,¹⁰⁷ or another type of specialized therapeutic criminal court—engages in a direct, emotional, and frequently effusive manner with defendants, who are often referred to as the courts’ “clients.”

In Washington, D.C.’s Mental Health Diversion Court, for example, Judge Linda Kay Davis greets defendants by warmly asking them how they are doing and how they are feeling.¹⁰⁸ She encourages them in their accomplishments and, for a sustained period of good behavior—clean drug tests and regular attendance of psychotherapy—she gives them a rose, a certificate, and a coin.

The D.C. Mental Health Diversion Court is part of the Criminal Division and exercises jurisdiction over defendants who have been diagnosed with mental illness and who may qualify for deferred prosecution while undergoing mental health treatment. Many defendants in the D.C. Mental Health Diversion Court also suffer from co-occurring drug addiction.

In demonstrating her heartfelt concern for the defendants/clients in her court, Judge Davis descends from the bench to deliver her gifts to those who successfully complete her prescribed treatment program. She explains that the coin is to remind them of their hard work, though it carries no monetary value. In the spirit of therapeutic jurisprudence, Judge Davis asks defendants who fail drug

104. The rehabilitative model “fell into disfavor” because “it produced serious disparities in the sentences imposed on similarly situated defendants” and because many came to believe “that the system’s attempt to achieve rehabilitation of offenders had failed.” See *Tapia v. United States*, 131 S. Ct. 2382, 2387 (2011) (quoting *Mistretta v. United States*, 488 U.S. 361, 365–66 (1989)) (internal quotation marks omitted).

105. BERMAN & FEINBLATT, *supra* note 7, at 9; see also *id.* at 34–35.

106. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (“[J]udges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially.”).

107. Christopher Bruell, *Sex Offender Courts: Implications for the Future* (paper presented at the annual meeting of the American Society of Criminology (ASC), Los Angeles Convention Center, Los Angeles, California, Nov. 1, 2006) (summary available at http://citation.allacademic.com/meta/p127257_index.html?PHPSESSID=e4d700de960ebe2892f7e9570253eca9) (“[I]t seems reasonable to believe that we should create and utilize specialized sex offender courts, which can address sex offenders’ underlying addictions through treatment and graduated levels of community supervision. These specialized sex offender courts should be based upon the therapeutic jurisprudence approach used in drug courts and other problem-solving courts.”).

108. Author’s Notes, observation of D.C. Mental Health Diversion Court, July 6, 2011 (afternoon session) (on file with author).

tests or other court requirements “what the court can do to help” and extends and intensifies their period of court supervision.¹⁰⁹

The actual therapeutic or other effects of this engagement remain uncertain. Judge Davis, for instance, who was once a public defender at D.C.’s Public Defender Service, conducts her court in a therapeutic manner that appears eminently humane, though she has no formal psychotherapeutic expertise. Illustrating the bizarre quality and uncertain psychotherapeutic impact of merging judicial and therapeutic roles, one afternoon in mental health court, Judge Davis greeted a defendant/client with smiles and congratulations, telling the mentally ill defendant/client how “proud” she was of her, and how the defendant/client was “really doing well,” about which the judge relayed “delight.” But the clerk interrupted the exchange to point out to the judge that the day prior the defendant/client had tested positive for cocaine. Judge Davis then desisted in her praise, extended the defendant/client’s term in the criminal supervisory program, issued a stern warning about noncompliance, and ordered the defendant/client to talk to the assigned therapist about the relapse. The mentally ill defendant/client looked visibly pleased at the judge’s initial encouraging approval and then visibly distraught by the abrupt turn of events. The defendant/client reported to the judge directly (not through counsel) having difficulty finding an available individual therapist to comply with the court’s orders as none were available, and she related that she was hanging out with drug users, which made it hard for her to resist using drugs. It appeared unclear whether the defendant/client understood that the role of the judge was distinct from that of a mental health care provider or other counselor. The judge listened in front of the full courtroom and then called the next defendant/client.

Whatever uncertainties attend Judge Davis’s therapeutic courtroom methodology—and indeed she appears compassionate and well-intentioned in her dealings with the defendants/clients who appear before her—an additional potential problem posed by the therapeutic jurisprudence model is that, in promoting itself as a useful treatment approach, it may cause other criminal justice system actors—particularly police and prosecutors—to likewise view the court as a treatment outlet. This may lead relatively minor cases to go forward, offenses that perhaps ought not to be prosecuted in the first instance. But these cases come to the court for extended court proceedings rather than just being dropped, or the defendants simply referred for treatment because the court itself, rather than the social service organization conducting therapeutic treatment, is understood to be a central part of the therapeutic process.

This potential “net widening”¹¹⁰ effect of a therapeutic model of specialized

109. *See id.*

110. *See, e.g.,* STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION (1985) (exploring, in one of the first studies of its kind, how development of criminal law administrative alternatives may produce a widening “net” of penal control); *see also* Joel Gross, Note, *The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts*, 10 U. Md. L.J. RACE, RELIGION, GENDER & CLASS 161, 162 (2010).

criminal law administration underscores that criminal courts are part of a working institutional and social system, not simply sites for interpersonal conduct modification.¹¹¹ As criminal law scholar Guyora Binder has persuasively argued: “Punishment is not a behavior, but an institution. It is part of a system that involves conduct norms, an authoritative procedure for generating these norms, an authoritative procedure for decisions to impose sanctions, and some measure of practical power over persons or resources.”¹¹² When specialized criminal courts operate on a therapeutic model they exert system-wide institutional effects, likely shaping what cases are brought to criminal court, and to which agencies’ treatment resources are allocated. And all the while, therapeutic judges exercise substantial power over defendants/clients.

Given the authoritative force of therapeutic judges’ determinations, a further set of problems may arise if judges administering criminal law on a therapeutic model believe themselves to be acting in the therapeutic interests of the defendants/clients before them but are not as humane as Judge Davis. Accounts of the Glynn County, Georgia Drug Court suggest that the former presiding judge there wielded her therapeutic judicial authority with an iron fist.¹¹³ For infractions as minor as a first offense of forging two checks totaling 100 dollars, one young woman was sentenced to ten and a half years under criminal supervision: five and one half years in the Glynn County Drug Court, including fourteen months behind bars, and then an additional six months locked up, followed by four and one half years on probation.¹¹⁴

This young woman, Lindsay Dills, forged two of her father’s checks, entered the Glynn County Drug Court, missed a curfew, and failed a drug screen. As a consequence, without further ado, she spent seven days in jail. Dills reported that Drug Court Judge Amanda Williams “would flip out every time [Dills] went before her. . . . [S]he was just . . . screaming . . . in court. . . . [S]he’s standing behind the bench, with a microphone and screaming”¹¹⁵ For subsequent technical violations, such as a missed curfew or dirty urine tests, Dills

111. See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 6 (1993).

112. See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321, 321 (2002).

113. See Ira Glass, *Very Tough Love*, *THIS AM. LIFE* (Mar. 25, 2011), <http://www.thisamericanlife.org/radio-archives/episode/430/transcript>.

114. See *id.* Judge Amanda Williams has challenged this characterization of her court on a number of different grounds. See, e.g., Press Release, Georgia Judge Rebuts Public Radio Story on Drug Court, (Apr. 14, 2011), available at <http://www.atlawblog.com/wp-content/uploads/2011/04/Williams-Rebuts-Glass-Press-Release-April-14-2011.pdf>. In response, attorneys for “This American Life” maintain the basic accuracy of the program’s account of the Glynn County, Georgia Drug Court, and Judge Williams has subsequently retired after facing state disciplinary charges. See Letter from Michael M. Conway, Foley & Lardner LLP, to Prof. David G. Oedel, Mercer Univ. Law Sch. (Apr. 15, 2011), available at http://www.thisamericanlife.org/sites/default/files/Foley_response_to_Oedel_April_15_2011.pdf; Martha Neil, *Longtime Ga. Judge Facing Disciplinary Case After ‘This American Life’ Broadcast Will Retire*, *ABA JOURNAL* (Dec. 20, 2011, 5:28 PM), http://www.abajournal.com/mobile/article/longtime_ga_judge_facing_disciplinary_case_following_this_american_li/.

115. See Glass, *supra* note 113.

reported spending 51 days, 90 days, and 104 days incarcerated, until Judge Williams sent Dills away on an “indefinite sentence.”¹¹⁶ In Dills’ own words:

So I get to the jail house and I call my dad immediately . . . from the pay phone that’s in the booking area. And I hear the phone ring . . . where the booking area is. And they answer it and I heard them say, “Dills.” . . . So I’m on the phone and they said, “Dills hang that phone up.” And I’m like, “OK.” [S]o I turn around and the[y] tell me that Judge Williams has now called and ordered me to have no further contact: no phone, no visitation and no mail. And that I’d be put in their isolation cell. And I’m like, “How long?” [T]hey’re like, “We don’t know.” And I’m like, “Well for the whole 28 days that I’m here?” And they said, “Well your order is now indefinite.”

. . . .
 . . . I cried a lot . . . I was like, “How is this happening? How is this ethical? . . . Have I killed someone that I don’t know about?” . . . But there’s nothing I can do about it. Because I can’t even use the phone. I can’t even send a letter.¹¹⁷

Dills reportedly came to the attention of the jail authorities when she attempted suicide after weeks in isolation by cutting open her wrists.¹¹⁸

Judge Williams’s interest in starting a drug court was personal: she had addiction in her own family and believed in “tough love.”¹¹⁹ Although the National Association of Drug Court Professionals discourages such a punitive approach, the malleability of therapeutic jurisprudence when administered by lay-therapist judges makes it all too likely that judges will confuse therapy with punishment and that their unchecked retributive impulses will be brought to bear under the guise of therapeutic jurisprudence.¹²⁰

Such potential miscarriages of therapeutic jurisprudence expose another significant overlooked feature of specialized criminal courts operating on a therapeutic model. Therapeutic courts attempt to rid themselves of the various traditional approaches to criminal law administration and punishment—retribution, deterrence, incapacitation¹²¹—in favor of a therapeutic approach. While conventional criminal courts generally (at least in principle) administer criminal law with self-conscious reference to a compound of retributive, deterrent, and other

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. Even if portions of the widely-reported account of Judge Williams’ drug court are particularly egregious and unusual, the question the report raises remains: that is, whether a court configured on a non-adversarial, anti-formalist, psychotherapeutic model with largely unconstrained judicial discretion poses the inherent risk of the sorts of outcomes attributed to the Glynn County, Georgia Drug Court. This Article does not purport to identify any definite outcomes that will necessarily follow from courts adopting a therapeutic jurisprudence model but rather aims to develop a critical theoretical framework within which to think about the possibilities and perils of variously configured specialized criminal courts.

121. *See, e.g.,* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 30–48 (5th ed. 2009).

punishment approaches, specialized criminal courts adopting a therapeutic cast seek to purify the administration of criminal law to one putatively rehabilitative “therapeutic” variant.¹²² The risk of this attempted purification is that it is difficult to disentangle deterrent, therapeutic, and retributive impulses in criminal punishment,¹²³ and so cordoning off certain courts as purely involved in therapeutic interventions may both misstate what is actually occurring in those courts and undermine judicial self-consciousness about whether the punitive effects of particular decisions are proportional to the offending conduct and no greater than necessary to deter offending behavior.¹²⁴ Indeed, some judges administering specialized criminal courts on a therapeutic model label their courts’ sanctions “smart punishment” but propose that “[s]mart punishment is not really punishment at all, but a therapeutic response.”¹²⁵

Although the problem of disproportionate punitiveness might in principle be resolved by having all specialized criminal courts adopt sentencing ceilings for technical violations, courts operating on a therapeutic model embrace an anti-formalist, problem-oriented, discretionary approach that rejects such externally imposed, pre-fixed constraints. This model, when it comes to predominate over other approaches to criminal law administration, thus threatens to place judges with extraordinary power in a position where they act in what they perceive to be defendants’/clients’ therapeutic interests but with unchecked, potentially punitive effects, unimpeded by principles of proportionality characteristic of a retributive theory of punishment. This is all the more troubling because these judges may lack formal psychotherapeutic expertise and many are likely exhausted by the undoubtedly difficult work of dealing with criminally accused addicted or mentally ill individuals, often in under-resourced environments. The relaxation of procedural safeguards as part of an anti-formalist, team-based,

122. Compare the purely therapeutic judicial orientation to the composite sentencing approach provided for under the Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, according to which a federal sentencing judge is required to:

[C]onsider . . . (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a) (2006). As the U.S. Supreme Court explained in *Tapia v. United States*: “These four considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally, and a court must fashion a sentence to achieve these purposes” 131 S. Ct. 2382, 2387 (2011) (internal quotation marks omitted).

123. See, e.g., Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 346–48 (1984) (examining how, in order to deter, criminal sanctions must also communicate moral blame, necessarily intertwining utilitarian and retributive approaches to punishment).

124. See Richard C. Boldt, *The “Tomahawk” and the “Healing Balm”*: *Drug Treatment Courts in Theory and Practice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45, 65 (2010) (noting that “[under] treatment/punishment hybrids . . . therapeutic impulses tend to collapse into punitive practices”).

125. See Hora et al., *supra* note 12, at 469–70.

therapeutic approach only stands to exacerbate these problems if judges are not particularly conscientious.

A further limitation of the therapeutic jurisprudence model has to do with the difficulty of bringing a therapeutic court-based approach to scale, even were that to be a desirable outcome—a matter on which the preceding analysis should cast some doubt. Although the reformist potential of a therapeutic model rests on being able to administer therapy to individual defendants through the courts, these courts only address a small fraction of drug cases or other relevant categories of cases in the system. As of 2005, the number of individuals in drug court programs was 70,000, as compared to a population on probation of about four million individuals, many of whom are drug-involved offenders.¹²⁶ To reach even ten percent of individuals serving a probationary sentence, the number of therapeutic drug courts would need to increase enormously.¹²⁷ The Akron Mental Health Court as of 2004 handled at one time approximately 120 clients, only a small fraction of the many thousands of mentally ill individuals likely to be caught up in Ohio's criminal justice system.¹²⁸ The Louisiana Mental Health Court as of 2009 had eighty-five participants and operated one day per week.¹²⁹ Administering therapeutic jurisprudence through convening separate specialized criminal courts is also relatively costly, further decreasing the likelihood that it will be possible to bring this model to scale even were this to be a sought-after result.

In any event, there is considerable cause to question whether specialized criminal courts adopting a therapeutic jurisprudence model ought to be brought to scale given that proceedings in these courts appear to possess certain inherent features that may tend to exacerbate some of the most troubling problems associated with the adjudication of criminal cases in conventional courts, including unnecessary terms of incarceration for minor or technical violations and prevalent procedural irregularities. On a therapeutic model, any judicial tendencies in these directions are more likely to be unchecked.

Worse still, on a therapeutic jurisprudence model, procedural shortcutting or unnecessary incarceration may be defended as therapeutic, rendering it less susceptible to critical engagement.¹³⁰ For instance, when California drug court

126. See Bozza, *supra* note 8, at 141–42.

127. National research indicates that approximately three out of every four arrestees in large cities test positive for drugs at the point of arrest. See John Feinblatt et al., *Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts*, CT. MANAGER, Summer 2000, at 28, 29.

128. See Lisa Shoaf, *A Case Study of the Akron Mental Health Court*, 32 CAP. U. L. REV. 975, 995 (2004).

129. See John E. Cummings, Comment, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 281 (2010) (citing telephone interview with Hon. Arthur L. Hunter, Jr., Chief Judge, Orleans Parish Criminal District Court and Presiding Judge of the Louisiana Mental Health Court (Mar. 31, 2009)).

130. Foreshadowing this concern, C.S. Lewis, an early liberal critic of rehabilitative sentencing, cautioned against a system of criminal punishment in which

judges wished to amend the California penal code to reduce the privacy rights of drug court defendants/clients, one judge defended the practice as follows: “I support a search clause for drug treatment court clients because I think a search clause is therapeutic I don’t see a search clause as a sanction so much as an additional therapeutic intervention that will help them succeed.”¹³¹ The potentially problematic effects of this curtailment of privacy are obscured by a therapeutic justificatory approach that is difficult for non-experts to critically confront on its own terms. And even if, on balance, relinquishing some privacy protections may be socially desirable because it serves to reduce recidivism, casting the argument for this approach in vague psychotherapeutic terms obscures, rather than illuminates, the relevant considerations at stake.

A therapeutic jurisprudence model thus does little by itself to reduce reliance on criminal supervision and incarceration unless administered by a judge already inclined to reduce carceral sentencing and enable other positive interventions; and in fact, in the wrong judge’s hands, a therapeutic approach may cause significant harm. Reliance on jail sentences as a sanction for noncompliance with treatment or other technical requirements can actually result in substantial carceral penalties.¹³² Potential net widening effects associated with placing criminal courts in the role of administering therapeutic interventions also threatens to increase criminal case filings and, hence, overall levels of criminal supervision and quite possibly incarceration.¹³³ Although a therapeutic jurisprudence model nonetheless appeals to many because it repackages (and resurrects) a rehabilitative sentencing approach, it does so with considerable risk of engendering a variety of unintended and undesirable consequences, both for rule of

only the psychotherapist can tell us what is likely to cure. It will be in vain for the rest of us, speaking simply as men, to say, “but this punishment is hideously unjust, hideously disproportionate to the criminal’s deserts.” The experts with perfect logic will reply, “but nobody was talking about deserts. No one was talking about *punishment* in your archaic vindictive sense of the word. Here are the statistics proving that this treatment deters. Here are the statistics proving that this other treatment cures. What is your trouble?”

C.S. Lewis, *The Humanitarian Theory of Punishment*, reprinted in 6 RES JUDICATAE 224, 226 (1953); see also Candace McCoy, Commentary, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1513–17 (2003) (discussing the tension and potential conflict between the rehabilitative and coercive elements present in juvenile justice administration).

131. See James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1562 (2003) (quoting an unidentified judge).

132. See, e.g., DONALD J. FAROLE, JR. & AMANDA B. CISSNER, CTR. FOR COURT INNOVATION, SEEING EYE TO EYE?: PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS 1 (2005) (“[D]rug courts have been somewhat less successful in reducing incarceration time. Although those who complete the program spend substantially less time in prison than traditionally prosecuted cases, the relatively lengthy sentences for those who do not complete, combined with programs’ use of short-term incarceration as a sanction for noncompliant participant behavior, render the overall time incarcerated only slightly lower than that of comparable non-drug court defendants.” (citation omitted)). *But see* DOUGLAS B. MARLOWE & WILLIAM G. MEYER, NAT’L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHBOOK 36–37 (2011) (recommending that incarceration should only be used as a last-resort sanction).

133. See FAROLE & CISSNER, *supra* note 132.

law principles and for the persons it is intended to benefit.

The answer to these problems is to disentangle reformist criminal law administration from a particular set of predefined therapeutic jurisprudential commitments and instead to experiment with jurisprudential content so as to reduce reliance on incarceration and to divert cases to other sectors that may more meaningfully address social goals. The appropriate reconceptualization for the courts is as a strategy to enable decarceration, their unifying feature being that they are experimenting with criminal law administration to reduce carceral sentencing in favor of preferable approaches rather than adapting a therapeutic methodology for criminal law. But before turning to a decarceration model, it remains in the following sections to explore the other predominant reformist models at work in specialized criminal courts.

B. JUDICIAL MONITORING MODEL

The defining characteristic of specialized criminal courts operating on a judicial monitoring model is that they rely primarily on judges to engage in monitoring of defendants or participants who may be asked to submit to urine tests and curfews and to attend court appointments as often as several times per week.¹³⁴ The theoretical basis of the judicial monitoring model is that intensified judicially administered criminal surveillance will reduce future misconduct, at lesser cost than incarceration, and with greater efficacy than conventional probation or parole. As distinct from the therapeutic jurisprudence model, specialized criminal courts operating exclusively on a judicial monitoring model do not aim to generate therapeutic outcomes through courtroom proceedings. Instead, the judge is empowered to closely monitor defendants' compliance with court mandates in a manner akin to a probation or parole officer. On the judicial monitoring model, the court retains jurisdiction to monitor the defendant/participant during pretrial proceedings. And when the court assigns a non-carceral sentence, the judge mandates reporting back to the court on a regular basis.

