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Prison Abolition: From Naïve Idealism to Technological Pragmatism

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CRIMINAL LAW

PRISON ABOLITION: FROM NAÏVE IDEALISM TO TECHNOLOGICAL PRAGMATISM

MIRKO BAGARIC, DAN HUNTER & JENNIFER SVILAR*

The United States is finally recoiling from the mass incarceration crisis that has plagued it for half a century. The world’s largest incarcerator has seen a small drop in prison numbers since 2008. However, the rate of decline is so slow that it would take half a century for incarceration numbers to reduce to historical levels. Further, the drop in prison numbers has occurred against the backdrop of piecemeal reforms, and there is no meaningful, systematic mechanism to reduce incarceration levels. Despite this, there is now, for the first time, a growing public acceptance that prison is a problematic, possibly flawed, sanction. Prison is expensive, inflicts serious unintended suffering on incarcerated people, and profoundly damages families. Alternatives to prison are finally being canvassed. In one respect this is not surprising. The way that we deal with serious offenders has not meaningfully changed for more than 500 years—during all this time, we have simply locked offenders behind high walls. The way we deal with people who have caused serious harm has been more resistant to scientific and technological advances than any other aspect of society. The most radical suggestion regarding prison reform is to abolish prisons. Prison abolition has been a theme in some limited academic quarters for many decades. It had never received anything approaching mainstream credibility as a reform option, but this is now changing. Prominent politicians, social groups, university organizations, and mainstream media commentaries have recently advocated prison abolition. This proposal is no longer a fringe idea. It has

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gained considerable currency, particularly in light of the dual society-changing phenomena of the COVID-19 pandemic and the Black Lives Matter movement. Yet, the persuasiveness of the proposal to abolish prison evaporates when any degree of intellectual rigor is cast over it. It is likely to go down as naïve idealism due to the absence of any practical alternatives to prison. This Article shores up the notion of prison abolition to the maximum degree that is pragmatically feasible by carefully outlining an alternative to prison and hence addresses what is thought to be an insurmountable flaw in the abolitionist proposal. We advance a viable alternative to prison that involves the use and adaption of existing monitoring and censoring technology, which will enable us to monitor and observe the actions of offenders in real-time and, when necessary, to halt offenders’ potentially harmful acts before they occur. In proposing this new sanction, we provide lawmakers and the community a pathway to abolishing most prisons. The reforms suggested in this Article can result in the reduction of prison numbers by more than 90%, without any diminution in public safety.

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INTRODUCTION

It is difficult to conceive a society without prisons. They are a principal way that we have dealt with serious offenders since the eighteenth century. Moreover, throughout this time, the design and appearance of prisons has barely changed. Progress and development in science and technology have impacted prisons less than any other part of the community. Yet, there is now a growing call to not only reduce the extent to which we sentence people to prison, but even to abolish prisons entirely. This is against the backdrop of increasing recognition that the mass incarceration policy pursued by lawmakers during the past fifty years has failed. Imprisoning more than two million Americans imposes a prohibitive financial burden on the community, ruins families, and leads to increased recidivism levels.

The proposal to abolish prisons is not novel. However, until recently, it has featured only as an abstract concept in academic literature and has never received legitimacy as a serious reform proposal in the wider community. This is changing: Representative Alexandria Ocasio-Cortez has called for prisons to be abolished; the topic has featured widely in the mainstream media; a recent edition of the Harvard Law Review focused on prison abolition; and there are now a number of social groups advocating for the proposal.

The momentum to abolish prisons has increased even more recently in light of two unrelated but society-changing phenomena. The COVID-19 pandemic has had a devastating impact on all aspects of American society. This includes the prison population. Prisons’ structure has made them fertile grounds for the virus to spread, and this has resulted in large numbers of incarcerated people being released from prison. At the same time, it has highlighted inadequacies in the design and workings of prisons leading to

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1 Harry Elmer Barnes, The Historical Origin of the Prison System in America, 12 J. CRIM. L. & CRIMINOLOGY 35, 36, 60 (1921).
2 See infra Part II.
4 See infra Part III.
5 See infra Part II.
6 See id.