The impetus for judicial monitoring courts arose largely due to an acute sense of the limits of conventional probation and other non-carceral forms of criminal supervision. Although probation is by far the most common criminal sanction in the United States,¹³⁵ with caseloads of up to 1,000 probationers per officer, the degree of supervision is frequently minimal.¹³⁶ Judicial monitoring aims to improve supervision by transferring authority to judges to monitor defendants. This transfer, it is hoped, will reduce recidivism and thereby reduce incarceration.

134. BERMAN & FEINBLATT, *supra* note 7, at 9.

135. See, e.g., *Key Facts at a Glance: Correctional Populations*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (reflecting the disproportionately large number of individuals sentenced to probation, as compared to prison or jail, in the United States from 1980 to 2009) (last revised Feb. 12, 2012).

136. BERMAN & FEINBLATT, *supra* note 7, at 21.

Two examples of specialized criminal courts operating primarily on the judicial monitoring model are domestic violence courts and sex offense courts, though certain drug courts and other specialized criminal courts also function primarily as judicial monitoring bodies. Intensive monitoring of defendants in domestic violence cases aims to encourage greater compliance with protective orders and attendance of anger management trainings.¹³⁷ Judicial monitoring sex offense courts likewise supervise defendants' compliance with court mandates and mandatory treatment.¹³⁸ A judicial monitoring model as applied to drug courts extends judicial supervision over drug offenders. In some jurisdictions' drug courts, judicial monitoring is coupled with a therapeutic jurisprudential approach. In other jurisdictions it is not.¹³⁹

Although judicial monitoring relies in part on technological devices to facilitate monitoring, the judicial role shifts in these courts in ways that pose considerable risks of judicial overreaching, expanded surveillance, and increased incarceration for technical violations. Due to the large numbers of criminal cases disposed of with probationary sentences—and the tremendous capacity of the defense, computer, and electronic industries—there is an extensive market for electronic monitoring, voice verification systems, and inexpensive on-site drug testing on which monitoring may rely.¹⁴⁰ But the central feature of judicial monitoring, as opposed to probation or parole, is that the *judge* plays an active role in overseeing surveillance of defendants. And once a judge becomes the monitor of defendants' compliance with court orders, the judge's role changes from one of, at least in principle, adjudicative neutrality to more active investigative supervision on behalf of the state. Simultaneously, a judicial monitoring model threatens to expand, rather than reduce, levels of criminal supervision and at least short-term incarceration because more intensive supervision increases the likelihood of identifying technical violations, which increases the likelihood of short-term incarceration. This increased likelihood is true particularly because, in many judicial monitoring courts, incarceration is the default penalty for technical violations that do not even rise to the level of criminally chargeable misconduct.¹⁴¹

One particularly striking example of the judicial role transformation and expanded criminal surveillance associated with the judicial monitoring model can be found in the ethnographic work of sociologist James Nolan, who undertook several multi-year studies of drug courts and other specialized criminal courts. As related in this Article's introduction, in Judge McKinney's Syracuse, New York drug court, Nolan found that judicial monitoring empow-

137. See JUSTICE POLICY INST., *supra* note 73, at 19.

138. See Interview by Center for Court Innovation with Judge James McCarthy, *supra* note 86.

139. See, e.g., Glass, *supra* note 113.

140. Joan Petersilia, *A Decade of Experimenting With Intermediate Sanctions What Have We Learned?*, FED. PROBATION, Dec. 1998, at 3, 5.

141. See, e.g., ZACHARY HAMILTON, CTR. FOR COURT INNOVATION, DO REENTRY COURTS REDUCE RECIDIVISM?: RESULTS FROM THE HARLEM PAROLE REENTRY COURT 4 (2010).

ered the judge to delegate reporting authority to the defendant's employer, to whom Judge McKinney promised a deal: "[Y]ou take [the defendant] back and I'll add another weapon to your arsenal. If he doesn't come to work when he is supposed to, doesn't come to work on time . . . I'll put him in jail, on your say so."¹⁴² Invasive judicial monitoring of this sort may result in part from the court's understanding of itself as engaged purely in deterrent conduct-shaping monitoring rather than punishment. As on the therapeutic jurisprudence model, which is (ostensibly) solely rehabilitative in its focus, on the judicial monitoring model specialized criminal courts seek to purify their approach to a solely deterrence-based framework. But as with the neo-rehabilitative approach of the therapeutic jurisprudence model, the judicial monitoring model is unconstrained by concerns of proportionality and operates without self-consciousness of its potentially punitive and overreaching, rather than purely deterrent, effects. Also, because the judicial monitoring model treats the unconstrained authority of the judge to solve problems as central to its mission, it is no solution simply to constrain sanctions for technical violations to those that would have been available had the defendant gone through the conventional process or to those that would otherwise be proportional to particular sorts of violations.

Further, because a judicial monitoring model is frequently dominant in specialized courts where retributive responses are likely to be triggered—such as domestic violence and sex offense courts—the threat of punitive judicial overreaching in carrying out purportedly purely deterrent monitoring is of special concern.¹⁴³ In other words, whereas the therapeutic approach tends to dominate in courts addressing more sympathetic cases—those involving drug addicts, veterans, or the mentally ill—the punitive excesses of judicial monitoring threaten to surface with particular force given that the model plays a central role in courts with less conventionally sympathetically received defendants. There is even a risk that the monitoring courts will become partially insulated from conventional adversarial advocacy because they are specialized anti-formalist, team-oriented courts, and judicial monitoring will serve as a vehicle for enhanced punitiveness for unpopular classes of defendants: those charged with domestic violence or sex offenses, for example.

In addition to the liberty-infringing risks posed by courts operating on a judicial monitoring model, there remain fundamental questions about the ability of such courts to reduce recidivism and achieve other desired ends.¹⁴⁴ Part of the motivation for court specialization is that judges in a specialized judicial monitoring court may become experts with regard to the particular offense at

142. See Nolan, *supra* note 17, at 32.

143. See, e.g., *supra* notes 137–38 and accompanying text.

144. To the extent reduced cost is a concern, judicial monitoring is more resource intensive than probation or parole supervision as it relies on relatively higher paid judges supervising relatively smaller case loads.

issue.¹⁴⁵ But problems arise when judges believe they possess special expertise about a single best approach to monitoring an issue when in fact there is profound uncertainty as to how best to handle such matters. For example, there is preliminary empirical evidence that a judicial monitoring approach is less effective than might be anticipated in reducing recidivism in domestic violence cases. A study of the Bronx Misdemeanor Domestic Violence Court tracked randomly assigned groups of offenders who received varying combinations of judicial monitoring and batterer's intervention.¹⁴⁶ The differential rates of recidivism of violent conduct among the groups (including those who received no judicial monitoring or other intervention) were not statistically significant.¹⁴⁷ This result suggests that the routine judicial monitoring interventions of the domestic violence court—batterer's intervention and court monitoring—may have limited success in reducing the incidence of domestic violence.¹⁴⁸ So while in at least one jurisdiction domestic violence recidivism remained unchanged, substantial resources were devoted to a judicial monitoring regime that threatens to significantly transform the role of the judge with other uncertain and potentially undesirable effects.¹⁴⁹

What is more, in the reentry context at least, a judicial monitoring model has been associated with substantial increases in reincarceration for technical violations. A study of the Harlem Parole Reentry Court's initial judicial monitoring program found that “[t]echnical revocations occurred more frequently for Reentry Court participants than comparison parolees” for all three years of the study—an effect the Court's researchers ascribe to a “supervision effect”¹⁵⁰ (that is, increased discovery of punishable violations produced by increased supervision). Thus, the Harlem Parole Reentry Court study reflects that a judicial monitoring approach threatens to increase incarceration for technical

145. BERMAN & FEINBLATT, *supra* note 7, at 103 (“By handling all felony cases from the borough in a single courtroom, the court was designed to develop a focused expertise in domestic violence.”).

146. See MELISSA LABRIOLA ET AL., CTR. FOR COURT INNOVATION, TESTING THE EFFECTIVENESS OF BATTERER PROGRAMS AND JUDICIAL MONITORING 15–21 (2005) (describing research methodology).

147. *Id.* at 41–42; see also *id.* at 62 (“We anticipated that monitoring would suppress recidivism, at least during the monitoring period itself. But judicial monitoring had no more impact on re-offending than did batterer programs: When we compared the offenders in our randomized trial—all of whom were monitored—to a matched group of offenders who pled to violations and were sentenced to a conditional discharge without monitoring, we found no differences in nearly all re-arrest measures.”).

148. See *id.* But see Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981, 995–96 (2004) (reporting other studies of domestic violence batterer treatment programs that demonstrated evidence of reduced recidivism).

149. Similar concerns about the soundness of court monitoring and intervention applies in the drug court context: some evaluations of drug courts show that drug court monitoring and treatment achieve outcomes no better than traditional in-community treatment, and other evaluations claim reduced recidivism but suffer from significant methodological problems. See, e.g., Candace McCoy, *Do Drug Courts Work? For What, Compared to What? Qualitative Results from a Natural Experiment*, 5 VICTIMS & OFFENDERS 64 (2010) (exploring methodological problems with drug court studies and analyzing natural experiment suggesting that drug courts achieve outcomes equivalent to traditional in-community treatment).

150. See HAMILTON, *supra* note 141, at 29.

violations, such as missed curfews or other failures to conform with the court's monitoring orders.¹⁵¹

These findings are consistent with the best available evidence regarding "intensive supervision programs" (ISP) during an earlier period of experimentation with intensive criminal surveillance. Monitoring aimed at deterrence, when uncoupled from a substantial rehabilitative component, tends strongly to expand incarceration with little in the way of countervailing benefits. According to Stanford criminologist Joan Petersilia, who is among the country's leading experts on intermediate sanctions, the:

[E]mpirical evidence regarding intermediate sanctions is decisive: Without a rehabilitation component, reductions in recidivism are elusive. In sum . . . programs were seldom used for prison diversion but rather to increase accountability and supervision of serious offenders on probation. In addition, programs did not reduce new crimes, but instead increased the discovery of technical violations and ultimately increased incarceration rates and system costs.¹⁵²

The ineffectiveness of judicial monitoring may be further aggravated if judicial monitoring negatively influences defendants' perceptions of legitimacy of the courts. Diminished perceptions of procedural fairness on the part of defendants in judicial monitoring courts may actually undermine compliance with court orders by fostering resentment and exacerbating recidivism.¹⁵³

So as with the therapeutic jurisprudence model, on the judicial monitoring model the role of the judge expands, potentially dramatically beyond its traditional bounds. Surveillance increases. Procedural protections are curtailed to enable judicial monitoring. And there is no overriding commitment to avoid incarceration in the instance of discovery of technical violations. As a consequence, increased periods of at least short-term incarceration threaten to follow, even if only as a product of technical violations, and the reach of the criminal

151. *See id.*

152. Petersilia, *supra* note 140, at 6; *see also* Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 *CRIME & JUST.* 281, 311 (1993) (finding that, in a study of ISP participants, "an average of 65 percent of the ISP clients experience[d] a technical violation compared with 38 percent of the controls").

153. In judicial monitoring courts, even before adjudication, defendants are routinely subject to intensive supervision and mandatory treatment with the only alternative being incarceration. This arrangement raises double jeopardy concerns, among other problems: insofar as the preadjudication monitoring is punitive in purpose, it effectively may lead to imposition of double punishment, once preadjudication and subsequently postadjudication. *See generally* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 *WM. & MARY L. REV.* 1843 (2002) (explaining how social psychological findings regarding perceptions of legitimacy and legal compliance indicate that procedural justice may be important to reducing the incidence of domestic violence recidivism and, hence, domestic violence court monitoring should attend to this variable in determining court interventions).

law threatens to radically expand.¹⁵⁴ Monitoring that is not merely extending surveillance for its own sake must attend to what forms of surveillance actually promote socially desirable outcomes by eliminating crime and reducing incarceration. This is, in significant part, the ambition of a decarceration model, to which we will turn after exploring the order maintenance model—the final criminal law reformist model commonly at work in specialized criminal courts.

C. ORDER MAINTENANCE MODEL

The third widely occurring criminal law reformist model operative in specialized criminal courts seeks to advance order maintenance by convening local tribunals devoted to prosecutions of relatively minor quality-of-life crimes. Although the general goal of specialized criminal courts was to address the impacted and poor quality of conventional criminal law administration by shifting cases out of conventional courts into specialized courts, in the view of some advocates, “in many cases, the current system works just fine” such as in handling “murders, rapes, and robberies;” they believed that alternatives for prosecution of more serious offenses would be inappropriate.¹⁵⁵ Consequently, efforts focused on minor crimes—“prostitution, low-level drug possession, and disorderly conduct”—that conventional criminal courts were otherwise inclined to ignore.¹⁵⁶

The theoretical framework underlying the order maintenance model is largely derived from the broken windows approach to policing. The broken windows, or order maintenance, hypothesis maintains that minor physical and social disorder—turnstile jumping, marijuana use, public drinking—if not addressed, contributes to more serious crime.¹⁵⁷ A specialized order maintenance criminal court responds to public order violations by initially assigning intermediate

154. See Loïc Wacquant, *Prisoner Reentry as Myth and Ceremony*, 34 *DIALECTICAL ANTHROPOLOGY* 605, 616 (2010) (explaining how monitoring, along with other community supervision programs, may extend the scope of criminal supervision without offering any means to counteract the pressures toward technical noncompliance and criminal offending that abound in under-resourced neighborhoods). *But see* ANGELA HAWKEN & MARK KLEIMAN, *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE* (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> (evaluating favorably probation monitoring and flash incarceration intensive supervision program for drug offenders in Hawaii for its reduction of reliance on prison sentencing for high-risk drug offenders relative to less intensively surveillant conventional supervision). It is worth noting that Project HOPE is a probation supervision, as distinct from a specialized courts, regime, and, while Hawken and Kleiman's study suggests HOPE probation may be preferable to the dysfunctional status quo in conventional drug probation and parole, it is still heavily reliant on incarceration and intensive criminal surveillance. *See id.*

155. BERMAN & FEINBLATT, *supra* note 7, at 4.

156. *See id.*

157. Professor Bernard Harcourt powerfully criticizes this hypothesis, refuting the oft-cited bases of empirical support for the theory and raising foundational theoretical and empirical questions regarding broken windows policing. As Harcourt explains in summary:

First, the quality-of-life initiative may create the category of the disorderly. Second, the category of the disorderly may facilitate a policy of aggressive arrests, with the possibility of attendant brutality, even though such a policy is unlikely to have the slightest effect on crime

sanctions such as community service. It is hoped that imposition of these sanctions, in turn, will improve perceptions of the law's legitimacy and hence social order. The theory, as applied to specialized criminal courts, holds that, as a consequence of prosecuting public order offenses, crime overall will decline and, with it, more general reliance on criminal arrests and incarceration.¹⁵⁸

Along these lines, community courts, the quintessential order maintenance courts, aim to improve social order by providing a venue for the prosecution of relatively minor quality-of-life offenses occurring in a delimited geographic area.¹⁵⁹ Incarceration is imposed only if a defendant is noncompliant with intermediate sanctions or if his offense is relatively serious. Generally, misdemeanor defendants are able to opt in to courts operating on an order maintenance model rather than being mandatorily assigned.¹⁶⁰

In addition to community courts, other specialized criminal courts may also operate on an order maintenance model. For example, drug courts operating on an order maintenance approach provide a local forum for prosecuting lower-level drug offenses that would otherwise receive minimal attention in conventional criminal courts.

There are three supposed advantages to an order maintenance model of specialized criminal court administration, all of which fail to withstand close scrutiny. First, proponents suggest that these courts will increase potential offenders' perceptions of the criminal law's legitimacy and, hence, will increase law-abiding behavior overall.¹⁶¹ This is thought to be the case because the courts assign presumably more meaningful non-carceral sanctions.¹⁶² But order maintenance courts are often perceived as harsher and less legitimate than conventional courts in their response to public order violations. Community courts are less inclined to dismiss cases with "time served" sentences, and where jail time is imposed, it is for longer periods.¹⁶³ Further, community service sentences will not necessarily be perceived as more legitimate than jail

rates. Third, the interplay of the norm of orderliness (discipline) and the ideals of justice (law) may succeed in blinding us to the disorder that accompanies the quality-of-life initiative.

Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 368 (1998); see also BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

158. *But see* Harcourt, *supra* note 157, at 292–94.

159. *See, e.g.*, Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1574 (2003) (“[T]he unifying feature of these community courts is their preoccupation with the ‘quality of life’ in local neighborhoods.”).

160. *See, e.g.*, BERMAN & FEINBLATT, *supra* note 7, at 62.

161. *See generally* MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT (2000).

162. *See id.*

163. *See id.* at 129 (“[A]ll else being equal, petit larceny cases at Midtown receive[d] jail sentences that [were] 31 days longer than similar cases Downtown [at the main criminal courthouse], and . . . jail sentences for prostitution cases tended to be longer at Midtown than Downtown.”).

sentences. One sex worker sentenced at the Midtown Community Court explained: “Community service is all day—cleaning toilets and stuffing envelopes”¹⁶⁴ Rather than improving perceptions of legitimacy, routine reliance on community service of this sort as a sanction may reduce opportunities for paid work in a jurisdiction and cause further economic hardship for defendants. The onerous requirements of unpaid community service work coupled with associated fines may even increase pressures to participate in criminalized markets.

A second purported advantage of an order maintenance model is that it will reduce reliance on conventional carceral sentencing, instead introducing more effective and beneficial intermediate sanctions, like community service. But when defendants fail to comply with intermediate sanctions, they are often punished with at least short-term incarceration. Indeed, empirical analyses establish that increased short-term incarceration is the unintended outcome of at least some courts operating on an order maintenance model.¹⁶⁵

Additionally, in a manner distinct from that of therapeutic courts, order maintenance courts widen the net of infractions addressed by criminal courts because they focus primarily on low-level misdemeanor offenses, which otherwise would receive less attention: disorderly conduct prosecutions are commonplace in order maintenance courts for pedicab drivers’ obstruction of crosswalks or unlicensed vending of t-shirts or otherwise licit goods.¹⁶⁶ This net widening tendency is consistent with the findings of Professors Michael Tonry and Norval Morris, who demonstrated in their famous study of intermediate sanctions that “[w]hen an intermediate choice is offered it will tend to be filled more by those previously treated more leniently than by those previously treated

164. Robert Victor Wolf, *New Strategies for an Old Profession: A Court and a Community Combat a Streetwalking Epidemic*, 22 JUST. SYS. J. 347, 355 (2001).

165. See SVIRIDOFF ET AL., *supra* note 161, at 129. As an aside, to the extent that more vigorous enforcement of particular quality-of-life offenses, such as prostitution, in one discrete area aims to eliminate that conduct (whether by improving offenders’ perceptions of legitimacy or otherwise), it is equally likely that the undesired conduct will just be pushed to a different (not necessarily distant) location. Further, all too often courts administering specialized criminal law recognize the broader web of the problem at stake—whether prostitution or shoplifting—but focus exclusively on an individual’s addiction or other personal issues that may be impossible to meaningfully address without attending to background conditions that inform the personal problems. See generally Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 948–49 (2003) (“Although originally designed to provide a creative and rich mix of social and rehabilitative services to citizens with a variety of legal entanglements and social problems living in a disadvantaged neighborhood the Red Hook Community Justice Center relies heavily on drug treatment to address residents’ complex personal problems that do not easily fall into a simplified medical treatment paradigm. Despite its notable achievements . . . the Justice Center remains focused on milling the neighborhood’s ‘disorderly’—the loiterers, the publicly intoxicated—into drug treatment of uncertain effectiveness.”).

166. See Author’s Site Visit Notes, Midtown Community Court, September 2011 (on file with author).

more severely.”¹⁶⁷ This is not to suggest that intermediate sanctions are never appropriate but rather that there is a risk of net widening where such sanctions are made available and order maintenance courts stand to considerably expand the class of offenses subject to criminal prosecution by emphasizing offenses that would otherwise be unlikely targets for prosecution. As a result of this net widening tendency, an order maintenance model threatens to expand criminal supervision and increase short-term incarceration when individuals are unable to comply with intermediate sanctions.