Although the main focus of the demonstrations sparked by George Floyd’s killing was ending police violence against African Americans, broader transformation of the criminal legal system is also a focus of the Black Lives Matter movement\footnote{Its objectives include building “power to intervene in violence inflicted on Black communities by the state and vigilantes.” \textit{About, Black Lives Matter}, https://blacklivesmatter.com/about/ [https://perma.cc/QF6U-L6YB] (last visited March 18, 2021).} because “many collateral consequences of mass incarceration have . . . fallen much more heavily on the necks of African Americans than on those of whites.”\footnote{See Michael Rocque & Steven E. Barkan, \textit{Black Lives Matter in Prisons Too}, OUPBLOG (June 23, 2020), https://blog.oup.com/2020/06/black-lives-matter-in-prisons-too/ [https://perma.cc/URAS-ENW4].}

Despite the emerging popularity of the prison abolition movement, it will almost certainly be rejected as an idealistically naïve proposal. Prisons are a cornerstone of our society, and while there are numerous, serious disadvantages associated with incarcerating offenders, which are exacerbated by mass prison numbers, the reality is that prisons do serve an invaluable function. They protect the community from offenders committing further crimes while they are incarcerated. Other benefits of prison supposedly include general deterrence—the view that harsh penalties discourage potential offenders from committing crime\footnote{Mirko Bagaric & Sandeep Gopalan, \textit{Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties}, 60 ST. LOUIS U. L.J. 169, 188 (2016) [hereinafter Bagaric & Gopalan, \textit{Taking Proportionality Seriously}].}—and specific deterrence—the theory that individual offenders will be dissuaded from reoffending if the
sanction they receive is unpleasant.\textsuperscript{13} There is considerable empirical evidence that shows that harsh prison sentences do not achieve general and specific deterrence;\textsuperscript{14} however, even if both were unattainable, it is incontestable that prison removes offenders from the community and therefore necessarily prevents them from causing harm to individuals or the community generally.

Thus, the ongoing unequivocal need to protect society from criminals provides a compelling basis for rejecting the abolitionist movement. In short, prisons will remain unless and until there is a viable alternative available. An irreducible requirement of an alternative to prison is that it provides an effective means of safeguarding the community from offenders committing further harm. In addition, it would be desirable for any alternative sanction to be more cost effective than prison and cause fewer incidental harms and suffering to the offender and his or her family. This Article proposes an alternative that satisfies these criteria. In doing so, it seeks to change the likely trajectory of the prison abolition movement from an idealistic suggestion to a realistic, achievable reform. To be clear, our argument is not strictly abolitionist; rather it is reformist. We believe the total elimination of the causes that lead to the need for prisons are unachievable, however, our solution coheres with an aspect of the abolitionist objective because it will greatly reduce the amount of people that are imprisoned.

We advance a viable alternative to prison that involves the use and adaptation of existing monitoring and censoring technology, which will enable us to monitor and observe the actions of offenders in real-time and, where necessary, to halt potentially harmful acts of offenders before they hurt other people.\textsuperscript{15} We also shore up the normative and empirical arguments in favor of prison abolition. Again, to be clear, we do not advocate for total prison abolition, but rather argue for a reduction of at least 90\% in prison population. Thus, we advocate for the substantive, as opposed to total, abolition of prisons.