Whether other beneficial effects on local neighborhoods follow from this net widening criminal law enforcement remains uncertain. According to Portland’s district attorney Mike Schrunk, a proponent of Portland’s order maintenance specialized criminal court, as a prosecutor “[y]ou tend to blow off” turnstile jumping or petty shoplifting because they are “not as important as rape and robbery.”¹⁶⁸ Yet, Schrunk justifies emphasis on these minor offenses in order maintenance courts on the grounds that “what really drives people out of a neighborhood or makes a neighborhood rot from the inner core is the small, petty stuff.”¹⁶⁹ But it is not entirely clear why turnstile jumping, unless absolutely pervasive and reckless, would undermine the quality of life in a particular neighborhood. Although petty shoplifting is perhaps more harmful to local businesses, it is not apparent why such offenses must be prosecutorial priorities in order to obtain a satisfactory level of respect for private property in targeted neighborhoods. For instance, local business organizations could instead encourage store owners to adopt store policies that render goods less readily subject to theft. In fact, the available evidence indicates that police arrest less than one percent of all shoplifters.¹⁷⁰ Shoplifters are most likely to steal products, such as clothing, CDs, and DVDs, which are “concealable, removable, available, valuable, enjoyable, and disposable.”¹⁷¹ Placing unremovable security tags on these products and/or storing them in locked shelving units, along with other store design and stock control measures, substantially reduce the opportunity to shoplift.¹⁷² For these reasons, store owners and the public at large would likely be better served by adopting environmental and business practices that reduce the incidence of shoplifting rather than investing large sums of public resources in prosecuting some small percentage of these offenses (that are so minor as to otherwise command little prosecutorial attention) in specialized order maintenance courts. Of course, this alternative approach transfers the costs of addressing petty crime in part from tax payers to business owners, but the business costs of merchandising and related policies are not prohibitive and there is

167. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 225 (1990).

168. BERMAN & FEINBLATT, *supra* note 7, at 72.

169. *See id.*

170. CLARKE, *supra* note 59, at 1–2.

171. *See id.* at 6.

172. *See id.* at 8–9; *see also* Klingele et al., *supra* note 59, at 975–76.

strong reason to believe they would prove both more effective and less costly overall.¹⁷³

What's more, although there may be positive effects associated with devoting attention to disruptive conduct that residents of affected areas care about—for instance, the prevalence of street prostitution may cause more sexual harassment of all women and girls—there are also significant potential negative, systemic consequences generated by bringing more people under criminal supervision than would otherwise occur. In particular, net widening may cause criminal courts' dockets to become further impacted. In Denver, Colorado, for example, the number of drug cases filed in the Denver District Court grew radically after the introduction of a drug court program dedicated to prosecuting low-level drug offenses—effectively an order maintenance drug court model—as police and prosecutors perceived the courts to be capable of handling the sort of minor offenses that would previously not have been pursued. During 1993, the last full year before the Denver Drug Court convened, 1,047 drug cases were filed, but during the second year of the Court's existence, in 1996, there were 3,017 filings. Judge Morris Hoffman of the Denver criminal court reported that the Denver Drug Court “caused police to make arrests in, and prosecutors to file, the kinds of ten- and twenty- dollar hand-to-hand drug cases that the system simply would not have bothered with before.”¹⁷⁴ Ultimately, in large measure for this reason, Denver abandoned its Drug Court in 2003 and did away with order maintenance drug law administration.¹⁷⁵

Expanding the range of individuals subject to criminal prosecution in order maintenance courts is not simply a matter of burdening court dockets. Net widening produces other broader, systemic pressures: when offenders do not comply with intermediate sanctions administered by order maintenance courts, they are subject to short-term incarceration. Subsequently, even those offenders who receive only thirty-day jail sentences often cycle back through the criminal

173. Likewise, much auto theft may be prevented through straightforward changes by auto manufacturers. See Ronald V. Clarke & Patricia M. Harris, *Auto Theft and Its Prevention*, 16 CRIME & JUST. 1, 37 (1992). To provide another related example of this approach, in Portland, Oregon, residents concerned about open-air drug dealing in a local park turned on the park's sprinklers periodically throughout the day, and it worked to disperse the drug dealing. As one prosecutor related: “No expenditure of police or prosecutor resources, the problem is solved, and all we did was water the lawn.” See Klingele, et al., *supra* note 59, at 966 (citing AM. PROSECUTORS RESEARCH INST., UNWELCOME GUESTS: A COMMUNITY PROSECUTION APPROACH TO STREET LEVEL DRUG DEALING AND PROSTITUTION 1 (2004) (quoting Multnomah County Deputy District Attorney Wayne Pearson)). Drug transactions in Portland surely did not cease, but they shifted location and that may be all that can be expected of crime control interventions of any kind. See, e.g., Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2392–97 (1997) (exploring how criminal law's deterrent effect may often lead to substitution of one offense for another or displacement of crime rather than its elimination).

174. See Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1502 (2000).

175. See Morris B. Hoffman, Commentary, *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567, 1567 (2003). But see Sue Lindsay, *City Resurrects Drug Court: Supporters Tout New Strategies To Avoid System's Past Failures*, ROCKY MOUNTAIN NEWS, Jan. 15, 2007, <http://www.highbeam.com/doc/1G1-157582096.html>.

courts, trapped in a never-ending series of criminal supervisory sentences, such that these minor law breakers end up “doing life in prison, thirty days at a time.”¹⁷⁶ This pattern imposes tremendous costs on the public and often irreparably disrupts the lives of accused minor law breakers and their families.

A final benefit noted by supporters of an order maintenance model, and of community courts in particular, involves the courts’ revival of local democratic participation in criminal law administration. While democracy is not an unqualified good for criminal law—indeed, democratic processes have often resulted in later-regretted criminal law and policy outcomes—democratic excesses could in principle be restrained by confining community participation to discrete localities in which the members would themselves internalize the costs of favored policies.¹⁷⁷ The local democratic potential of community courts is thought to derive from the involvement of community members in setting the courts’ priorities, the local access to community court judges, and more general increased accessibility and transparency of the courts. Yet, the actual democratic potential of order maintenance community courts is unclear given that, as multiple studies indicate, only a small number of often relatively wealthy or unusually vocal individuals participate actively in community court programs.¹⁷⁸ In fact, there is some evidence that these courts may serve to advance the interests of a moneyed minority interest group in furthering gentrification to improve property values.¹⁷⁹ And while gentrification may be a positive force in these neighborhoods—engendering improved neighborhood quality of life and increasing property values—it is nonetheless questionable whether associated court reform desirably reconstitutes local democratic practices in criminal law administration. Control of a local criminal law enforcement agenda by a few relatively powerful outspoken community members hardly represents a robust form of local democratization of criminal law, whatever may or may not be the

176. Alex Calabrese, Presiding Judge, Red Hook Community Justice Center, Speech delivered at London, England (July 7, 2003) (quoted in BERMAN & FEINBLATT, *supra* note 7, at 16).

177. See, e.g., Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1173–77 (1998); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 832 (1998) (“When inner-city residents can choose for themselves the law enforcement policies that will work for them, crime is reduced through community empowerment.”); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

178. See Fagan & Malkin, *supra* note 165, at 943–47; Lanni, *supra* note 68, at 381; Malkin, *supra* note 159, at 1585–86.

179. As one supporter of the Portland Community Court remarked, “Now people are buying property, and when you own property, you care about it. . . . Now we feel like we can really invest in a home here.” BERMAN & FEINBLATT, *supra* note 7, at 82 & 207 nn. 16–17 (citing *Voice from the Neighborhood*, Community Court Reporter, Portland Oregon Community Court, June 2001 (quoting Susan Cox, resident of Southeast Portland)). The most vocal supporters of the Midtown Community Court in Manhattan are likewise those local residents whose real estate assets benefitted considerably from the gentrification enabled by order maintenance policing. See, e.g., *Midtown Community Court Video*, CTR. FOR COURT INNOVATION, <http://www.courtinnovation.org/research/midtown-community-court-video> (last visited Mar. 9, 2012); see also Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343 (examining some of the potential threats of the invocation of the term “community”).

other advantages of gentrification.¹⁸⁰

In summary, the criminal law reformist benefits ascribed to an order maintenance model are uncertain, and this approach poses a significant risk of generating otherwise harmful consequences.

D. DECARCERATION MODEL

A decarceration model is committed foremost to reducing reliance on incarceration and to a sociologically and empirically informed framework that links court participants to local social services and other institutions, shifting the management of socially disruptive conduct in part from criminal courts to other sectors. The ultimate aim of a decarceration model, as applied to specialized criminal courts, is to isolate those crimes for which conventional criminal law administration may be most fitting, contributing gradually to the de facto decriminalization of certain categories of conduct and enabling alternative non-carceral regulatory approaches to a range of social ills where criminalization remains appropriate. The basic premise underlying a decarceration model in the specialized courts context is that overcriminalization and overincarceration are in part structural problems, which specialized criminal courts may begin to address.

Because a decarceration model aims to reduce reliance on incarceration while achieving other social goals, the model endeavors to respond to the forces that led incarceration rates to rise so precipitously in the first instance and that cause them to remain so high. The explanations for large-scale incarceration are various, but there is general agreement that criminal law and policy contributed significantly to the growth in incarceration.¹⁸¹ Expanded sentences for drug convictions perpetuated a significant portion of the increase in state prisoners beginning in the late 1980s, and, subsequently, much of that growth has been attributable to increased penalties for violent crimes, predominantly robbery and assaults, and “public order” offenses.¹⁸² As a result, criminal law and policy changes stand to contribute substantially to decarceration, but one single policy intervention will be insufficient to bring about any extensive decrease in imprisonment. Instead, the scholarly consensus suggests that prison commitments must be reduced *and* prison release increased *and* return to prison after parole failure decreased.¹⁸³ Obstacles to achieving these ends, which I will touch upon only briefly because they are thoroughly explored elsewhere, include: the difficulty of legislatively retreating from the “pathological politics” of

180. It is beyond the scope of this Article to address the complicated relationship between order maintenance, social welfare, and gentrification. My more limited suggestion here is that, regardless of one’s views on these matters, there is considerable reason to doubt that order maintenance specialized criminal law administration revitalizes local democratic criminal law decision making, as these processes appear to be controlled by a small but vocal and economically influential minority.

181. See Gartner et al., *supra* note 53, at 293–94.

182. JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION 7 (2007).

183. See, e.g., Gartner et al., *supra* note 53, at 313.

overcriminalization and overincarceration;¹⁸⁴ the organizational cultures of police and prosecutors' offices that encourage vigorous enforcement of existing criminal laws;¹⁸⁵ fiscal constraints that limit available funds for social service alternatives to incarceration; reduced judicial authority under determinant sentencing laws; resistance of interest group lobbies, such as victims' rights groups and prison guards unions; a limited role for less politicized expert input in criminal law and policy-making; and belief in the efficacy or at least unavailability of criminalization and incarceration.¹⁸⁶ A decarceration model may function to circumvent and begin to reshape some of these barriers.

Courts operating predominately on a decarceration model circumvent some of the legislative impediments to changing substantive criminal law by working cooperatively with prosecutors, police, defense counsel, and elected officials at the local level to shift cases out of the conventional criminal courts. Without requiring legislative repeal of particular criminal statutes, these courts provide a venue for suspending or dropping criminal charges in drug cases, a range of misdemeanor cases, and, in some instances, even in cases involving more serious felony charges as well as in a range of matters involving mentally ill offenders and veterans. A decarceration approach seeks to locate alternative fora for responding to these matters, and then when the courts have obtained a certain measure of broad-based support, legislators are able to enact statutes that legitimize and institutionalize the decarceration regime. This method has proven to be more politically viable than seeking directly to decriminalize particular conduct, and alternative diversionary court approaches have garnered considerable public support.¹⁸⁷

In their day-to-day operations on a decarceration model, courts act as diversionary clearinghouses for social service resources, ensuring the assignment of individual defendants to those resources. Careful empirical monitoring tracks on an ongoing basis court outcomes to ensure that incarceration is actually reduced

184. See, e.g., Luna, *supra* note 28, at 719 ("As a rule, lawmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts, but face no countervailing political pressure to scale back the criminal justice system."); Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 169–73 (2003) (critically examining the expansion of criminal codes and the difficulty of retreating from this pattern through legislative repeals); Stuntz, *supra* note 2, at 510, 515; see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

185. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 519 (2004) (discussing how police organizations, not unlike other bureaucracies, are inclined to assess success quantitatively by arrest and citation numbers rather than by qualitative assessments); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 347–48 n.46 (2001) (noting that conviction percentages influence election and promotion in state prosecutors' offices).

186. See Gartner et al., *supra* note 53, at 313–19.

187. See, e.g., NAT'L CTR. FOR STATE COURTS, *THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS* 5 (2006) (reporting that over eighty percent of persons surveyed in representative national telephone survey supported alternative non-carceral sentencing "often" or "sometimes" for nonviolent cases).

and to ascertain the effect of various alternative sanctions and services on participants and other relevant variables.¹⁸⁸

At least in some jurisdictions, courts adopting a decarceration model assume jurisdiction over those charged with, or convicted of, more serious felony offenses.¹⁸⁹ This is critical to reducing reliance on incarceration and avoiding net widening because many nonviolent misdemeanor offenses are already dealt with through non-carceral sentences in the conventional courts.¹⁹⁰ To the extent courts adopting a decarceration approach address accused offenders who might otherwise receive probationary sentences, the diversionary programming orders issued may make it less, rather than more, likely that defendants will be subject to incarceration in the future by facilitating opportunities for law-abiding livelihoods.

The theoretical framework that informs the decarceration model focuses on deploying social structures separate from criminal law administrative components—such as local neighborhood networks, business organizations, and mental health, public health, job training, and other social services—to reduce criminal offending and to foster socially constructive citizenship behaviors. The foundational idea is that social institutions outside the criminal law context are critical to the maintenance of social order and to organizing informal surveillance. Correspondingly, a shift away from current carceral practices will be enabled by bolstering opportunities for social integration and institutional involvement, particularly for those persons with otherwise limited access to such conventional social institutions.¹⁹¹

There is wide-ranging empirical and theoretical support for this structural

188. See, e.g., ROSSMAN ET AL., *supra* note 12, at 1–10, 165, 169, 262–65 (examining, in multi-site study of drug courts, certain features of courts that correspond to a decarceration model, including organization of specialized courts as clearinghouses for social service resources and empirical monitoring).

189. See, e.g., Interview by Carolyn Turgeon with Judge Matthew J. D’Emic, Brooklyn Mental Health Court (June 2004), available at <http://www.courtinnovation.org/research/matthew-j-demic-brooklyn-mental-health-court?mode=889&url=research%2F889%2Finterview> (“Initially we were set up to handle exclusively non-violent felonies, but that changed and we do take some violent felons . . .”).

190. Although only approximately seventeen percent of the crimes for which individuals are arrested are either violent or property crimes, roughly seventy-one percent of people incarcerated in state prisons have been convicted of violent or property crimes. Compare *Uniform Crime Reports, Crime in the United States 2010: Arrests*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested> (last visited Mar. 20, 2012), with HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2009, at 7 tbl.7 (2010).

191. See ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 22 (2012) (“[N]eighborhoods are not merely settings in which individuals act out the dramas produced by autonomous and preset scripts . . . but are important determinants of the quantity and quality of human behavior in their own right.”); *id.* at 423 (“[E]ven the worst-off communities command human assets and organizational potential that have not been fully harnessed. In fact . . . disadvantaged communities sometimes have rather high levels of other-regarding behavior and latent collective efficacy that are otherwise suppressed by the cumulative disadvantages built up after repeated everyday challenges.”). In a study comparing the lives of former juvenile offenders (discussed in

approach. One interesting early contribution comes from the work of Sheldon and Eleanor Glueck, married co-authors employed at Harvard Law School from the late 1920s to the 1950s, who conducted a seminal study of the lives of 500 Boston juvenile delinquents.¹⁹² The Gluecks found that although most of the cohort ceased committing crime after turning twenty-five, a small minority persisted in criminal involvement. Decades later Harvard sociologist Robert Sampson and criminologist John Laub reexamined the Gluecks' data to determine if there were any criteria distinguishable from the early lives and criminal offending of those men who went on to become persistently criminally involved over the course of their lives.¹⁹³ Sampson and Laub could not identify any factors present during childhood or adolescence that differentiated those young men who would pose a continuing menace and those who would desist from criminal activity following adolescence.¹⁹⁴ There were, however, "turning points" in the men's lives—obtaining and maintaining employment and establishing contacts with conventional institutions and groups—that distinguished those who continued to commit crime from those that did not.¹⁹⁵ Further, men who had been incarcerated in prison were substantially more likely to continue to

further detail *infra* notes 192–97 and accompanying text), sociologist Robert Sampson and criminologist John Laub found that:

The majority of men we interviewed desisted from crime largely because they were able to capitalize on key structural and situational circumstances. They often selected these structural and situational circumstances (for example, they decided to get married, get that job, hang out with those friends), but those institutions and relations in turn influenced the men as well. . . . Men who desisted from crime were embedded in structured routines, socially bonded to . . . others . . . and were virtually and directly supervised and monitored. In other words, structures, situations, and persons offered nurturing and informal social control that facilitated the process of desistance from crime. . . .

. . . .
 . . . Generally, the persistent offenders we interviewed experienced residential instability . . . job instability . . . and relatively long periods of incarceration. Except when in prison or jail, they were 'social nomads,' to use Foucault's term.

JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70, at 279–80 (2003) (citations omitted). A distinct theoretical approach, which Professor Mary D. Fan has called "rehabilitation pragmatism," shares some significant features in common with a decarceration approach. The difference between rehabilitation pragmatism and conventional rehabilitation is that the rehabilitative intervention is not undertaken for the benefit of the individual defendant but instead in the public interest to improve safety and reduce costs, with reliance on empirical data in selecting defendants who are more likely to succeed. *See* Fan, *supra* note 48, at 45–56; *see also* Jessica S. Henry, *The Second Chance Act of 2007*, CRIM. L. BULL., Summer 2009, at art. 3 ("Rehabilitation, with an eye to reentry, has been repackaged, not as way to improve the individual offender for his or her own sake, but rather as a way to improve public safety for all of society."); Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 212 (2008) ("Well-run, well-targeted educational and vocational programs, substance abuse treatment, cognitive behavioral therapies, and reentry partnerships can reduce recidivism by 5–30 percent.").

192. *See* SHELDON GLUECK & ELEANOR T. GLUECK, UNRAVELING JUVENILE DELIQUENCY (1950).

193. *See* LAUB & SAMPSON, *supra* note 191.

194. *See id.* at 113.

195. *Id.* at 114–49.

offend than men who served only local jail time or probation.¹⁹⁶ These factors—rather than personality characteristics, early offense characteristics, childhood experiences, or other factors—appeared to differentiate the perpetual offenders from those that went on to lead relatively law-abiding lives.¹⁹⁷

Additional support for the hypothesis that social engagement and institutional involvement, or group-level effects, cause reduced criminal offending derives from a significant body of further studies linking structural context and the prevalence of effective social organizations with decreased interpersonal violence and neighborhood disorder.¹⁹⁸ As important, this theory accords with known social facts about the world: social institutions—employers, community organizations, families—convey social expectations and informally surveil those who participate in them. In a neighborhood where these institutions are functioning effectively, people tend to be discouraged and inhibited from engaging in criminalized pursuits, and they will tend to have access to social supports in the event they find themselves struggling with addiction or other personal challenges.¹⁹⁹

Nevertheless, it is important to acknowledge that social institutional engagement will not serve to dissuade all persons from criminal conduct, and some conventional social institutions may even be criminogenic.²⁰⁰ Indeed, employed persons operating in firmly established institutional contexts perpetrate fraud, embezzle funds, and harm others.²⁰¹ But conventional institutional engagement provides some significant constraint on particular sorts of criminal offending

196. *See id.* at 188–90.

197. It is possible, of course, that the law-abiding men were otherwise disposed to obtain employment and to establish conventional institutional ties, and that their social engagements were not the cause of their law-abiding turn. Instead, their turning points might have been the product of some unidentified additional factor—moral fortitude or personal perseverance. In other words, it might be that some other variable besides social institutional involvement is the critical differentiating characteristic between offenders and nonoffenders, even if Sampson and Laub were unable to identify such a variable from the Gluecks' data.

198. *See, e.g.,* Robert J. Sampson et al., *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 *CRIMINOLOGY* 465, 465 (2006) (analyzing data that “support[] the inference that states of marriage causally inhibit crime over the life course”); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *SCIENCE* 918, 923 (1997) (finding that a “combined measure of informal social control and cohesion and trust [was] a robust predictor of lower rates of violence”); Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in *CRIME AND INEQUALITY* 37 (John Hagan & Ruth D. Peterson eds., 1995).