In Part I of the Article, we provide an overview of the extent and nature of the incarceration crisis in the United States. This is followed, in Part II, by an analysis of the problems associated with high levels of incarceration. This relates to not only relatively obvious problems, such as the public cost of

\textsuperscript{13} Id. at 187.
\textsuperscript{14} Id at 188.
\textsuperscript{15} The technological aspects of our proposal are set out in detail in Mirko Bagaric, Dan Hunter & Gabrielle Wolf, \textit{Technological Incarceration and the End of the Prison Crisis}, 108 J. CRIM. L. & CRIMINOLOGY 73, 93–131 (2018). This Article builds on the reforms advanced in the earlier article. The proposal to move towards technological incarceration is, in our view, the only mechanism to give pragmatic effect to the proposal to abolition prisons.
incarcerating more than two million Americans, but also the less-evident costs of the suffering of incarcerated people and their families. In Part III, we discuss the current momentum towards prison abolition and the pitfalls associated with this philosophy. An alternative to prison that achieves all of the demonstrably beneficial aspects of incarceration but avoids the human rights and fiscal problems of incarceration is set out in Part IV. Finally, we summarize our reform proposal in the conclusion.

I. MASS INCARCERATION – THE NUMBERS

In the United States, incarcerated people are held in two forms of detention: prisons and jails. Prisons are institutions run by states or the federal government, which hold offenders whose sentences are typically longer than one year and include public and private prisons, boot camps, and treatment centers. Jails are confinement facilities, which are operated by a sheriff, police chief, or city or county administrator and generally hold offenders who are sentenced to a term of one year or less.

According to the most recent incarceration data, there are approximately 1,505,400 Americans in state and federal prisons and an additional 740,700 in local jails, for a total of 2,162,400 incarcerated people. Total incarceration numbers in the United States peaked at 2,310,300 in 2008. The current number of incarcerated people in the United States per 100,000 adults is 860, whereas the incarceration rate was approximately 1,000 per 100,000 adults in 2008 and 980 per 100,000 adults in 2009. Thus, there has been a more than 10% reduction in prison numbers during this period. By contrast, before 2008, imprisonment numbers increased nearly four-fold in four decades.

The reduction in incarceration rates does not apply evenly to incarcerated people from different social groups. For instance, this shift most affected African Americans, whose incarceration levels diminished by 31%
during the decade.\textsuperscript{23} This may be attributable to some states moderating their previous emphasis on an offender’s prior criminal history in determining the appropriate sanction.\textsuperscript{24} Notwithstanding this change, African Americans are still incarcerated at a rate that is more than three times higher than that of the rest of the population. Although only 13% of American residents are African American, they constitute 40% of the incarcerated population.\textsuperscript{25}

Despite the decrease in imprisonment numbers in recent years, the rate of change remains slow. At the current pace of decarceration, it is estimated that it will take up to forty years to return to the rate of imprisonment in 1971.\textsuperscript{26} Moreover, the United States remains the highest incarcerator in the world by a large margin.\textsuperscript{27} It imprisons more people than any other nation\textsuperscript{28} and at a rate that is, remarkably, ten times higher than that of some other developed nations.\textsuperscript{29}

Mass incarceration is a relatively new phenomenon in the United States.\textsuperscript{30} As noted, prison numbers have grown massively during the past four decades, with a significant increase in the number of incarcerated people. This growth is attributed to various factors, including changes in sentencing policies, mandatory minimum sentences, and increased law enforcement strategies. The consequences of mass incarceration are far-reaching, affecting individuals, families, and communities. It is widely accepted that incarceration levels are unsustainable. For further discussion regarding the growth of prison numbers and the unsustainable nature of it, see Anthony C. Thompson, Releasing Prisoners, Redeeming Communities: Re-Entry, Race, and Politics (2008); Lynn Adelman, What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration, 18 Mich. J. Race & L. 295 (2013); Todd R. Clear & James}

\textsuperscript{23} Black Lives Matter, supra note 10.
\textsuperscript{26} Cameron Kimble & Ames Grawert, Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem, BRENNAH CTR. FOR JUST. (Aug. 6, 2019), https://www.brenncenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem [https://perma.cc/UCC9-RYM6]. 1971 was the last time the crime rate was as low as it is today. Id.
\textsuperscript{27} See Nick Wing, Here Are All of the Nations That Incarcerate More of Their Population Than the U.S., HUFFINGTON POST (last updated Dec. 6, 2017), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html [https://perma.cc/4MNN-3P9H].
\textsuperscript{28} Id.
\textsuperscript{29} See generally Roy Walmsley, World Prison Population List, INST. FOR CRIM. POL’Y RSCH., https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [https://perma.cc/U7L-4U3K] (last visited Feb. 23, 2021) (providing statistics for prison populations by nation). Denmark, Sweden, Finland, Japan, and Iceland (and a number of unexpected developing countries such as South Sudan, Tanzania, Syria, Yemen) each have an imprisonment rate less than ten times that of the United States. See id.
\textsuperscript{30} However, it is widely accepted that incarceration levels are unsustainable. For further discussion regarding the growth of prison numbers and the unsustainable nature of it, see Anthony C. Thompson, Releasing Prisoners, Redeeming Communities: Re-Entry, Race, and Politics (2008); Lynn Adelman, What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration, 18 Mich. J. Race & L. 295 (2013); Todd R. Clear & James
decades, resulting in a quadrupling of the prison population. This rise in prison numbers stemmed from increased penalties driven by an increasing crime rate during the “War on Drugs,” which was declared by President Richard Nixon during the 1960s and continued into the 1970s and 1980s. A notable feature of the increased sanctions was that they were often in the form of harsh mandatory minimum terms, which reduced judges’ discretion to impose sentences that they felt were appropriate to the offender and the crime.

The mass incarceration crisis has caused a number of wide-ranging problems, which have combined to cause a groundswell of opposition to the practice. We now discuss the nature and extent of these problems.

II. THE MASS DISADVANTAGES OF MASS INCARCERATION

Numerous serious problems stem from mass incarceration. One readily measurable aspect of mass incarceration is the financial cost. Incarceration costs the taxpayer $80 billion annually. This spending necessarily reduces the government resources that can be spent on essential social services. To this end, it has emerged that in the period from roughly 1992 to 2012, spending on incarceration increased at six times the rate of spending on higher education. Further, a study by the Marshall Project demonstrated that

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32 Id. at 68–69, 118–20.
every dollar spent on incarceration leads to another ten dollars expended in the form of social costs.\(^{37}\)

The financial cost of incarceration is compounded by the humanistic toll it takes on incarcerated people and their relatives.\(^{38}\) There are a number of incidental deprivations experienced by prisoners that are cumulatively so burdensome that they arguably constitute a greater burden than the loss of liberty that is meant to be prison’s principal hardship. As one of the authors has noted previously, incarcerated people cannot access most goods and services,\(^{39}\) nor can they have sexual relationships,\(^{40}\) procreate,\(^{41}\) or participate in family activities.\(^{42}\) Further, they are sexually and physically victimized at significantly higher rates than the rest of the community.\(^{43}\)

The COVID-19 pandemic that has swept the United States in 2020 has highlighted the collateral hardship inflicted on incarcerated people. COVID-19 spreads most rapidly in circumstances when people congregate closely together.\(^{44}\) By their nature, prisons are densely populated with incarcerated people undertaking all living activities in confined spaces and having


\(^{40}\) Bagaric, Gopalan & Florio, Redefining Excessive Imprisonment as a Human Rights Abuse, supra note 38, at 1667.

\(^{41}\) Id. at 1695–1702.

\(^{42}\) Id.