199. It is widely recognized that reasonable educational opportunities, access to employment, and informal institutional social controls are associated with improved public safety. *See* ARNOLD S. LINKSY & MURRAY A. STRAUS, *SOCIAL STRESS IN THE UNITED STATES: LINKS TO REGIONAL PATTERNS IN CRIME AND ILLNESS* (1986). While incarceration drains resources from these areas, decarceration would make available resources for these social sectors. But funds devoted to resource-intensive judicial monitoring, order-maintenance, and therapeutic court processes are unavailable for educational programs, job training, healthcare, affordable housing, or other services.

200. *See, e.g.,* David Friedrichs, *Enron et al.: Paradigmatic White Collar Crime Cases for the New Century*, 12 *CRITICAL CRIMINOLOGY* 113, 119–21 (2004) (examining the criminal organizational culture of Enron as well as those of other large corporations, accounting firms, and law firms).

201. *See id.* at 114–16.

and lacks the criminogenic and other harmful characteristics associated with prison or jail.

On a decarceration model, then, given the severe harms associated with large-scale incarceration and the compelling evidence that social institutional engagement may address certain commonly criminally prosecuted forms of socially disruptive conduct more effectively than incarceration, non-carceral sentencing is preferred. The only circumstances under which a carceral sentence would be imposed in a specialized criminal court adopting a pure decarceration model would be where there is substantial reason to believe incarceration is necessary to protect public safety or is otherwise necessary in the interests of justice. And to the extent there is doubt as to this determination, on a pure decarceration model that doubt would be resolved in favor of non-carceral sentencing unless and until incarceration becomes necessary.²⁰² In such instances—for example, in cases of serious violent crime where the defendant is adjudged mentally well and that individual's prior record and most recent criminal conduct suggests a serious ongoing risk to public safety—it is unlikely a defendant would be referred to a specialized diversionary court in the first place. Were that to occur, however, the case would be referred back to the conventional court. Though these determinations are inevitably complicated and involve assessment of uncertain risks, serious violent and dangerous defendants who would continue to pose a grave threat—even if subject to an alternative socially integrative sentencing regime of mental health treatment, job placement, and social service reporting—are a substantially smaller demographic than that of the current population incarcerated in the United States.²⁰³

A decarceration model of specialized criminal law administration operates with reference to this framework, seeking to facilitate greater non-carceral social institutional integration of persons accused of an array of criminal offenses. But apart from this commitment to attempting to reduce criminal involvement by improving access to other social institutions, a decarceration model is untethered from any highly specified jurisprudential or institutional content. Its sole unifying feature is that of closely empirically monitored

202. More generally, a decarceration model would aim to restrict incarceration over time only to those cases where persons are guilty of crimes so appalling the public's sense of justice requires it, such as for serial killers; to matters where the convicted offender's prior criminal history is so extensive and serious that the risk of release would be too grave to manage; and to those who, once subject to diversionary sentencing, revealed themselves through subsequent offending to pose an ongoing threat to others.

203. See *Key Facts at a Glance: State Prison Population by Offense Type, 1980–2006*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/corrtyp.cfm> (last revised Mar. 9, 2012) (reporting that state prison populations as of 2006 consisted of approximately 100,000 persons convicted of public order offenses, over 200,000 persons convicted of drug offenses, and over 200,000 persons convicted of property offenses); see also GLAZE, *supra* note 1, at 1 fig.1; *Homicide Trends in the U.S.: Homicide Victimization 1950–2005*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/homicide/tables/totalstab.cfm> (last revised Mar. 9, 2012); *Key Facts at a Glance: Percent of Total Crime Reported to Police*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/tables/reportingtypetab.cfm> (last revised Mar. 9, 2012).

experimentation with criminal law administrative alternatives so as to reduce reliance on incarceration consistent with maintenance of public safety and to forge a more sociologically and empirically oriented criminal justice framework.

Courts adopting a pure decarceration approach would reject the court-based therapeutic methods of certain specialized criminal courts and the commitment to judicial monitoring as a scalable manner of deterring criminal conduct. A focus on order maintenance is abandoned too on a decarceration model, along with the associated commitment to broken windows policing. The purpose of a decarceration approach—more conducive to adoption by conventional courts than reformist approaches that entail providing therapy in a courtroom context or transforming judges into probation officers, though certainly not typical of traditionally conceived courts—is to oversee the adequate provision of services to the class of defendants referred to those services and appearing before the diversionary courts, predominately by monitoring the service providers. This is a role somewhat familiar to courts from the structural reform litigation context.²⁰⁴

Critically, courts adopting a decarceration model are experimentalist institutions that are open to revision in light of ongoing empirical feedback—they are unfinished, self-correcting, reformist organizations. The aspiration of a decarceration model of specialized criminal law administration is to bring about criminal law reform incrementally, revising policies in response to input from defendants, judges, prosecutors, public defenders, and empirical monitoring entities.²⁰⁵ In this sense, a decarceration model is decidedly unfinished, promising gradual reform rather than a bold new program fully specified in advance.²⁰⁶

A further advantage of a decarceration model is that it works to reduce reliance on incarceration while closely attending to the particular needs and

204. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

205. See MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 209–10 (1983) (describing the “problem-oriented approach” as one that calls for “making incremental and unexciting adjustments in the administration of existing [programs]”). A decarceration model may be understood in this regard as adapting an approach elaborated by Scandinavian criminologist and political theorist Thomas Mathiesen, who developed a theory of the unique promise of *unfinished* reforms. See THOMAS MATHIESEN, THE POLITICS OF ABOLITION 13–28 (1974). For Mathiesen, the unfinished alternative emerges when we refuse “to remain silent concerning that which we cannot [yet] talk about”; in our grasping attempts to fashion a competing, contradictory, and in that sense *new* state of affairs, we “express the unfinished.” See *id.* at 16. A decarceration model adopts precisely this approach, borrowing the now familiar institutional home of the specialized criminal court to attempt to direct criminal law administration in different directions, incrementally, experimentally, with sensitivity to empirical feedback, and with the overall goal of facilitating a form of social order that is less reliant on conventional criminal law frameworks and incarceration.

206. See FEELEY, *supra* note 205. Dorf and Sabel also underscore that experimentalist institutions are in an important sense always “unfinished.” See Dorf & Sabel, *supra* note 13, at 860; see also Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 940 (2003) (referring to problem-oriented courts as “always a work in progress,” and stating that “the very conditions upon which problem-solving courts insist in the actors they evaluate—openness and revisability in light of experience—apply as well to problem-solving courts themselves”). But see Super, *supra* note 24 and accompanying text.

risks associated with specific populations of defendants. The hope is that this will free up resources currently allocated to criminal law administration and make them available for other sectors better suited to addressing the relevant underlying problems. This may help to negotiate (if not to entirely avoid) the decarceration trap that Professors Robert Weisberg and Joan Petersilia have cautioned against: the “grave risk of backfire if advocates attempt to reduce mass incarceration simply for the sake of reduction rather than coupling advocacy with a full consideration of the causes of recidivism.”²⁰⁷ Because, as Weisberg and Petersilia warn, “even if small increases in crime by released prisoners . . . are not statistically meaningful, they may reignite the political demagoguery that contributed to mass incarceration in the first place.”²⁰⁸ A decarceration model functions in an incrementalist fashion to reduce reliance on incarceration by experimenting with alternatives closely tailored to the needs of populations currently subject to criminal supervision while attending to the causes of recidivism and creating a record of demonstrated positive results.

A decarceration model also promises to attend to the risk of “transinstitutionalization,” which Professor Bernard Harcourt has identified with regard to mentally ill incarcerated persons.²⁰⁹ Transinstitutionalization refers to the disastrous experience encountered during the earlier attempt to deinstitutionalize persons living in mental hospitals without accounting in any meaningful way for their integration elsewhere. Following the deinstitutionalization of hospitals for the mentally ill in the 1960s and 1970s, many persons released from mental institutions either became homeless or were later reinstitutionalized in prisons and jails.²¹⁰ A decarceration model works to avoid this outcome of transferring persons from one total carceral institution (prison or jail) to another total institution (for example, a psychiatric hospital) by collaborating closely with, monitoring, and shifting resources to a continuum of networked though independent and mostly nonresidential service providers that address housing, mental health, medical, and employment needs of low-income persons in a given delimited geographic area.²¹¹

It is imperative to underscore, though, that in diverting certain categories of cases and defendants to sectors outside the criminal law administrative context, a decarceration approach should be understood as a *partial strategy* for decarceration, not necessarily as a permanent criminal law administrative fixture nor as a comprehensive solution to the problems of overcriminalization and overincarcera-

207. See Weisberg & Petersilia, *supra* note 5, at 126.

208. *Id.*

209. Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 87–88 (2011).

210. See *id.* at 53–54, 87–88.

211. Cf. Weisberg, *supra* note 179, at 363–69 (examining how deinstitutionalization of the mentally ill in the 1970s was a catastrophe motivated in part by widely shared but unexamined notions of how gravely disabled people could be treated “in the community,” with little thought devoted to how such care would actually be administered).

tion. Rather, the decarceration model's more modest goal is to shift the management of social disorder, where possible, from criminal courts, probation or parole offices, jails, and prisons to a range of other institutions. Invariably, violent and otherwise criminal conduct will continue to intrude upon people's lives, and conventional criminal law administration will play a role, however imperfect, in responding to that conduct. A decarceration model promises to minimize such conduct, focus conventional criminal law resources where they seem most plainly called for, and begin to respond to the problems of overcriminalization and overincarceration by enlisting other social institutions more fully in managing social disorder. Documented successful diversion of some cases may form the basis for subsequent decriminalization of certain conduct (for instance of particular drug offenses), while other offenses may entail harm that warrants a retained norm of criminalization (particularly where theft or violence is involved) even as successful diversion may support substantially reduced reliance on incarceration for that category of offense or offender.

The remainder of this section will explore how different existing specialized criminal courts are functioning or could and should function on a decarceration model. The criminal law reformist possibilities of a decarceration model are further explored in Part III. Objections to a specialized criminal law reform strategy more generally are considered in Part IV.

Although many mental health courts adopt some combination of a therapeutic jurisprudence and judicial monitoring approach, mental health courts may also embrace a decarceration model, shifting resources for mentally ill persons from the criminal courts, jails, and prisons to other sectors. Mental health courts operating on a decarceration model seek to remove mentally ill individuals from conventional criminal processing to a forum where the focus is on addressing holistically relevant needs so as to prevent subsequent criminal offending.

There is tremendous potential to accomplish significant decarceration by addressing mentally ill individuals' socially disruptive conduct outside the context of conventional criminal law administration. Roughly 500,000 mentally ill people are incarcerated in prisons and jails in the United States.²¹² Among the most common mental illnesses U.S. prisoners suffer are schizophrenia and bipolar disorder, both of which are amenable in many cases to effective psychiatric intervention.²¹³

212. See, e.g., *The New Asylums*, PUB. BROAD. SERV., <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/view/> (last visited Mar. 9, 2012). Reports suggest that between one fifth to one half of prisoners in the United States suffer from a serious mental illness. In 2005, a Bureau of Justice Statistics study found that more than half of the inmate population had a mental illness. See DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006). Other sources suggest that between sixteen to twenty percent of prisoners in the United States are seriously mentally ill. See, e.g., Merrill Balassone, *Jails, Prisons Increasingly Taking Care of Mentally Ill*, WASH. POST, Jan. 23, 2011, http://www.washingtonpost.com/national/jails-prisons-increasingly-taking-care-of-mentally-ill/2011/01/21/AB03WRJ_story.html.

213. See, e.g., Stephen Allen, *Mental Health Treatment and the Criminal Justice System*, 4 J. HEALTH & BIOMED. L. 153, 161–65 (2008).

For the mentally ill, incarceration is frequently brutal and devastating and conditions of confinement routinely worsen rather than improve the relevant mental illnesses and associated disorderly conduct.²¹⁴ As the U.S. Supreme Court explained in *Brown v. Plata*: In California, “[b]ecause of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets.”²¹⁵ The Court included this image of the holding cages used for mentally ill individuals in California prisons²¹⁶:



214. Gary Fields, *No Way Out: Trapped by Rules, the Mentally Ill Languish in Prison*, WALL ST. J., May 3, 2006, <http://online.wsj.com/article/SB114662497280042311.html>.

215. 131 S. Ct. 1910, 1924 (2011).

216. *Id.* at 1950 app. A.

The majority opinion in *Plata* continued:

A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “no place to put him.”²¹⁷

The brutality of these conditions entailed by incarcerating large numbers of mentally ill individuals, often in response to relatively minor offending criminal conduct, is sufficiently apparent as to require little further explication.

By contrast, on a decarceration model, mental health court teams—composed of a judge, prosecutor, defense counsel, social worker, and psychologist—work to identify mentally ill individuals who may be removed from conventional criminal carceral sentencing to alternative programming without excessive risk to public safety, leading Professor Shauhin Talesh to refer to mental health courts generally as “dynamic risk managers.”²¹⁸ Then, mental health court teams work to locate sustainable psychiatric treatment, sustainable housing arrangements, and meaningful activity of some sort for participants to undertake.²¹⁹ Mental health courts operating on a decarceration model monitor provision of mental health treatment and other services to defendants.²²⁰ The service providers themselves have an informal surveiling function, and the courts only need to intervene to conduct a revocation hearing or to increase service levels or monitoring if a defendant reveals himself or herself to pose a substantial danger to others.²²¹ The courts use outside referrals to apply a combination of risk assessment tools to develop programmatic interventions, including actuarial models to identify risk factors and more individualized

217. *Id.*; see also *id.* at 1926 (“Mentally ill inmates languished for months, or even years, without access to necessary care. They suffer from severe hallucinations, and they decompensate into catatonic states.” (alteration omitted) (quoting *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (internal quotations marks omitted)).

218. Talesh, *supra* note 80, at 119–24.

219. According to Mental Health Court Judge Patrick Morris:

A substantial number of these folks are so low functioning that you have to reduce your level of expectations. Many are illiterate, and when you say, “Go to school,” you may mean simply “Go [to] the county library and be engaged in a literacy program.” What you want to do is essentially find a way to occupy them constructively Re-engage them with their family if at all possible . . . so that they have a support group out there and a daily activity to go to that’s meaningful and constructive. And it may be as simple as a volunteer position at a homeless shelter . . . but you look for a variety of ways to simply help them reconstruct a life that has some meaning to it, and that’s about all you can do with some of these clients.

Id. at 122 n.191 (citing Interview with Judge Patrick Morris, Satellite Broadcast of Mental Health Courts, Ctr. for Court Innovation (Nov. 14, 2002)).

220. See JUSTICE POLICY INST., *supra* note 73, at 19.

221. See, e.g., Matthew J. D’Emic, *The Promise of Mental Health Courts: Brooklyn Criminal Justice System Experiments with Treatment as an Alternative to Prison*, CRIM. JUST., Fall 2007, at 24, 26–27.

clinical assessment.²²² Perfect compliance with treatment and other orders is not expected, and incarceration is used only as a last resort when all other lenient policies relating to noncompliance have failed.²²³ There is evidence that diversionary mental health courts may reduce reliance on incarceration in managing mentally ill persons, reduce reliance on in-patient psychiatric treatment, and improve access to housing for program participants.²²⁴

Veterans courts operating on a decarceration model would similarly obtain local cooperation to manage the cases of referred veterans through non-carceral sentencing, such as through referral to Veterans Affairs programs as in the case of Eifert recounted in this Article's introduction.²²⁵ If community courts are to function on a decarceration model, they would need to limit their jurisdiction to matters in which defendants would otherwise likely be subject to incarceration.²²⁶

Drug courts may function on a decarceration model, accomplishing some measure of de facto decriminalization by sentencing drug-involved defendants to treatment and non-revocable or revocation-limited probation. When state legislatures pass drug court acts or related legislation authorizing this non-carceral drug court approach, the effect is to bypass political barriers to more explicit decriminalization and to lend democratic legitimacy to drug courts'

222. See, e.g., Talesh, *supra* note 80, at 113–15 (“Mental health courts have a unique, clinically-based risk management model that is routinely updated and altered and relies on dynamic assessment.”).

223. See, e.g., Shoaf, *supra* note 128, at 991 (“Jail time is used only when deemed absolutely necessary, and is usually for a short period of time such as three, five, or ten days. If the client is eventually terminated from the program, any jail time served is put towards the remaining time the client may have on his or her original sentence.”); Talesh, *supra* note 80, at 119 & n.174; see also Mark A.R. Kleiman, *The Outpatient Prison*, AM. INT., Spring 2010, at 45 (reporting reduced incarceration and recidivism in Hawaii program that applied short and certain carceral sanctions to high-risk group of drug addicted ex-offenders).

224. See, e.g., Richard D. Schneider, *Mental Health Courts*, 21 CURRENT OPINION IN PSYCHIATRY 510, 510–11 (2008) (reporting range of positive outcomes associated with mental health courts); see also Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 28–29 (2002) (reporting that evaluation of Alaska's mental health court reflected that participants experienced reduced mental hospital admissions, reduced criminal justice involvement, and improved housing placement). *But see* Christine M. Sarteschi et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 J. CRIM. JUST. 12 (2011) (reporting findings that suggest mental health courts are an effective intervention with respect to both recidivism and clinical outcomes but noting findings are limited by methodological weaknesses of existing studies); see also Richard J. Bonnie & John Monahan, *From Coercion to Contract: Reframing the Debate on Mandated Community Treatment for People with Mental Disorders*, 29 LAW & HUM. BEHAV. 485, 485 (2005) (analyzing the types and features of mandated community treatment that are tied to “some form of ‘leverage’ in which deprivations such as jail or hospitalization have been avoided, or rewards such as money or housing have been obtained [by persons with mental disorders], contingent on treatment adherence”).

225. See, e.g., Dahlia Lithwick, *A Separate Peace: Specialized Courts for War Veterans Work Wonders. But Why Stop at Veterans?*, SLATE (Feb. 11, 2010, 1:33 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/a_separate_peace.html.

226. See Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 239–40 (2009) (discussing the need to avoid the dangers of net widening in implementing alternatives to incarceration programs).

efforts.²²⁷

Reentry courts may also operate on a decarceration model. Parole or probation violators constitute approximately 50–65% of people admitted to state prison, and about half of these individuals are re-incarcerated for technical violations.²²⁸ Reentry courts may facilitate access to social services and employment and rely on those referral sources for notification of extremely concerning noncompliance but otherwise sharply limit reincarceration for technical violations.²²⁹

Although most domestic violence courts function on a judicial monitoring model of limited effectiveness and with substantial associated rights-eviscerating risks, domestic violence courts could shift to a decarceration model for certain cases arising from relatively less serious and less violent incidents. Alternative sentences could still be onerous and require, among other conditions, considerable financial support of and physical separation from the complainant. These provisions might better serve the interests of the complainant spouse than incarceration for short periods of a spouse who is the primary source of financial support for the family.²³⁰ Courts could also work to facilitate services for complainants—as do many domestic violence courts currently—particularly because the availability of alternative living arrangements, employment opportunities, or vocational or educational training may empower survivors of domestic violence to leave or transform abusive relationships and, hence, in the long-run reduce reoffending, re-arrests, and reincarceration. Sex offense courts are generally conceptualized primarily on a judicial monitoring model but could also shift to a decarceration model by identifying those individuals whose convictions are such that carceral sentencing seems unnecessary (for instance, individuals convicted on the basis of public urination, certain other forms of indecent exposure, or consensual sex with a person not significantly younger than the accused).²³¹

227. See, e.g., Daniel T. Eismann, *Three Branches of Government Working Together Effectively Have Made Idaho a Leader*, THE ADVOCATE: OFFICIAL PUBLICATION OF THE IDAHO STATE BAR, Sept. 2008, at 12, 12 (“In 2001, the legislature enacted the Idaho Drug Court Act to provide a statutory framework for implementing drug courts throughout the state.”).

228. AUSTIN ET AL., *supra* note 182, at 23. According to the U.S. Department of Justice, parole violators returned to prison serve eighteen months on average before being released again. *Id.* In Louisiana, technical violators serve an average of twenty months before being re-released. See *id.*

229. After the Harlem Parole Reentry Court learned judicial monitoring was associated with increased reincarceration, it began to shift to something approaching a decarceration model, seeking to reduce judicial surveillance and revocation to jail for technical violations. See HAMILTON, *supra* note 141, at 33 (“In New York State a policy shift occurred in 2006, resulting in parole officers making a concerted effort not to revoke parolees based on technical violations.”); see also *id.* at 30 (“[I]n the days ahead the Reentry Court might consider exploring alternative responses to technical infractions, such as increased use of intermediate sanctions in lieu of revocation.”).

230. See, e.g., Quinn, *supra* note 14, at 68 (“Women’s problems frequently are exacerbated rather than solved by a lack of financial and other support from their incarcerated partners.”).

231. See, e.g., *New Sex Offender Court Being Set Up in Pittsburgh*, ASSOCIATED PRESS, May 4, 2011, <http://www.buffalonews.com/wire-feeds/state/article412890.ece> (describing the goals and design of Pittsburgh’s sex offender court).

In all of these separate specialized criminal court contexts, a decarceration model does not purport to be capable of solving the underlying problems. Instead, a decarceration model frees up resources that might be allocated to sectors better able to address relevant problems, even if the problems ultimately remain in some measure intractable, at least without further-reaching intervention. A decarceration model is minimalist in its mission as compared to competing criminal law reformist models, at least with regard to the degree of intervention taking place in the court itself. Empirical monitoring may establish the basis for transferring this framework outside the specialized courts context, facilitating farther-reaching transformative criminal law reform. Gradually, in an incremental experimentalist fashion, a decarceration model may begin to reform criminal law more broadly by working to address the compound problem of the criminal law's relationship to social-order maintenance and the social conditions associated with targeted conduct, moving the regulation of certain matters outside criminal law administration to other sectors.

In summary, the upshot of the Article's analysis to this point is that if specialized criminal courts aim to begin to reduce harshness and brutality in criminal law administration and to limit reliance on criminal supervision and incarceration while addressing socially disruptive conduct, they should organize themselves predominantly on a diversionary, minimalist, experimental, sociologically oriented decarceration model. The therapeutic, judicial monitoring, and order maintenance models represent distinct criminal law reformist strategies that threaten to exacerbate rather than unwind existing problems in criminal law administration because they each possess inherent features that tend to increase reliance on criminal supervision and that may even expand incarceration—radically transforming the judicial role and diluting procedural protections more significantly than on a decarceration model, without generating other demonstrated desirable outcomes.

The following Part will explore in more detail three criminal law reform strategies that courts adopting a decarceration model may set in motion. Part IV will address anticipated objections.

III. POSSIBILITIES OF A DECARCERATION MODEL

Much of the reformist promise of a decarceration model lies in the associated courts' ability to begin to redirect criminal law administration more generally through three primary strategies: (1) cognitive reframing; (2) institutional reinvention; and (3) systemic change. The following subsections attend to each of these three strategies in turn.

A. COGNITIVE REFRAMING

Specialized criminal courts adopting a decarceration model hold the potential to reframe shared understandings of criminalized conduct, developing alternative approaches to an array of matters currently managed in large part through

criminal supervision and incarceration. Reframing common conceptions of crime and punishment is a critical component of any decarceration strategy because to shift the management of social order from criminal law administration to other institutions will require changed public understandings of when incarceration is called for and what viable alternatives might entail.

Before turning to the mechanisms by which courts adopting a decarceration model may reframe the criminal law's response to various forms of criminally charged conduct, a brief detour into the literature on framing is in order. Framing is a process explored widely in psychological,²³² political science,²³³ sociological,²³⁴ and legal scholarship,²³⁵ so I will only quickly define the dimensions of framing relevant for present purposes.

In short, a "frame" is a mental structure through which we understand the world and which serves to organize perception.²³⁶ Frames are generated through interactive social processes²³⁷ and they shape how people construct meaning, identify problems, and determine to resolve those problems, often operating unconsciously to inform individual and collective decision making.²³⁸ How a particular problem or choice is framed significantly influences the way in which people proceed to address the situation.²³⁹ For example, a public-health framing of the problem of drug use might suggest drug treatment as a preferred solution; a moralistic framing of drug use as an unethical failure of will might suggest a criminally punitive response. Likewise, a mental health framing of veterans' or mentally ill persons' antisocial conduct might suggest a coordinated reaction of clinical treatment and social service provision, whereas a framing of such persons as dangerous and unmanageable criminals likely would suggest a carceral response.

Despite the powerful influence exerted by existing frames, reframing occurs routinely, contributing to shifting social understandings. In effect, reframing reorganizes intuitions and understanding, generating different frames, often by introducing alternative ways of speaking about and approaching (and regulating) the dimension of the world in question.²⁴⁰

232. See, e.g., Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981).

233. See, e.g., DONALD A. SCHON & MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* (1994).

234. See, e.g., Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 *ANN. REV. SOC.* 611, 614 (2000).

235. See, e.g., Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804, 813–18 (2008).

236. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21 (1974).

237. See, e.g., Benford & Snow, *supra* note 234.

238. See, e.g., Tversky & Kahneman, *supra* note 232; see also GOFFMAN, *supra* note 236.

239. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3–4 (2008).

240. Another related, though distinct, way to characterize the process of reframing is in terms of changing or ambiguating social meaning. See, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 1039–42 (1995). According to Lessig:

Social psychologist John M. Darley explains one way in which intuitions may change as abstract reasoning overrides less reflective judgment.²⁴¹ Cognitive psychologists refer to this as dual processing: “One process, produced rapidly, takes place non-optionally The second set of processes involves abstract reasoning areas of the brain, and is not always triggered into action. . . . [W]hen this reasoning system is activated, it sometimes overrides intuitions.”²⁴² Over time, cognitive frames may shift through the contestation, embrace, and repetition of competing frames in different social and cultural contexts.

In the criminal law context, frames are routinely invoked in ways that shape how people imagine particular forms of disfavored conduct ought to be managed.²⁴³ In a provocative article on what he called “Interpretive Construction in the Substantive Criminal Law,” Mark Kelman revealed how certain frames shape whether the conduct of a criminally accused person is understood as morally blameworthy, as an appropriate subject of criminal punishment, or as excusable.²⁴⁴ Though Kelman did not himself rely on the conceptual apparatus of cognitive framing, his analysis offered an account of how framing occurs in the context of criminal law administration through the selection of time frames (narrow or broad) and intentionalist versus determinist interpretations of behavior, among other interpretive schemes.²⁴⁵ Narrow versus broad time framing influences perceptions of the degree of culpability of a defendant, enabling or undermining the view of that defendant as morally responsible (on an intentionalist account) or as significantly constrained and, hence, less responsible in some relevant respect (a determinist interpretation).²⁴⁶

A decarceration model of specialized criminal law administration offers an alternative perspective on the necessity of incarceration; on structural, neighborhood-level mechanisms that may inhibit crime; as well as on time-framing, moral responsibility, and blaming practices in criminal law. And it asserts these alternative frames in local, state, and national contexts. The process by which

[S]ocial meanings . . . are used by individuals, or groups, to advance individual or collective ends; and . . . their force in part hangs upon their resting upon a certain uncontested, or taken-for-granted, background of thought or expectation

. . . .

. . . [Change in social meanings] proceeds by remaking that which is taken for granted, and which gives a particular text an unwanted meaning. It functions by switching on new associations. This breaking up, or remaking, requires effort; it follows from a practice.

See *id.* at 951, 962.

241. See John Darley, *Realism on Change in Moral Intuitions*, 77 U. CHI. L. REV. 1643, 1649 (2010).

242. *Id.*

243. See, e.g., FRIEDMAN, *supra* note 111, at 10 (discussing the “teaching function” of U.S. criminal law).

244. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 592–98 (1981).

245. See *id.* at 593–96.

246. See *id.*

courts adopting a decarceration model reframe understandings of particular categories of crime and offenders begins with a dialogue between architects of specialized criminal courts, prosecutors, public defenders, and defendants.²⁴⁷ Collectively, these actors forge a different account of the causes and consequences of certain criminal offenses. For example, veterans courts and mental health courts have made considerable headway in advancing a regime of treatment rather than incarceration in response to socially disruptive conduct on the part of veterans and mentally ill persons; other specialized criminal courts have introduced with substantial success a revised approach to drug offenses involving treatment and irrevocable or rarely revocable probation. Over time, this understanding is embraced, at least to some extent, by those who interact with the specialized criminal court itself and by other relevant criminal law administrative actors: police, prosecutors, defense counsel, and judges. These alternative frames are diffused through the court to the various individuals that come into contact with the court. Eventually, the reconfigured framework may be taken up by actors outside the specialized court. The publication and dissemination of empirical analyses of court outcomes may allow for broader circulation of a proposed framework for reform.

Consider again the veterans courts program in Okemos, Michigan and the case of Staff Sgt. Brad Eifert introduced in this Article's introduction. Eifert served in Iraq and lives in Okemos, which is one of the approximately eighty jurisdictions in the United States with a veterans court. After returning from Iraq, Eifert struggled with depression, alcohol, and his own anger until he took a gun and initiated a confrontation with the police of a kind sometimes referred to as "suicide by cop."²⁴⁸ Although he faced charges carrying multiple potential life sentences, he was ultimately permitted to participate in a diversionary court program that may result in a dismissal of all charges.²⁴⁹

The procedures whereby Eifert came to be admitted to the diversionary program reflect the reframing processes potentially introduced through a specialized criminal court adopting a decarceration approach. In the first instance, to establish a veterans court, judges and other advocates introduce a different framing of responsibility for the criminal conduct in question. In the veterans court context, this entails reframing veterans' socially disruptive acts as, to some extent, a shared responsibility occasioned by the fact that these individuals have been sent by elected officials into harm's way, resulting in their inability to function in a socially acceptable manner. The offending behavior in question is also reframed as something other than a deliberately criminal transgression, warranting blame and carceral punishment. Instead, veterans' socially disruptive conduct is recharacterized as a manifestation, in part, of what Buffalo, New York's Veterans Court Judge Robert T. Russell has called the

247. See, e.g., Dorf & Sabel, *supra* note 13, at 832.

248. See Goode, *supra* note 15.

249. See *id.*

“invisible wounds of war.”²⁵⁰ Judge Russell said of his Veterans Court in an interview with the *New York Times*: “I don’t interpret it as excusing behavior, but as addressing what the behavior is.”²⁵¹ In galvanizing support to create veterans court programs, the courts’ architects invoke repeatedly this set of contending frames, differently characterizing the defendants and offending conduct to be addressed by the court, both at the local level and also on a state and national stage through media and other public engagements.

Then, when the court is operational, the process of moving particular defendants into that court itself engages and reframes the way different key actors in the local criminal process understand the problems at hand. For Eifert to be admitted to the diversionary program, the judge, defense counsel, prosecutors, and police all had to agree on the transfer. The judge had to consider whether Eifert could be admitted given that his case involved the use of a firearm and threat of injury to police officers. Defense counsel advocated for Eifert’s admission and ultimately convinced the judge. Initially, though, the prosecutor’s office “was not going to play at all,” according to Eifert’s counsel. But eventually, as Eifert’s lawyer introduced a differently framed interpretation of the case—calling attention to the severity of Eifert’s post-traumatic stress disorder and his decision not to harm the officers when, as a trained marksman, he could have done so—the prosecution adjusted its position. Then, the assistant prosecutor had to engage the police officers who had been in the woods that night when Eifert was firing shots. The case had been debated in local news venues with some arguing that Eifert should receive a life sentence and others urging a more lenient response. In the end, the officers were persuaded to agree to Eifert’s admission to the veterans court and in public comment, one officer, who stated he feared for his life that night, concluded: “I don’t think any of us would not want him to get treatment There’s a difference between somebody who’s a criminal and someone who’s just in a perfect storm of things going wrong.”²⁵²

The line between those two figures—the criminal and the person “in a perfect storm of things going wrong”—may not in fact be clear at all in the vast majority of criminal cases, but veterans courts reintroduce a determinist frame, a collectivist frame, and a broader time frame for a range of conduct in ways that shift public understandings of a significant group of defendants, veterans, and a variety of criminalized conduct. Ongoing media attention to specialized criminal courts carries the reframed understandings in particular jurisdictions, such as in Okemos, Michigan where Eifert’s case unfolded, to a broader national audience.

Judges operating in specialized criminal courts understand that they are engaged in a strategic undertaking focused in large part on shifting public perceptions about the appropriate scope of criminal law and punishment. As

250. *See id.*

251. *See id.*

252. *See id.*

Judge Ginger Lerner-Wren of the Broward County Mental Health Court relayed in comments excerpted in this Article's introduction: "We view the Mental Health Court as a '*strategy*' to bring fairness to the administration of justice for persons being arrested on minor offenses who suffer from major mental disability."²⁵³ This strategy of reframing particular defendants and criminalized behaviors as suited for alternative forms of social response apart from the criminal law is a crucial part of the work of a veterans or mental health court and of a decarceration approach more generally.

It is important to note, however, that this strategy is not without important limits: the success of reframing and of admission to the programs depends on the zealous advocacy of defense counsel and on the openness of the judge and prosecutor. While measures could (and perhaps should) be taken to limit prosecutorial discretion in the referral process, the cooperation of prosecutors contributes to the reframing work in which the court is engaged.

In any case, despite its limits, through this strategy specialized criminal courts have generated some significant reconceptualization of how to approach particular categories of offenses and offenders. These changes generally begin with judges and lawyers working within the courts. Chief Judge Jonathan Lippman of the New York Court of Appeals, for instance, has suggested that: "When it comes to non-violent crime, we have changed how judges and lawyers measure success—no longer by the number of dispositions, convictions, or acquittals but by whether we are able to break the cycle of addiction and crime and improve public safety."²⁵⁴ Judge Clinton Deveaux reports that, although his judicial colleagues used to deride his specialized criminal court work as that of a "social worker on the bench," in due course other judges started to refer cases to his court and reported adopting some similar approaches in their own conventional courts, acknowledging that "this is the only way to deal with this stuff if you're going to actually stop the recidivism and actually solve some of the problems that are bringing these people to the court."²⁵⁵ Transfer of reframed conceptions also is likely to occur through the transfer of judges from the specialized criminal court back to the conventional court. When judges move between a specialized criminal court and a conventional court, many report that they continue to apply in part the approach developed in the alternative court context to the extent allowable.²⁵⁶

253. DENCKLA & BERMAN, *supra* note 16, at 17 (emphasis added).

254. Lippman, *supra* note 77, at 1055.

255. NOLAN, *supra* note 7, at 21 (quoting Judge Deveaux, who presides over an Atlanta community court).

256. BERMAN & FEINBLATT, *supra* note 7, at 196 ("There was general agreement among the judges that taking ideas from problem-solving courts was not only possible but desirable. They highlighted several things that they had learned from their time in problem-solving courts—including the value of a problem-solving mindset, direct interaction with defendants, monitoring offenders' performance in treatment, and reaching out to social service providers—that were appropriate for mainstream use . . ."); *see also* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 87 (Bruce J. Winick & David B. Wexler eds., 2003) ("[M]any former problem solving court judges, upon being transferred

Beyond the level of reshaping the perspectives of individual court personnel, judges and other institutional actors frequently adapt the courtroom to function as public theatre and publicize through the media the aspirations of their respective courts. As a consequence, large numbers of cases are not necessarily required for the courts to shift understandings on a broader scale.²⁵⁷ This addresses one challenge for specialized criminal courts: namely, that they cannot reasonably be brought to scale. Active engagement of judges, lawyers, and social scientists involved with diversionary courts in reframing certain of the criminal law problems at stake in the courts allows the courts broader reach than that provided by the relatively limited number of cases they are able to process at any given time.

Additionally, through empirical monitoring of the courts, a decarceration model helps determine whether incarceration is necessary or advisable for certain kinds of crimes and defendants, balancing important concerns about public safety and criminal law reform goals. Many administrators of specialized criminal courts, often alongside external empirical monitoring entities, closely track the outcomes regarding recidivism and other variables for participants in non-carceral programming relative to similarly situated persons subject to conventional criminal supervision and/or incarceration. If a decarceration approach is able to demonstrate that reliance on incarceration can be diminished without imperiling public safety, this approach *may* reframe public attitudes regarding incarceration more broadly—providing the basis for a large-scale reasoned rethinking of prison- and jail-based social order maintenance.²⁵⁸

The process of disseminating empirical analyses is well underway with drug courts. In a quasi-experimental study released in June 2011, a team of social scientists working with the Urban Institute and funded by the U.S. Department of Justice examined the outcomes regarding criminal recidivism and drug relapse for participants in twenty-three drug courts and six comparison sites.²⁵⁹ Using a combination of statistical techniques to correct for potential selection bias, attrition bias, and clustering of outcomes within sites, the study's authors found that drug courts significantly reduce criminal recidivism and drug use after eighteen months as compared to the outcomes for similar individuals in the comparison sites.²⁶⁰ In July 2011, the Senate Judiciary Committee convened hearings regarding this and related studies to explore expanded funding for specialized criminal courts relying on alternatives to incarceration, with specific

back to courts of general jurisdiction, have taken with them the tools and sensitivities they have acquired in those newer courts.”)

257. *See, e.g.*, D’Emic, *supra* note 221.

258. *Cf.* Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 258 (2009) (examining the link in popular imagination between safety and incarceration).

259. *See* ROSSMAN ET AL., *supra* note 12, at 1.

260. *See id.* at 2–7.

emphasis on drug courts and veterans courts.²⁶¹ In time, empirical analyses of this sort may facilitate alternative framings that would enable legislative reforms markedly scaling back sentence lengths across the board.

Though specialized criminal courts have generally started with jurisdiction only over a very limited class of offenders or offenses, typically the courts' authority expands and an increasing range of cases come before the courts. For example, drug courts began by accepting drug possession cases but over time have expanded to include individuals arrested for forgery, burglary, and other crimes believed to be associated with drug addiction.²⁶² This occurs in part due to the cognitive reframing that the courts enable: drug crime is characterized to include not only narcotics possession and sales offenses but also conduct motivated by drug addiction.

Once diversionary specialized criminal courts have become an established alternative means of addressing drug offenses and the socially disruptive conduct of veterans or the mentally ill, broader shifts in social understanding may be set in motion. The diversionary alternatives introduce a new institutional framework for managing the problems in question. The existence of these programs normalizes the alternative responses. And the availability of a parallel diversionary alternative for a significant class of cases makes available a set of reasons why diversion may be preferable in other contexts—a potentially transposable “reasoned override” to the automatic invocation of conventional criminal law frameworks.²⁶³ The contagion of the diversionary approach is confirmed by the experience of the past decade during which time diversionary courts have rapidly multiplied in numerous areas and expanded to cover more serious offenses.

The alternative framings of crime and punishment emerging through the work of specialized criminal courts, particularly those adopting a diversionary decarceration approach, hold the promise to shift considerably and broadly public conceptions of various problems currently managed through criminal prosecution and incarceration.

B. INSTITUTIONAL REINVENTION

Along with reframing social understandings of crime and punishment, a decarceration model may also reshape criminal law administrative institutions by introducing additional tasks for judges, defense counsel, and prosecutors. Further, a decarceration model incorporates novel players into specialized criminal courts' work, in part by facilitating partnerships with local organizations and social service providers.²⁶⁴

261. See *Drug and Veterans' Treatment Courts: Seeking Cost-Effective Solutions for Protecting Public Safety and Reducing Recidivism: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong. (2011).

262. See *supra* notes 70–71 and accompanying text.

263. See *supra* notes 241–42 and accompanying text.

264. See Dorf & Sabel, *supra* note 13, at 865–68.

The roles of the judge and the parties on a decarceration model are all in flux, but, unlike on the therapeutic jurisprudence or judicial monitoring models, these role shifts are relatively consistent with preservation of conventional values respectively associated with these roles. The primary work of the judge on a decarceration model is to convene the parties and service providers; to oversee the negotiation of a diversion plan; to monitor performance of diversion programs; and then to be available to adjudicate motions for sanctions should major noncompliance become an issue. The judge on a decarceration model plays a far less active role than on a therapeutic, judicial monitoring, or order maintenance model, requiring only one or two days of work per week in the specialized court. The courts' institutional design facilitates conscientiousness about procedural protections, particularly in sanctions proceedings, and it aims to make transparent the reasons behind court orders.²⁶⁵ On a decarceration model, the judge also often serves as a spokesperson for a decarceration strategy and for experimental, empirically informed criminal law administration.²⁶⁶

Defense counsel's role shifts too, such that his or her most critical function involves negotiating the terms on which a defendant opts into the diversionary court. Because specialized criminal courts are configured differently with regard to the consequences of failure in terms of sentence penalties, informed counsel at this stage is extremely important. Defense counsel continues to play a role in safeguarding a defendant's procedural rights and other interests throughout the process, especially when motions for sanctions arise. Defense counsel may play a critical part as well in ensuring that the court actually reduces carceral sentencing, as opposed to on a therapeutic approach where defense counsel may acquiesce in a carceral sentence for its presumed therapeutic effect, or in conventional courts where much defense work involves brokering plea deals and rarely actively contesting evidence, let alone conducting trials.²⁶⁷

The role shift on a decarceration model is perhaps most dramatic for prosecutors. Embracing a decarceration approach for prosecutors entails that their offices operate not simply by seeking the toughest charges and sentences for criminal defendants, but that they work also on strengthening public safety and advancing justice in a broader context.²⁶⁸ Prosecutors on a decarceration model

265. See HAMILTON, *supra* note 141, at 9 (“[T]he judge is responsible for openly and publicly discussing program requirements, sanctions and their purposes.”).