\(^{43}\) In 2007, a Bureau of Justice Statistics (BJS) report revealed that four years after passage of the Prison Rape Elimination Act (PREA), more than 70,000 prisoners were raped in American jails the previous year. Jo Yurcaba, Rape Behind Bars: Stopping the Cycle of Violence, NATION SWELL (Sept. 28, 2018), https://nationswell.com/rape-in-prison/ [https://perma.cc/H2UY-YDPY]. In 2012, the Justice Department issued standards for reporting sexual assault under PREA. Alysia Santo, Prison Rape Allegations Are on the Rise, MARSHALL PROJECT (July 25, 2018), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise [https://perma.cc/GS97-XU3P]. Since these standards were released, assaults are being reported more, with the number increasing from 8,768 in 2011 to 24,661 in 2015. Id. After a prisoner survey in 2012, the BJS “estimated that more than 200,000 inmates are sexually abused in American detention facilities annually.” Id.

virtually no capacity to reduce their contact with other people.\textsuperscript{45} Thus, prisons are fertile breeding grounds for the spread of COVID-19. As early as March 2020, consultant and former executive director of the Colorado Department of Corrections Rick Raemisch described prisons as “bacteria factories,” noting that the public would not appreciate the gravity of COVID-19’s impact on the criminal legal system, and that the “devastation” would be “unbelievable.”\textsuperscript{46}

Hence, it was not surprising that within months of the first COVID-19 cases being reported in the United States, the disease infected thousands of prisoners. By June 6, 2020, there were more than 40,000 cases of COVID-19 in United States prisons,\textsuperscript{47} and a study ascertained “that the number of cases is five times higher, and the number of adjusted deaths is three times higher than in the general population.”\textsuperscript{48} The dangerous and rapid spread of COVID-19 into the prison system has resulted in immediate and dramatic action by some U.S. jurisdictions. Some jurisdictions have already released large numbers of inmates prior to the expiration of their sentences to minimize the spread of the virus within prisons and in recognition of the limited health services available to incarcerated people.\textsuperscript{49} However, most jurisdictions have been slow to take any effective action.\textsuperscript{50} The full extent of the release of

\textsuperscript{48} Id.
incarcerated people is yet to be determined, but it is likely that the pandemic will result in one of the largest releases in U.S. history.51 The incidental suffering that stems from prison also extends to the innocent, primarily in the form of incarcerated peoples’ families52 or those who are financially or emotionally dependent on prisoners.53 A study published in 2019 reported that 45% of Americans have had an immediate relative imprisoned.54 Incarceration thus causes immense, albeit unintended, suffering for many individuals aside from those actually incarcerated.55 Children’s separation from their incarcerated parents can have an extremely detrimental impact on them.56 It is estimated that 2.7 million American children have a parent who is in prison.57 More than five million American children experience this separation from their imprisoned parents at some point in their lives.58 After factoring in other variables, such as income and race, the incarceration of a child’s parent is associated with a higher chance of the child experiencing difficulties during their most formative years.59 Children of incarcerated parents face more emotional difficulties, are less engaged in school, have more problems in school between the ages of six and seventeen, and suffer from other issues that stem from the lack of parental

51 For details of large prisoner releases, see Peter Wagner, Large Scale Releases and Public Safety, PRISON POL’Y INITIATIVE (Apr. 9, 2020), https://www.prisonpolicy.org/blog/2020/04/09/large-scale-releases/ [https://perma.cc/LK69-3E44].


53 See Bagaric & Alexander, First-time Offender, supra note 52; see also Martin, supra note 52.


55 See Bagaric & Alexander, First-time Offender, supra note 52, at 438–39.


59 Murphey & Cooper, supra note 58, at 1.
monitoring. Further, incarcerating a parent greatly increases the likelihood that his or her children will also be incarcerated, experience physical and mental health problems later in life, or both.

This is not to suggest that prison does not have any benefits. It provides communities with protection from offenders while they are incarcerated and can also be a means of imposing proportionate sentences. These advantages are discussed further below. However, it is pertinent at this point to note that the community benefits derived from prison are overstated. This idea provides insight into the discussion in the next two sections of this Article dealing with the current momentum for massive reform in the manner by which we deal with serious criminal offenders.

The benefits of prison are overstated for three main reasons. First, the enhancement in community protection stemming from prison is only temporary, given that 95% of incarcerated people are ultimately released back into the community. Nearly three-quarters of released prisoners reoffend and are arrested within five years of release; 60% of them are reconvicted. Second, when incarcerated people are integrated back into the community, most of them reoffend within three years of their release.