266. See, e.g., D’Emic, *supra* note 221.

267. See BERMAN & FEINBLATT, *supra* note 7, at 87 (“Public defenders, who would normally object to a client’s revealing any extraneous personal information, are apt to accept these conversations, knowing that encouraging words from an authority figure like the judge can be extremely helpful to a client struggling to achieve sobriety.”); Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007).

268. See, e.g., Levine, *supra* note 74, at 1125 (“I think if you were to ask most prosecutors what their goals are, they would say: ‘My job is to put bad guys away.’ That goal is endorsed by our education and by our culture If you were to change the goal slightly . . . that completely changes both the methods that you use, the partners you choose, and every single aspect of what you do.” (quoting John Feinblatt & Derek Denckla, *What Does It Mean To Be a Good Lawyer?: Prosecutors,*

focus their conventional prosecutorial resources on more serious violent or property crimes where conventional criminal proceedings are most warranted and refer to specialized courts or drop charges in those matters where non-carceral sentencing is possible. Prosecutors committed to decarceration also devote their resources in part to enabling alternatives to incarceration. Taking up in some significant manner a decarceration agenda, the Brooklyn District Attorney's Office, for example, has pioneered several alternatives-to-incarceration programs. These initiatives emerged before the proliferation of specialized criminal courts, suggesting that a decarceration approach may have broader potential to restructure a prosecutorial agenda beyond specialized courts.²⁶⁹ In 1990, Brooklyn's D.A. Charles "Joe" Hynes introduced a diversion program that allowed nonviolent drug offenders to enter substance abuse treatment instead of receiving a conventional criminal sentence. By the late 1990s, the D.A.'s Office was organizing community group gatherings across Brooklyn to link individuals on parole or probation to jobs, housing, and treatment programs.²⁷⁰ This work does not require prosecutors to cease prosecuting cases of serious crime, but it suggests that prosecutors can play an important part in decarceration strategies by augmenting the prosecutorial function and organizational mission.

Beyond reshaping the roles of existing players in criminal courts, a decarceration model introduces additional players. One notable new player is the resources coordinator—a position increasingly institutionalized in criminal law administrative systems more broadly.²⁷¹ Resource coordinators work to link defendants to services, treatment, and housing, and they work to address other related cross-sector collaborative efforts of the courts.

Finally, specialized criminal courts operating on a decarceration model may work to shift the institutional form and function of the courts themselves. As it has begun to adopt to a greater extent a decarceration mission, the reentry court in Harlem, for example, has appropriated the form of the parole revocation court but has become less court-like, functioning simultaneously as a clearinghouse for job placement, mental health care, and legal advice, aiming to change local opportunities for ex-offenders and to facilitate more general economic development programs in East Harlem.²⁷² Over time, as these courts become resource clearinghouses rather than primarily sites for processing guilty pleas or

Defenders and Problem-Solving Courts, 84 JUDICATURE 206, 209 (2001) (quoting Elizabeth Glazer (second alteration in original))).

269. See, e.g., Bruce Western, *Reentry: Reversing Mass Imprisonment*, BOS. REV., July/Aug. 2008.

270. See *id.* at 9–10.

271. See, e.g., Interview by Carolyn Turgeon with Judge John Leventhal, *supra* note 85 (“Then we got a grant for a resource coordinator, a position that has now been institutionalized in the system.”).

272. See HAMILTON, *supra* note 141, at 11. As a defendant in another specialized criminal court reported: “It’s not over when you get out of this [graduate the program] If you needed help or something, or . . . lost your job and you needed help doing a resume or you needed help finding employment, you can come back here in this door here and they’re going to do anything they can to help you out.” FAROLE & CISSNER, *supra* note 132, at 7 (alterations in original).

parole revocations, this may work to transform diversionary courts from criminal courts into different institutions altogether, focusing conventional criminal law resources on the most serious forms of violent and property crime and lending support to a range of different local social and economic development initiatives.

C. SYSTEMIC CHANGE

Through both reframed understandings and institutional reinvention, a decarceration model may enable broader systemic change: altering conceptual approaches to prevalent social problems, freeing financial resources for other initiatives, increasing the level of accountability of service providers in diversionary collaborations, politicizing court actors regarding the limits of available alternative programming, and transforming the manner in which criminal law is administered more generally. First, by marshaling support for particular types of social service interventions, a decarceration model directs attention and financial resources to public health, mental health, housing, and other services that might not otherwise be available.²⁷³ Particularly during times of fiscal austerity, as resources are cut for mental health and other public health programs, a decarceration approach may free resources that could be allocated to treatment initiatives.²⁷⁴ As prisons close, additional resources may be freed for other initiatives.²⁷⁵ In this regard, specialized criminal courts function as a potential vehicle for “justice reinvestment;” as the former Executive Director of the National Association of Drug Court Professionals, Karen Freeman-Wilson, explained, “the ultimate idea is to shift the resources from the departments of correction and other places where that money could be put to better use.”²⁷⁶

These courts may also bring about systemic change by influencing how the problems confronting criminal courts—for instance, mental illness—are managed in other parallel institutions, such as in cities’ public health and publicly subsidized housing systems. Monitoring the provision of services in diversionary programs provides an additional layer of accountability for those sectors.²⁷⁷ Through this monitoring, the courts aim to encourage improved performance in related fields as court administrators advocate, for example, to make sure “there are enough treatment beds, treatment slots . . . in order to make these courts

273. See, e.g., Dorf & Sabel, *supra* note 13, at 833 (“Unlike traditional courts of specialized jurisdiction, drug courts are creating the framework for a pervasive reform of the service providers with whom they collaborate in the very act of coordinating the services provided.”).

274. Cf. Nicole Santa Cruz & Ashley Powers, *Mental Health in Arizona: A Case Study*, L.A. TIMES, Jan. 19, 2011, <http://articles.latimes.com/2011/jan/19/nation/la-na-arizona-mental-health-20110120> (explaining how services for mentally ill persons have been reduced by \$2 billion across the country, eliminating 4,000 inpatient beds, and depriving numerous patients of desired treatment and medication).

275. See GREENE & MAUER, *supra* note 3 (examining the fiscal impacts of prison downscaling).

276. WOLF, *A NEW WAY*, *supra* note 68, at 6.

277. See Dorf & Sabel, *supra* note 13, at 839.

functional.”²⁷⁸

As specialized criminal court judges and advocates run up against the limits of social service providers to accommodate the need for the relevant services, the effect in many instances may be a politicization of judges and other court advocates regarding the structural problems afflicting the demographic served by the court. Part of the reformist potential of a decarceration model, then, is that it may lead court participants to galvanize broader support for reallocation of resources to better address these problems. Some mental health court personnel have begun this process by locating resources for housing subsidies and by serving as advocates for court participants with potential landlords.²⁷⁹

It is important to acknowledge, though, that in some, perhaps even in many, circumstances, a decarceration model may run up against a sense of tragic futility—and the court and related diversionary programs may be unable to address adequately the matters at hand, even with more extensive resources for treatment and other social service alternatives.²⁸⁰ After all, simply improving the employment and life prospects of particular individuals and shifting resources to institutions that may support those individuals to become more socially integrated, is unlikely to do a great deal to shift the structures of opportunity in blighted urban and rural neighborhoods when, fundamentally, the problems the courts aim to address are deep-seated, systemic problems.²⁸¹ Yet, under such circumstances, the limitations of specialized criminal courts may facilitate larger-scale legislative reform that support effective decriminalization of certain offenses, reduced incarceration regarding others, and reinvestment in under-resourced areas. For instance, the limited capacity of drug courts in California to address treatment and other needs in that state helped to facilitate legislative reform along these lines. In 2000, when California voters passed Proposition 36, the Substance Abuse and Crime Prevention Act—permitting drug arrestees to receive probation with drug treatment instead of incarceration—the public was responding in part to criticism of drug courts that they served too

278. WOLF, A NEW WAY, *supra* note 68, at 10 (quoting Nancy Fishman, Project Director, Council of State Governments’ Justice Center).

279. Shoaf, *supra* note 128, at 992.

280. See Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 589–90 (2003) (citing MERCER L. SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY 226–50 (1989)).

281. For instance, the relationship between crime and unemployment is complex—there is no simple crime–unemployment correlation:

[K]ey is not the employment of the individual, but the density of consistent employment in the neighborhood. . . . [I]t is not a singular material factor, because it includes, for example, the efficacy of local job networks, which distinguish blue collar neighborhoods where education rates are not necessarily high. And of course distant macroeconomic forces probably affect crime rates, factors like the outsourcing of manufacturing . . . [as do] various local attitudes that include tolerance, [and] exhaustion or resistance in the face of criminal victimization

Id. (footnote omitted).

few drug offenders and involved too much judicial oversight.²⁸² While California's drug courts provided treatment to approximately 3,000 individuals annually before 2001, under Proposition 36 approximately 36,000 drug offenders each year were receiving probation with drug treatment by 2004.²⁸³ Further, supervision is delegated from the judge to probation officers and revocation of probation is only considered under limited specified conditions; "flash incarceration" (short-term incarceration for technical violations) is not permitted.²⁸⁴

The Utah Drug Offender Reform Act provides another intriguing window on to the systemic shifts set in motion by the relatively limited capacity of specialized criminal courts. According to Dan Becker, Utah's State Court Administrator:

The focus that drug courts have put on treatment gave rise to a lot of interest on the part of the larger criminal justice community in Utah. . . . All of the criminal justice agencies got together and worked for several years on crafting legislation that's called the Drug Offender Reform Act, which provides for screening and assessment for every single person charged with a felony where there's a drug offense involved. . . . The legislature last year stepped forward and funded about half of the cost of implementation; they'll fund the other half next year hopefully. . . . And that's a complete shift in public policy. . . . I suspect you could trace that back to the roots of drug courts putting the emphasis on treatment.²⁸⁵

As court personnel struggle against structural barriers, such as a lack of adequate public health and mental health services, lack of affordable housing, and geographically concentrated underemployment, the result may be some measure of consciousness-raising and potentially responsive legislative change but also an acute sense of the impossible situation in which many subjects of the criminal law find themselves. Part of the reformist potential of a decarceration model is that this experience will lead court participants to work to address more comprehensively the structural problems at issue and to disseminate more widely the truth that criminal courts cannot serve as a cure-all for social

282. See *Gardner v. Schwarzenegger*, 101 Cal. Rptr. 3d 229, 232 (Cal. Ct. App. 2009) (recounting the history of Proposition 36's passage).

283. DRUG POLICY ALLIANCE, PROPOSITION 36: IMPROVING LIVES, DELIVERING RESULTS 19 (2006).

284. See *Gardner*, 101 Cal. Rptr. 3d at 238–40 (enjoining enforcement of flash incarceration measures enacted subsequent to the implementation of Proposition 36).

285. WOLF, A NEW WAY, *supra* note 68, at 12. One interesting feature of the systemic shifts instigated by specialized criminal courts in this respect is that they leave intact criminal prohibitions on certain conduct but facilitate remarkable lenience with regard to that conduct. In other words, on a decarceration model, systemic change tending toward decriminalization need not involve statutory repeals of criminal prohibitions. Instead, the existence of diversionary courts and the cognitive and institutional shifts they work, adjust enforcement priorities and make available social service treatment alternatives while leaving intact the expressive symbolic prohibition in the criminal statute. This may be a peculiar instance of the sort of acoustic separation that Professor Meir Dan-Cohen theorized in his famous article on "Decision Rules and Conduct Rules." See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

insecurity, social risk, and the underlying social problems the courts routinely confront. Moreover, specialized criminal courts operating on a decarceration model begin to expose the complexity of the problems at hand and the unavailability of a complete resolution of that complexity. They can help all of us to see that the problems that have found their way to criminal courts are often ones for which there is no ideal solution, even though there are better, more humane responses or worse, more brutal carceral means of imperfectly addressing these problems.

In these various respects—through reframing understandings of criminally charged conduct, shifting the roles of key systemic players and institutions, and catalyzing resource reallocation and legislative change—a decarceration model may begin to bring about substantial transformative shifts in how criminal law is administered.

IV. PERILS OF SPECIALIZED CRIMINAL LAW REFORM

It remains to consider the perils presented by a specialized criminal courts reform agenda generally—as distinct from the potential risks addressed above with regard to the more predominant criminal law reformist models at work in specialized criminal courts. Specialized criminal courts generally pose a number of significant and concerning risks: excessive reliance on legal frameworks to address complex social concerns; dilution of the expressive retributive or deterrent force of criminal law; broadly diminished procedural protections; inefficiently proliferating specializations; and legitimization of harshness in conventional courts for less sympathetic, racial minority, or otherwise stigmatized defendants. This Part will begin to address these risks and the ability of courts adopting a decarceration model to respond to them.

A. EXCESSIVE LEGALISM?

Critics of specialized criminal courts reject the overarching premise that criminal courts can be relied upon to address complex social problems. Professor Jane M. Spinak has argued that court-based approaches will be incapable of managing either the structural problems the specialized criminal courts aim to address, such as crippling caseloads in conventional criminal courts, or the difficult social issues the courts seek to handle, such as addiction and social dislocation.²⁸⁶ Specialized criminal courts will be unable to manage the courts' structural problems, Spinak contends, because those problems are produced by legislatures and public policies over which the courts exercise little control. Simply put, so long as police persist in arresting and prosecutors persist in

286. Jane M. Spinak, *Romancing the Court*, 46 *FAM. CT. REV.* 258, 258–59 (2008); see also Levine, *supra* note 74, at 1131 (“By placing social problems inside the criminal justice framework without changing the fundamental orientation of the officials charged with addressing these problems, we ensure that the traditional apparatus of the criminal justice system—conviction, punishment, and surveillance—will be the only strategies considered by the problem-solvers.”).

prosecuting drug offenders, the volume of drug offenders in the criminal courts will remain high. Moreover, Spinak maintains, the societal and personal problems the courts seek to address are multifaceted and socially entrenched and will be difficult, if not impossible, for courts to mitigate, absent broader structural shifts. To substantiate these arguments, Spinak explores the history of the early family courts, which, like contemporary specialized criminal courts, had problem-oriented ambitions and fell short in resolving the relevant problems, largely because of the complicated socially ingrained character of family dysfunction.²⁸⁷ Spinak concludes that we “need to develop resources beyond the court” and focus on “more client-oriented solutions” rather than therapeutic or court interventions.²⁸⁸ In Spinak’s view, though, any conceptual reorientation within the courts toward building resources beyond the court and developing client-oriented solutions “is not enough to stem the tide of judicial activism that situates problem solving in the court itself rather than in the broader structure of how people in need are served by our society.”²⁸⁹

Professor Mae C. Quinn has advanced a related argument against the legalist orientation of a criminal law reform strategy located in specialized criminal courts. Quinn’s analysis draws on the failure of another earlier Progressive Era attempt to address a range of social problems through procedurally informal specialized courts. Quinn provides a fascinating history of how one Progressive Era female judge, the Honorable Anna Kross, convened specialized courts to address the problems of domestic violence and juvenile delinquency. But ultimately, Judge Kross’s experiments were disbanded and derided as failures because they were so expensive that they could never be brought to scale. Additionally, the “treatment methods” coordinated by the court were unable to address the broader social issues at hand, and the outsourcing of treatment tasks resulted in “overreaching and privatization of the judicial system.”²⁹⁰ The Progressive Era endeavor to address social problems through specialized courts was dismantled, legal protections for accused persons were expanded, and observers concluded that, while social work intervention might be helpful to persons in distress, this would be best achieved outside the context of criminal law administration. The troubled juvenile courts are the one continuing institutional component of this Progressive Era legacy. Quinn draws from this historical experience to suggest that contemporary criminal court reformers should be much more skeptical than they are about the claimed newness of their interventions and the capacity of court-coordinated “treatment” to resolve the targeted

287. See Spinak, *supra* note 286, at 258–60.

288. See *id.* at 271.

289. See *id.*

290. Quinn, *supra* note 14, at 77–78; see also Mae C. Quinn, *Revisiting Anna Moscovitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts*, 33 *FORDHAM URB. L.J.* 665 (2006); Mae C. Quinn, *Response, Further (Ms.) Understanding Legal Realism: Rescuing Judge Anna Moscovitz Kross*, 88 *TEX. L. REV.* See also 43 (2009).

legal systemic or social problems.²⁹¹

Spinak and Quinn's respective critiques apply with particular force to therapeutic, judicial monitoring, and order maintenance models of specialized criminal law administration. A decarceration model, however, is primarily invested in shifting problems and resources to other extralegal sectors, making it less susceptible to the charge of naïve legalism. And on a decarceration model, the diversionary programs are open to all persons, not just those referred through the court, so it is not principally the courts themselves that are determining the scope of the populations served or the precise content of the service providers' interventions. To the extent courts remain involved, they aim to ensure some measure of accountability for the service providers.

In response to the concern raised by Spinak—that the structural problems at issue emanate from police practices, legislatures, prosecutorial prerogatives, and the desolation of poor urban and rural neighborhoods and so cannot be resolved by court innovation—a decarceration model directs attention to reframing understandings of crime and punishment in ways that promise to shift police practices and prosecutorial prerogatives, as explored earlier in Part III. A decarceration model does not purport to use the court directly to resolve the broader problems but, in reframing and publicizing a conception of drug dependency, mental illness, and other matters as structural and social challenges, a decarceration model: (a) makes available other ways of conceiving and managing these concerns and (b) actively enlists police and prosecutors in the courts' work, thereby influencing those agencies' perspectives and conduct. Empirical documentation of the courts' progress may ultimately provide the basis for legislative change, as described earlier in Part III. A decarceration model, thus, promises to effect change in policing, prosecution, and to do so through legislation rather than assuming that a legalist court-based strategy on its own will effect desired change. Finally, in galvanizing resources for blighted social service sectors and neighborhoods, a decarceration model may begin to address (invariably only partially) some of the broader structural deficits to which therapeutic, judicial monitoring, or order maintenance models are less attuned due to the almost exclusive focus of these approaches on the presumed pathologies of individuals.

A decarceration model also begins to account for Quinn's objections regarding the implausibility, due to cost, of bringing specialized criminal courts to scale as well as the threat of judicial overreaching. On a decarceration model, the courts are part of an interim decarceration strategy carried out by reframing particular conceptions of crime, punishment, and its alternatives; by partially reshaping the institutional roles of judges, defense counsel, prosecutors, and criminal courts; and by shifting resources. A decarceration model need not be brought to scale to stimulate some significant measure of cognitive reframing,

291. Quinn, *supra* note 14, at 79–81; see also MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

institutional reinvention, and systemic change, as certain specialized criminal courts have already begun to do.

The problem of judicial overreaching to which Quinn attends, and which is in part a product of excessive faith in legal fora to facilitate change, is mitigated on a decarceration model due to the minimalist, diversionary approach characteristic of the model. The central aspiration of courts adopting a decarceration model is to divert cases to other social sectors, which fulfill some less formal surveillant function and provide social services without enlisting judges in that work. Although, as with any court-based reform strategy, a decarceration model runs some risk of excessive legalism, the experimental, empirically, and sociologically oriented diversionary approach of a decarceration model mitigates this risk considerably.

One might wonder, then, why involve the courts at all if a decarceration model is primarily diversionary? The answer lies in the fact that the matters at issue are currently lodged in criminal courts, and political process defects have left the task of addressing these matters largely to judges in criminal courts themselves. Judges devised specialized criminal courts as a creative work-around of these political process defects. At this point, the courts hold considerable advantages as sites for reshaping public understandings of crime and punishment, for shifting institutional roles, and for reallocating resources to other sectors. Further, as Professor Michael Dorf has argued, specialized criminal courts have “convening power,” as well as “disentrenching capacity” to “impose a ‘penalty default’ . . . so unpalatable to all parties that they have no choice but to hammer out some solution.”²⁹² Also, courts are perceived as relatively neutral and morally authoritative institutions, lending greater force to the experimental and empirical work ongoing there. Finally, courts may provide some mechanism through which to render service providers accountable in the transition to a diversionary regime. Along these lines, then, a decarceration model may navigate some of the excessive legalism potentially associated with specialized criminal courts and underscored by Spinak and Quinn, while taking advantage of the institutional authority of the courts to initiate broader transformative criminal law reform.

B. CRIMINAL JUSTICE?

A separate question regarding specialized criminal courts is whether they undermine the expressive force of criminal justice. Conveying blame and/or deterring wrongdoing are arguably the most important features of the criminal law.²⁹³ Plus, tying moral blame to criminal sanctions may play a critical role in

292. Dorf, *supra* note 206, at 946.

293. See, e.g., Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 160 (1996) (arguing that criminal law is “defined by the practice of blaming”).

realizing the criminal law's deterrent potential.²⁹⁴ Furthermore, Richard C. Boldt has argued that criminal law “does more than simply express an intentionalist perspective”—a perspective that affirms human agency and moral responsibility—but additionally, “it is a vital societal mechanism by which that perspective is created and maintained, and the causal or objective perspective obscured.”²⁹⁵ For this reason, Boldt contends it is a mistake to medicalize addiction and thereby excuse it; instead, decriminalization is preferable to excusing categories of conduct which are ill-suited for criminal prosecution, in part because appropriate excusing factors would undermine the fundamentally intentionalist perspective of the criminal law.²⁹⁶ From this vantage point, specialized criminal courts might be understood to weaken the moral condemnatory dimension of criminal justice and, hence, to undercut its deterrent force (insofar as moral prohibition is necessary to make deterrence effective).

In beginning to address these concerns, at first blush it may appear that retributivism is a theory of punishment irreconcilably at odds with the express mission of decarceration. The crux of a retributive approach is to punish offenders proportionally to their moral blameworthiness, based on the crime committed. Leniency and harshness both violate the principle of proportionality.

Yet, upon closer examination, there may be a retributive defense of a decarceration model after all. A retributive account of a decarceration model would proceed on the following premises. First, if retributivist criminal law administration is to impart moral blame and assign proportionate punishment, it ought to focus on those forms of misconduct for which blame is apt—not on conduct for which victims are absent or where moral agency is seriously in question. Courts adopting a decarceration approach focus in large part, though not entirely, on what Professor Sanford Kadish has characterized as “morally neutral” criminal offenses or on offenders whose moral blameworthiness is otherwise mitigated.²⁹⁷ For these categories of offense and offender, the retributive concern with imparting moral blame through criminal law holds less sway.

Still, in cases involving both morally neutral as well as more morally charged offenses, courts adopting a decarceration approach limit defendants' liberty in significant ways, which are surely experienced by defendants as constraining, sanctioning, and, in those respects, punitive. For example, a drug addict mandated by the court to undergo treatment or a person with mental illness

294. See, e.g., Seidman, *supra* note 123, at 336 (“Our most important collective institution for teaching through blaming is the criminal law.”).

295. Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2247 (1992).

296. *Id.* at 2253; see also Hoffman, *supra* note 174, at 1477–78 (“[W]e are judges, not social workers or psychiatrists. We administer the criminal law because the criminal law is its own social end. It is not, or at least ought not to be, a means to other social ends.”).

297. See SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 49–53 (1987). Morally neutral criminal laws include regulatory offenses that do not involve harmful wrongdoing to others as well as some offenses requiring only vicarious liability or imposing strict liability. See Luna, *supra* note 28, at 722–23.

mandated to comply with a mental health regimen, both have their liberty undermined. In the throes of addiction or a psychotic manic episode, most persons would prefer to use drugs or experience their mania. Specialized criminal courts punish those persons by limiting their liberty and mandating by force of law a socially preferred course of action. In other words, social service intervention and punishment are not necessarily diametrically opposed. Such intervention may be experienced as punitive. And in fact, such intervention “can actually provide the ideological basis whereby the state exercises greater control over the individual than is typical of a normal criminal court.”²⁹⁸ In this regard, from a retributive standpoint, specialized criminal courts may enable more meaningful punitiveness than conventional criminal courts. According to former Kansas City drug court prosecutor Claire McCaskill, the diversionary programs required of participants in her jurisdiction are “tougher than the alternatives.”²⁹⁹

In contrast, conventional jail, prison, and probationary sentencing often fail on a retributive theory, either because of disproportionate harshness when an inmate will be physically harmed and subject to brutal conditions, or when prison, jail, and probation function as part of the anticipated life course—not as especially stigmatizing punishment—for certain demographics of criminally convicted persons.³⁰⁰ In this regard, diversionary sentencing may provide more meaningful, proportionate, and significantly liberty-constraining punishment from a retributive standpoint than conventional sentencing.³⁰¹ Additionally, because a decarceration model maintains no commitment to a purely therapeutic neo-rehabilitative or purely deterrent judicial monitoring approach, there is nothing to prevent specialized criminal court teams from incorporating proportional sentencing constraints in devising diversionary sentences.

A decarceration model need not fundamentally undermine an agency-focused intentionalist perspective of the sort, Boldt addresses, but merely reorganizes society’s response to particular defendants and offenses, preferring mandatory social institutional integration to jail or prison sentencing. Criminal prohibitions remain intact until they are legislatively altered, so the expressive moral condemnation function of criminal law remains, in that regard, unchanged. The sentence assigned in response merely shifts from prison, jail, and conventional criminal supervision to other sectors.

This shift occurs on a decarceration model in part in the interests of a larger concern for justice—for maintaining the legitimacy of a legal order that is deeply compromised by overcriminalization and overincarceration. Even on a Kantian retributive theory, it may be that some measure of lenience is warranted

298. NOLAN, *supra* note 10, at 52.

299. *See id.* at 53–54.

300. *See* Pettit & Western, *supra* note 35.

301. *Cf.* *Freed Inmate Tries To Break Back into Prison*, ASSOCIATED PRESS, Sept. 6, 2001, <http://www.seattlepi.com/local/article/Freed-inmate-tries-to-break-back-into-prison-1065029.php>; Kate Mather, *Parolee Arrested Trying To Break Back into Sacramento Prison*, L.A. TIMES, Aug. 12, 2011, <http://latimesblogs.latimes.com/lanow/2011/08/parolee-break-back-into-prison.html>.

to “preserve the legal order on which justice depends.”³⁰² Though much more could surely be said, for now that concludes the retributive defense of a decarceration model.

From the perspective of deterrence, a decarceration approach dissuades for the same reasons that it may be experienced as punishment from a retributive standpoint: diversionary sentences still substantially constrain defendants’ liberty. A potential offender aware that apprehension may lead to a court-ordered diversion program, will be inclined to desist from being apprehended for conduct that will lead to a diversionary sentence, something that individual would prefer to avoid. Critically, on a decarceration model, referral services are open to all comers, not just those referred through diversionary courts, so there is no incentive to offend in order to obtain services should those services be desired. Further, for most eligible defendants—mentally ill persons, drug addicts, veterans suffering severe post-traumatic stress—their socially disruptive conduct is unlikely to be carried out following reflective cost-benefit analysis, so the deterrent potential of any criminal law administrative arrangement is questionable.³⁰³ It must, of course, be acknowledged that a diversionary sentence will not deter those individuals who wish both to commit an offense subject to the jurisdiction of a specialized criminal court *and* who wish to enter diversionary programming. But as noted above in reference to retributive concerns, this same problem arises with respect to conventional jail, prison, and probationary sentencing: for many criminal defendants, criminal law involvement has become an anticipated part of the life course, a life stage through which certain demographics of defendants expect to pass, and, in this regard, a diversionary approach may not be appreciably less stigmatizing (and less deterrent) than conventional sentencing.

One reason a decarceration model is preferable to a more jurisprudentially specified model of specialized criminal law administration, such as therapeutic jurisprudence, is because this jurisprudentially underspecified form permits the courts to engage multiple complex meaning imparting functions involved in criminal law administration. In certain criminal cases, the ideal role of the court may be simultaneously to condemn a given offense and the possibly reprehensible motivations behind it, to reaffirm the worth of the victim, to aim to craft a sanction that will deter the offender and others from such conduct in the future, but also to act mercifully. This is a complex undertaking, to be sure, and one that cannot be easily captured under a single criminal law jurisprudential theory, whether a therapeutic jurisprudential approach or an instrumentally deterrent

302. See Binder, *supra* note 112, at 356–58 (exploring conditions under which Kantian theory of punishment would permit justice to be traded for justice and citing IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 138 (John Ladd trans., Hackett Pub. Co. 2d ed. 1999) (1796)).

303. To the extent that skeptics inclined to a deterrent theory of punishment may worry that these courts would imperil public safety, there is considerable evidence that “measures to reduce prison population may actually improve on public safety because they address the problems that brought people to jail.” *Brown v. Plata*, 131 S. Ct. 1910, 1942 (2011) (internal quotation marks omitted).

model. As Dan M. Kahan and Martha C. Nussbaum have proposed: “A disposition that purports to answer only a single, abstract question—did the defendant’s background ‘cause’ his crime? or even does the defendant ‘deserve’ to be punished?—will never be rich enough to convey all of these meanings.”³⁰⁴ In this respect, courts adopting a decarceration approach have overdetermined meanings, rendering them potentially consistent with a range of differing ideological and legal precommitments. Retributivists may favor diversionary courts because they enable a tough and intrusive form of criminal law administration that is proportional to wrongdoing and lenient where in the interests of justice, having the potential to both deter and prevent future offending, and others may be drawn to diversionary courts for their rehabilitative and humanitarian potential. Regardless of one’s criminal law theoretical commitments, a decarceration model promises to reduce criminal law administrative costs, increase efficacy, and reduce reliance on incarceration.

For the time being, a decarceration approach is best suited to misconduct for which there is some considerable collective interest—among legal actors and the public—in experimental alternative social response. But perhaps over time a growing class of offenses and offenders will come to seem suitable candidates for decarceration. There are surely some crimes of violence that will not be amenable to decarceration processing at all, though it is not entirely clear what those offenses are in the abstract. The conduct of the person who murders, who rapes, who robs by violent means may not be subject to redirection through court or other intervention, and the only politically and socially viable response may be moral condemnation and incapacitation. As sociologist Jack Katz explains in his studies in *Seductions of Crime*, certain violent acts may “emerge from a *dizziness* in which *conformity* is the greatest spiritual challenge and *deviance* promises the peace of transcendent significance.”³⁰⁵ But for others who have killed, their deviant conduct may never again be repeated—it may have occurred in a drug-induced haze that, following recovery, would no longer threaten others and for which moral culpability is lacking. The experimental, unfinished character of a decarceration model allows this question be resolved incrementally over time.³⁰⁶

304. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 370–71 (1996).

305. JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 296 (1988).

306. Because, even if criminal law scholar Paul H. Robinson and his collaborators are right and there is a “core of agreement” about the relative wrongness of the most egregious types of criminal offenses, this does not in the least entail that we know what to do to best respond to the offenses in question or what to do to address the associated social problems. See Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007); see also Donald Braman, Dan M. Kahan & David A. Hoffman, *A Core of Agreement*, 77 U. CHI. L. REV. 1655 (2010).

C. REDUCED PROCEDURAL PROTECTIONS?

Specialized criminal courts frequently adopt a collaborative approach that entails, at certain stages, reduced adversarialism and reduced procedural protections—an approach that critics charge raises numerous due process concerns.³⁰⁷ Criminal defense attorneys object to these relaxed procedures on the grounds that reduced procedural protections lead to outcomes that are bad for their clients and that more generally are corrosive of the legitimacy and integrity of criminal law.³⁰⁸ This line of objection continues that, when defense counsel works as part of a diversionary sentencing “team,” they may be less than vigilant in seeking to have illegally obtained evidence excluded and less willing to challenge the legal or factual bases of the government’s charges.³⁰⁹ Defendants’ interactions with social service providers outside the presence of counsel also may entail due process violations as any incriminating statements may affect the defendant’s revocation sentence.³¹⁰ In certain drug courts, for instance, judges may rely on progress reports from substance abuse programmers in determining whether to apply sanctions to court participants; domestic violence courts similarly rely on reports from anger management programs to assess compliance.³¹¹ This information is obtained in a “treatment” context and is not subject to any measures that would ensure procedural fairness or regularity.³¹²

307. See, e.g., Lanni, *supra* note 68, at 383–87.

308. See, e.g., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 14, at 10–13.

309. Lanni, *supra* note 68, at 385; see also BERMAN & FEINBLATT, *supra* note 7, at 86 (“Defenders, who are accustomed to battling prosecutors to get the best deal for their clients, are often asked to work alongside them as part of a collaborative team. These cooperative efforts often start on the ground floor with traditional adversaries working together to design guidelines, eligibility criteria, and sanctioning schemes. When a drug-court judge hands down a three-day jail sentence because an addict has failed to attend his treatment program, defenders are often surprisingly silent, because they—and their clients—have already accepted the idea of intermediate jail sanctions as part of the treatment sentence.”). Another critical function of criminal courts is to police the police, and if specialized criminal courts require an expeditious guilty plea, they make unavailable suppression motions or other motions practice that may incentivize good police behavior. See Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 *FORDHAM URB. L.J.* 315 (2005).

310. Lanni, *supra* note 68, at 385.

311. BERMAN & FEINBLATT, *supra* note 7, at 85.

312. Nevertheless, to the extent a proceduralist objection focuses on reduced adversarialism within specialized criminal courts, it is worth bearing in mind that a pure form of adversarial criminal law administration is incorrectly assumed to obtain in conventional U.S. criminal courts and, insofar as adversarial procedures are present, these procedures’ desirability relative to various alternatives remains uncertain. See, e.g., Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 *STAN. L. REV.* 1009, 1019 (1974) (“European criminal procedures are no more purely inquisitorial than ours are purely [adversarial].”); see also MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980) (critically analyzing adversarial criminal justice administration and proposing modifications to address significant problems); LLOYD L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* (1977) (critiquing U.S. adversarial criminal processes and examining preferable alternatives); Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 *U. PA. L. REV.* 506 (1973) (critically examining adversarial criminal procedures relative to continental alternatives); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal*

Unlike on a therapeutic jurisprudence, judicial monitoring, or order maintenance model, on a decarceration approach there is considerable room to incorporate robust procedural protections, thereby responding to most procedural objections leveled generally against specialized criminal courts, even if there remain inevitably some procedural rights trade-offs. Because the legal process itself is not understood to have a therapeutic or other nonconventional orientation on a decarceration model, full due process protections should and have been applied at the stage of revocation.³¹³ To accommodate concerns regarding judicial neutrality, courts adopting a decarceration model could readily assign two separate judges, one to handle supervision and a separate judge to handle revocation.³¹⁴ The due process problems posed by labeling defendants in judicial monitoring courts “sex offenders” prior to adjudication are so obvious as to require little explanation—on a decarceration, model preadjudication judicial monitoring need not occur. An additional substantial ground for procedural objections is the often substantial disparity in specialized criminal courts between the relatively light sentence a defendant would have received in the conventional court and the disproportionately harsh jail or prison sentence a defendant will receive if he or she fails in the diversionary program. Because a decarceration model’s primary aim is to reduce reliance on incarceration consistent with maintaining public safety, such courts do not seek to obtain leverage by imposing disproportionately harsh revocation sentences; in fact, empirical analyses suggest that the severity of sanctions in drug courts does not appear to reduce the subsequent number of crimes committed or days of drug use.³¹⁵

Beyond these more obvious modifications on a decarceration model to account for procedural justice concerns, diversionary courts may operate in accord with any of several different procedural configurations. Courts may be pretrial/pre-plea, post-plea/presentencing, or post-conviction sentencing alternatives. For example, some drug court programs provide for placement in a drug court following adjudication but, if the terms of the program are violated, probation is revoked and the court will sentence the defendant anew or based on a predetermined revocation sentence.³¹⁶ In contrast, in other specialized criminal courts, failure to comply merely leads to the reinstatement of criminal proceedings, not

Procedure: “Myth” and Reality, 87 YALE L.J. 1549 (1978) (analyzing preferable features of inquisitorial as compared to adversarial criminal procedure models).

313. *See, e.g.*, *State v. Rogers*, 170 P.3d 881, 886 (Idaho 2007) (holding that drug-court-program participant was entitled to due process protections during proceedings to terminate his participation in the program and incarcerate him).

314. This solution is not as readily available on a therapeutic jurisprudence or judicial monitoring model because the theoretical bases of those models turn on the continuing relationship between the defendant/participant and the judge, whether that continued relationship emphasizes a presumed therapeutic connection or deterrent influence. A more general proceduralist concern relates to the potential role shift for the judge in specialized criminal courts, but on a decarceration model that role shift is less pronounced than on a therapeutic jurisprudence or judicial monitoring model.

315. *See* ROSSMAN ET AL., *supra* note 12, at 224.

316. *See, e.g.*, 730 ILL. COMP. STAT. ANN. 166/35(a)(4) (LexisNexis 2007 & Supp. 2011); *see also* *State v. Bellville*, No. 5-476/04-1634, 2005 Iowa App. LEXIS 963, at *2-7 (Iowa Ct. App. Aug. 31,

to a previously bargained conviction or sentence.³¹⁷

The decision to take a plea is a serious one and making an informed and rational choice about pleading guilty is particularly difficult when the alternative is a possibly much lengthier prison sentence and when the defendant is drug-addicted or suffering from mental illness.³¹⁸ One way to attempt to circumvent the procedural concerns that arise under such circumstances is to have the diversionary alternative process occur prior to a plea being entered. On this approach, a defendant would elect whether to opt in to the specialized criminal court and upon successful completion of the diversionary program any charges would be dropped. Egregious misconduct while in the program would result in referral to the conventional criminal process for the prior criminal conduct, but evidence from the diversionary period obtained through treatment or other social service intervention could be excluded. The defendant would then choose whether to plead guilty at the outset, pursue any motions practice, or proceed to trial.

The due process concerns on this approach relate principally to the fact that the diversionary alternative, to the extent it is intrusive and limiting of the defendant's liberty, is mandated prior to a finding of guilt. But the defendant's participation is optional, no more constrained than any choice made in light of the background criminal law regime, and the specialized court participant may at any point opt out and return to the conventional process.³¹⁹

Still, the *choice* of the participant does not eliminate concerns about coercion because any choice takes place against the coercive pressures of the criminal law regime and the broader social and political setting in which the defendant finds himself or herself. And if specialized criminal courts increase pressures to arrest or for arrestees to enter diversion programs, they will have constrained individuals' options in a significant sense rather than having expanded them. But the coercion at work in determining whether to enter the specialized criminal court is no more than the coercion in play at any other critical phase of proceedings in which a defendant decides to plead guilty or go to trial, and the potential benefits to the participant are considerable.

The other available approach is to employ the diversionary court as a post-conviction sentencing alternative, with egregious offending while in the program punished by an alternative pre-agreed upon sentence. This avoids the

2005) (upholding sentence of consecutive jail terms following revocation of drug court program based on prior plea agreement).

317. *See, e.g.*, GA. CODE ANN. § 16-13-2(a) (2011). An alternative approach, of which there is a pilot ongoing in Seattle, takes specialized courts out of the picture entirely and relies purely on police to divert drug-involved offenders to treatment providers prior to any criminal charge. *See* THE DEFENDER ASSOCIATION, LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) EVALUATION PANEL (2011) (on file with author).

318. *See* Brady v. United States, 397 U.S. 742, 748 (1970) (“[A] guilty plea is a grave and solemn act to be accepted only with care and discernment . . .”).

319. Specialized criminal courts leave the parallel conventional process undisturbed, with the full panoply of procedural protections in principle available to defendants there.

due process problems associated with court mandates prior to a finding of guilt but increases the risk of coercive, less-than-voluntary pleas.

As far as the post-conviction configuration is concerned, due process and coercion concerns may be mitigated if there is not too harsh a pre-agreed upon or subsequently determined revocation sentence—that is, if the revocation sentence is standardized to what the defendant would have received had he or she not opted into the specialized court. The procedural concerns could be further mitigated on a post-conviction model if both those convicted following trial and those who pled guilty were eligible for alternative sentencing. This latter, post-conviction approach would attend to the procedural rights of defendants and would likely reduce incarceration and associated costs. Expanding the ability of defendants to remain out of prison protects their interests in avoiding carceral sentencing *and* their due process rights so long as defendants are still able to challenge any illegally obtained evidence at the outset of the case, elect to go to trial, and not be subject to a disproportionately harsh sentence upon revocation.³²⁰

In sum, the trade-off is between a pretrial, pre-plea model that potentially avoids criminal proceedings altogether and more closely renders participation a choice, and a post-conviction model that avoids certain due process problems by making the specialized criminal court program effectively a part of the defendant's sentence. But unless the post-conviction approach allows defendants to enter following trial, it applies substantial pressure to plead guilty to retain the option to avoid jail or prison, even under circumstances where the defendant may contest guilt. The advantage of the experimental quality of a decarceration model is that jurisdictions may test the various procedural configurations and determine which best serves the range of interests at stake and raises fewer due process and other problems—not merely in theory but in terms of participants' experiences on the ground.³²¹

Finally, it is also critical to consider whether procedural protections are the panacea their proponents assume for fairness in conventional criminal law

320. See FAROLE & CISSNER, *supra* note 132, at 5–7 (exploring drug court participants' reasons for and aspirations in opting into drug court).

321. A decarceration model takes empiricism and experimentalism seriously, seeking to engage in a process of internal reform and improvement. This process is more likely to meaningfully occur on a decarceration model than on a therapeutic jurisprudence, judicial monitoring, or order maintenance model because there is not otherwise any commitment to a particular therapeutic, neo-rehabilitative, deterrence-based, or order maintenance ideology. See Dorf & Sabel, *supra* note 13, at 882–83. Dorf and Sabel overestimate the rigors of self-monitoring and self-reporting in drug courts and specialized criminal courts generally and neglect the strong incentives for entities to set limited but readily achievable goals so as to be able to claim success, regardless of actual outcomes. Further, self-monitoring and self-reporting may be less useful where the ultimate goal or measure at stake is in dispute, as I have suggested it often is in specialized criminal courts. *But see id.* A decarceration model is primarily concerned with reducing incarceration consistent with maintaining public safety and so circumvents some of these complications.

administration.³²² Because there is such great pressure on the conventional courts due to high case volumes, the vast majority of cases are handled through guilty pleas. Often public defenders have little time to investigate a case before a client is advised to plead guilty. But if greater numbers of cases were removed from the conventional criminal courts to specialized criminal courts and other sectors, fewer cases would remain in conventional courts, provided that specialized courts manage to avoid a net-widening enforcement effect. This would permit more robust procedural protections and investigations in the conventional criminal courts. Oddly then, it is plausible that the removal of cases to a less adversarial specialized criminal context may enhance procedural justice overall, improving procedural safeguards in conventional courts rather than the outcome feared by proceduralists.

D. SPECIALIZATION FOR GOOD OR FOR ILL?

A further peril of a specialized criminal courts law reform strategy is that it may require a profusion of specialized courts to address the myriad problems requiring reform. Convening a separate court for each separate area in which substantive criminal law reform is desired would be enormously costly.³²³ Additionally, reliance on criminal court specialization might well threaten to undermine rule of law values centered on a model of judges as neutral generalists.³²⁴

Although these are legitimate objections to certain forms of criminal court specialization, a decarceration model is less likely to entail these troubling features of specialization for two primary reasons. First, a decarceration model is an interim strategy for criminal law reform, focused specifically on reducing reliance on incarceration by setting in motion broader reform processes as discussed previously in section II.D and Part III. Diversionary courts need not aspire to become a permanent criminal law administrative fixture. Thus, a diversionary decarceration model poses a less significant threat of proliferating courts endlessly in response to every criminal law problem requiring reform. As a consequence, this approach stands to intrude less upon the predominant norm of generalist adjudication. Second, courts adopting a decarceration approach need not be particularly substantively specialized. A decarceration model could

322. See, e.g., Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, NAT'L PUB. RADIO (Jan. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=122725819&ft=1&3=3> (reporting that more than 500,000 inmates in the United States each year face a choice between pleading guilty for crimes for which they claim innocence or remaining incarcerated until a trial date weeks or months later to contest charges).

323. Roscoe Pound famously opposed court specialization on similar grounds because it would tend to result in duplication of function, waste, and inefficiency. See, e.g., R. Stanley Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 JUDICATURE 316 (1973).

324. Although specialization is a feature of modern society, courts and judges have generally constituted an exception to this trend. See BAUM, *supra* note 6, at xi–xii. There are, however, numerous specialized courts outside the criminal context, such as the Tax Court and the Court of Appeals for the Armed Forces.

incorporate within one court jurisdiction over a range of different matters for which non-carceral sentencing is preferred. This too stands to reduce the risk of endlessly proliferating specialized criminal courts and positions specialized criminal court judges in a role more akin to the prototypical generalist judge.³²⁵

E. LEGITIMATION COSTS?

Finally, specialized criminal courts threaten to impose significant legitimation costs. First, specialized criminal courts may legitimate increased harshness in conventional criminal courts once more sympathetic criminal defendants have been removed. With the removal of presumably more vulnerable or less blameworthy individuals from conventional criminal courts and prisons, one might well envision an increase in punitive attitudes toward those remaining. This is so even though it may be profoundly unfair to allow some criminal law breakers access to specialized criminal courts because we perceive them to be more worthy of our understanding, when others are really no more blameworthy.³²⁶

A related risk is that in removing more purportedly sympathetic defendants from conventional criminal courts, racial and class disproportion will increase, with more defendants of color and materially poor defendants remaining in the conventional courts.³²⁷ Indeed, that is precisely what occurred under deinstitutionalization in the 1960s when the racialization of mental hospitals increased.³²⁸ And preliminary results from mental health courts suggest this trend is a problem in that context too, as a study of case processing in seven mental health courts found overrepresentation at the point of referral of older individuals, white persons, and women as compared to their proportion in the criminal justice system generally.³²⁹ Though empirical monitoring enables identification of the point at which racial disparities emerge, identification of the locus of the problem does not by any stretch guarantee its elimination. The convergence of interest between wealthier white defendants with mental health or addiction problems and similarly addicted or mentally ill poorer defendants of color—an interest convergence that likely contributed in large measure to the emergence and widespread popularity of specialized criminal courts—will be able to sustain a legitimate alternative sentencing regime only if all defendants, irrespec-

325. All this is not to say that a decarceration approach will necessarily reduce costs. To meaningfully address the complex social problems driving overincarceration will be resource-intensive, and specialized courts often rely on an array of “services that simply don’t exist in most criminal courts.” BERMAN & FEINBLATT, *supra* note 7, at 64.

326. See JUSTICE POLICY INST., *supra* note 73, at 23. As Edward P. Mulvey, delivering the Presidential Address at an American Psychological Association convention explained: “[T]he courts are being established for groups of individuals who are seen as ‘deserving’ of better processing and more individualized attention from the justice system.” *Id.* (quoting Edward P. Mulvey, Presidential Address to the American Psychology–Law Society, Division 41 of the American Psychological Association, Mar. 20, 2010).

327. See Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT’L BLACK L.J. 27, 28–30 (2009).

328. See Harcourt, *supra* note 209, at 4, 29–31.

329. Steadman et al., *supra* note 80, at 215.

tive of socioeconomic status or race, have equal access to favorable diversionary sentences.³³⁰

Separately, there is the problem of potentially legitimating the management of particular social challenges through criminal law by vesting more authority in specialized criminal courts to address social problems.³³¹ These are all genuine and profoundly concerning problems associated with a specialized criminal courts law reform strategy.

There are several ways in which a decarceration model may attempt to address these issues. At the outset, awareness of and careful attention to the associated risks may help to minimize their occurrence and impact in the event the problems identified come to pass. For example, ongoing empirical monitoring may track any racial or class disproportion as it arises and direct attention to the areas where the problem is greatest so that it might be addressed, explicitly focusing institutional actors on confronting racial disparities in referral, termination, or wherever else they are occurring. Ultimately, many of the pathologies in U.S. criminal law administration have to do with race and with racialization of the category of the criminal defendant or incarcerated person, so meaningful criminal law reform will almost certainly require grappling intensively with the racial dimensions of criminal law enforcement.³³²

Insofar as a decarceration model seeks to unwind harsh punishment and incarceration generally, this approach may serve more broadly to call into question exceedingly punitive criminal law frameworks, both for those defendants in specialized courts and those in conventional courts. Movement of judges between conventional and specialized criminal courts may also serve to limit stratification of the two systems.³³³ Admittedly, however, these cautionary efforts may prove inadequate.

Even so, in taking stock of these legitimation costs, as well as the other problems considered in this Part, it is crucial to compare the problems presented on a decarceration model with (a) the limits of the other competing reformist models of specialized criminal law administration considered earlier in this Article, and then to compare each of these to (b) the status quo in conventional criminal case processing in the United States. That is, the limits of a decarceration model or other specialized criminal law reformist model should be considered as compared, not just to the objector's preferred utopian alternative, but

330. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011) (critically discussing the interest-convergence thesis, which holds that disadvantaged groups receive favorable judicial treatment to the extent their interests coincide with the interests of majority group elites).

331. Chrysanthi S. Leon, *Should Courts Solve Problems? Connecting Theory and Practice*, CRIM. L. BULL., Winter 2007, at art. 2.

332. See, e.g., ALEXANDER, *supra* note 35.

333. Of course, it is possible that judges sitting in the specialized court would adapt a different judicial perspective than when sitting in the conventional court.

relative to the status quo in U.S. criminal law administration.³³⁴

Procedural protections may be found wanting on a decarceration model, but are these protections more meaningfully enforced in the standard criminal courts where well over ninety percent of criminal cases end in a plea, following proceedings, the character of which Malcolm Feeley powerfully captured in his book *The Process is the Punishment?*³³⁵ Is the liberty-infringing character of surveillance on a decarceration model more onerous than in prisons and jails, where many more specialized court participants might well be were the courts to be disbanded? Retributivists must consider too the relative achievement of retributive goals in the specialized criminal court setting as compared to the standard criminal process, which Feeley described decades ago as follows, and which remains in these respects unimproved:

[T]rials are rare events, and even protracted plea bargaining is an exception. Jammed every morning with a new mass of arrestees . . . [t]hese courts are chaotic and confusing; officials communicate in a verbal short-hand wholly unintelligible to the accused and accuser alike, and they seem to make arbitrary decisions, sending one person to jail and freeing the next. But for the most part they are lenient; they sentence few people to jail and impose few large fines.

. . . .

. . . Judges, bored by their jobs, become callous toward defendants who are so different from themselves. Prosecutors, dulled by their repetitive work . . . appear to be vindictive. Defense attorneys, depressed by feelings that their efforts are not appreciated, can easily begin to treat their clients carelessly.³³⁶

And this picture is not unique to the second half of the twentieth century when Feeley wrote his study of the New Haven criminal courts. Decades earlier, Roscoe Pound decried a similar set of ills, which persist after what is now approaching a century of efforts to improve conventional criminal law administration:

The bad physical surroundings, the confusion, the want of decorum, the undignified offhand disposition of cases at high speed, the frequent suggestion of something working behind the scenes . . . create in the minds of observers a general suspicion of the whole process of law enforcement³³⁷

More recently, in his study of the Chicago criminal courts, investigative

334. See Bratton Blom et al., *supra* note 13, at 42 (“All the criticisms of problem-solving courts—that they violate due process rights, that they fail to rehabilitate, or that they represent a form of undemocratic reform—apply to the reality of the court system today.”).

335. See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

336. See *id.* at 3–4.

337. ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 190–91 (Da Capo Press 1972) (1930).

journalist Steve Bogira sounded strikingly similar notes:

Every day, Chicago police wagons swing onto the grounds of the Cook County Criminal Courthouse and deposit their cargo at a rear door.

The prisoners being unloaded . . . are here for the usual reasons. . . . They tried to buy heroin from an undercover cop. They pocketed a fifth of booze at a grocery and failed to outrun the security guard.

. . . .

. . . The courtroom staff works . . . reflexively, not reflectively. The workers have no time to give much thought to any but the most extraordinary case, or to examine what they are doing.

. . . .

. . . [J]ustice miscarries every day, by doing precisely what we ask it to.³³⁸

The bottom line is that the status quo to which a decarceration model should be compared, absent a viable alternative reform proposal, is a status quo that is deeply inadequate whether one is concerned about procedural justice, liberty, racial disproportionality, or retributive punishment. Because these challenges are not unique to specialized criminal courts but rather reflect problems associated with conventional criminal law administration, it is no answer to simply jettison specialized criminal courts and revert to conventional criminal law frameworks.

Still, given the myriad perils associated with the competing models of specialized criminal courts elaborated in Part I, the question invariably comes to mind: are the potential benefits of a decarceration model worth the risks identified in specialized criminal courts in the preceding pages? This Article's short answer is yes. Yes, that is, if the courts are able to employ the three strategies elaborated here and in which some specialized criminal courts are actively engaged: reframing social understandings of crime, punishment, and its alternatives; institutionally reshaping the courts and associated agencies themselves; and effecting systemic change, shifting a wide range of social concerns to other sectors better equipped to address the problems at hand.

CONCLUSION

In this moment of increased openness to thoroughgoing criminal law reform, after decades of escalating criminal sentences, thousands of specialized criminal courts have emerged across the country and around the globe. These courts have become the location of a contest between competing criminal law models. Certain models at work in specialized criminal courts are configured in such a way that threatens to produce a series of unintended and undesirable consequences—increased and unnecessary criminal supervision, diminished proce-

338. STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 3, 21–22 (2005).

dural safeguards, and potentially even increased incarceration. But a less predominant criminal law reformist model—a decarceration model—may provide a way of developing different approaches to certain of the social problems currently managed through criminal law.

The greatest promise of a decarceration model—if it succeeds at engendering a certain degree of cognitive reframing, institutional reinvention, and systemic change—is to remove particular categories of offenses and offenders from conventional criminal courts to be addressed both more effectively and more humanely elsewhere. Primary candidates for such removal through existing specialized criminal courts include drug offenders, mentally ill persons, and individuals suffering the post-traumatic stress of war. Removal of these matters to other sectors would reduce volume pressures on conventional criminal courts so that they might more meaningfully and fairly address the relatively few cases of serious violent and property crime, for which alternative processes seem inappropriate or would be exceedingly unpopular. These more serious criminal matters may not be handled best in the standard criminal process either, but we have yet to identify a better approach. In due course, if specialized criminal courts set in motion some measure of systemic change in criminal law administration, they may both focus and improve responses in cases of serious crime and simultaneously improve community economic development, accessible public health services, employment, and more generally, human well-being. It is also possible that specialized criminal courts will achieve none of these things—that their perils rather than their possibilities will be their legacy—but, given the grave inadequacies and injustices of the status quo in U.S. criminal law administration, these courts are well worth trying.

2019

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

Robert H. Ambrose

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

Robert H. Ambrose[†]

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

9. *Id.*

10. *Id.*

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

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

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

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

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

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

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

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

17. *Id.*

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

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

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

18. See, e.g., Seung Min Kim, *Trump Endorses Bipartisan Criminal-Justice Reform Bill*, WASH. POST (Nov. 14, 2018), https://www.washingtonpost.com/politics/trump-endorses-bipartisan-criminal-justice-reform-bill/2018/11/14/9be8f926-e84c-11e8-bd89-ecf3b178206_story.html?noredirect=on&utm_term=.0ddbfe49973c [<https://perma.cc/65PH-WC8B>] (reporting bipartisan, presidential, and special interest support, including the Fraternal Order of Police and the International Association of Chiefs of Police for the First Step Act, which would loosen some mandatory minimum sentencing laws).

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

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

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

22. See *infra* Part II.

23. See *infra* Part II.A.

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

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

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

25. See *infra* Part II.C.

26. See *infra* Part III.

27. See *infra* Part III.A.

28. See *infra* Part III.B.

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

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

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

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

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

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

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

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

34. See *infra* Part IV.

35. DUNN, *supra* note 16.

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

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

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

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

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

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

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

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

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

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

II. THE PROBLEM OF MASS INCARCERATION

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

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

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

44. See *infra* Part IV.B.

45. See *infra* Part IV.C.

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

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

48. DUNN, *supra* note 16.

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

A. *Historical Context*

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

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

1. *1960s – 1980s*

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

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

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

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

52. *Id.*

53. *Id.*

54. *Id.*

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

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

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

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

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

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

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

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

61. Childress, *supra* note 40.

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

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

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

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

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

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

2. 1990s - 2000s

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

3. Present Day

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

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

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

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

70. *Id.*

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

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

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

74. Childress, *supra* note 40.

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

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

B. Systemic Power Structures

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

1. Prosecutorial Discretion

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

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

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

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

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

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

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

80. *Id.*

81. *Id.*

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

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

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

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

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

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

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

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

86. See *id.* at 298–99.

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

88. See Tonry, *supra* note 84.

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

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

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

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

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

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

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

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

93. *Id.*

94. *Id.*

95. See Tonry, *supra* note 84.

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

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

98. See *id.*

99. *Id.* at 1071.

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

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

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

2. *Mandatory Minimums*

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

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

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

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

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

104. See PFAFF, *supra* note 84.

105. Takei, *supra* note 39.

106. *Id.*

107. *Id.* at 825.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Sentencing Guidelines

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

116. *Id.*

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

118. *Id.* at 155-56.

119. *Id.* at 827-28.

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

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

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

123. *Id.*

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

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

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

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

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

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

126. *Id.*

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

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

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

130. *Id.* at 428.

131. *Id.*

132. *Id.*

133. *Id.* at 428-29.

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

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

C. *Consequences of Mass Incarceration*

1. *Racial Disparities of Prison*

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

2. *Reoffenders and Nonviolent Drug Offenders*

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

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

137. Takei, *supra* note 39.

138. *Id.*

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

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

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

3. *Prison Corrupts*

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

III. NEW APPROACHES TO SOLVE MASS INCARCERATION

A. *Sentencing Reform*

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

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

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

143. *Id.*

144. *Id.*

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

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

147. *Id.*

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

149. *Id.* at 1209-10.

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

B. Prison Abolition

1. Background

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

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

150. *Id.* at 1209.

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

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

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

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

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

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

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

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

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

3. *Goals and Public Acceptance*

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

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

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

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

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

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

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

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

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

IV. RECOMMENDATIONS TO SOLVE MASS INCARCERATION

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

164. *Id.*

165. *Id.*

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

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

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

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

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

171. *Id.*

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

A. *Systemic Changes*

1. *Eliminate Cash Bail*

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

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

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

173. *Id.* at 133.

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

175. *Id.* at 134.

176. Takei, *supra* note 39.

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

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

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

2. *Eliminate Jail for Misdemeanors*

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

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

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

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

180. *Id.*

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

182. MINN. STAT. § 609.02 subdiv. 4.

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

184. *Id.*

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

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

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

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

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

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

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

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

189. *Id.*

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

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

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

193. *Id.*

3. *Eliminate Sentencing Guidelines and Mandatory Minimums*

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

One judge interviewed for this Article stated the following:

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

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

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

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

196. *Id.* at 429.

197. *Id.*

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

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

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

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

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

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

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

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

202. *Id.*

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

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

B. Cultural Changes

1. Crime Prevention and Societal Changes

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

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

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

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

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

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

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

209. Obama, *supra* note 208.

210. *Id.*

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

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

2. *Broken Windows and Greening*

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

211. *Id.*

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

213. *See generally id.*

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

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

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

217. *Id.* at 366–67.

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

3. *Decriminalization of Drug Offenses*

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

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

219. *Id.* at 1231.

220. *Id.*

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

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

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

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

225. *Id.*

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

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

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

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

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

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

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

229. *Id.*

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

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

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

233. *Id.*

234. *Id.*

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

C. *Restorative and Rehabilitative Justice*

1. *Background*

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

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

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

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

236. *Id.* at 327.

237. *Id.*

238. *Id.*

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

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

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

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

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

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

2. *Rehabilitation and Reintegration*

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

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

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

244. DUNN, *supra* note 16.

245. *Id.*

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

247. Slater, *supra* note 7.

248. *Id.*

249. *Id.*

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

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

252. *Id.* at 1723.

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

a. Changes to Corrections

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

b. Preserving Civil Rights

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

253. Slater, *supra* note 7.

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

255. *Id.* at 138.

256. *Id.* at 138–39.

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

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

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

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

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

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

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

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

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

264. *Id.*

265. Jackson, *supra* note 263.

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

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

V. CONCLUSION

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

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

268. *See generally supra* Part II.

269. *See generally supra* Part II.

270. *See generally supra* Part I.

271. *See generally supra* Part III.

272. *See generally supra* Part III.

273. *See generally supra* Part III.

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

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