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60 Id. at 2.
61 Children of incarcerated parents are five times more likely than other children to commit crimes and, incredibly, 70% of them become incarcerated at some point. See E. Mosely, Incarcerated—Children of Parents in Prison Impacted, TEX. DEP’T OF CRIM. JUST. (July 2008), http://www.tdcj.state.tx.us/gokids/gokids_articles_children_impacted.html [https://perma.cc/2BG9-YGCW]; Keehn & Boyd, supra note 57.
62 Nearly three-quarters of released prisoners reoffend and are arrested within five years of release; 60% of them are reconvicted. NATHAN JAMES, CONG. RSCH. SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY AND RECIDIVISM 1 (2015), https://fas.org/sgp/crs/misc/RL34287.pdf [https://perma.cc/K7CQ-HRBP]. There are three reasons that prisoners do not get released. The most common is that they are sentenced to life imprisonment. There are in fact 160,000 inmates serving a life sentence, and of these, approximately 49,000 have been sentenced to life without the possibility of parole. See Ashley Nellis, Life Goes On: The Historic Rise in Life Sentences in America, SENT’G PROJECT 1 (2013), https://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf [https://perma.cc/7NEH-VF8R]. Approximately 5,000 inmates die in prison or jail each year due to natural causes, illness or disease, suicide or violence. See Margaret E. Noonan, Harley Rohloff, & Scott Ginder, BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013—STATISTICAL TABLES (Aug. 2015), https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf [https://perma.cc/4NKKM-X3A4]. For the report on number of deaths in federal prisons (444), see Margaret E. Noonan, BUREAU OF JUST. STAT., MORTALITY IN STATE PRISONS, 2001–2014—STATISTICAL TABLES PRESS RELEASE (Dec. 2016), https://www.bjs.gov/content/pub/pdf/msp0114st.pdf [https://perma.cc/XG34-V2DF]. A small number are also executed. In fact, 2016 had the smallest number of executions (20) in the modern era (i.e., since 1973 when some states commenced re-enacting the death penalty). See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2016: YEAR END REPORT 2 (2016), http://deathpenaltyinfo.org/documents/2016YrEnd.pdf [https://perma.cc/JZ3A-5JK6].
release.\textsuperscript{63} Part of the explanation for this seems to be that imprisonment actually increases the risk of reoffending.\textsuperscript{64} Third, mass incarceration does not seem to result in materially lower crime. A 2016 Brennan Center report notes that “[r]igorous social science research based on decades of data shows that increased incarceration played an extremely limited role in the crime decline.”\textsuperscript{65}

Moreover, recent declines in incarceration have not caused increased levels of crime. According to recent FBI data, overall crime rates declined in 2018 throughout cities and rural communities of different sizes.\textsuperscript{66} Overall, violent crime and property rates declined in communities of all population sizes, but rape crime rates increased in large and mid-sized cities.\textsuperscript{67} For the most part, mid-size and small cities experienced larger declines than big cities and rural communities.\textsuperscript{68} Robbery rates decreased the most across all populations.\textsuperscript{69} Each region experienced general declines, but the Midwest and the South noticeably outpaced the Northeast and West regions of the country.\textsuperscript{70} In total, crime trends have significantly improved since 2014.\textsuperscript{71} Against this backdrop, we now examine changed community attitudes to mass incarceration.

\textsuperscript{63} Sixty percent of released prisoners who reoffend and are arrested within five years of release are reconvicted. James, supra note 62, at 1 (citing Matthew R. Durose, Alexia D. Cooper & Howard N. Snyder, U.S. Dep’t of Just., NCJ 244205, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010 1 (2014)).


\textsuperscript{67} Id. at Table 1, https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/home [https://perma.cc/BGE7-JQ23].

\textsuperscript{68} Id.

\textsuperscript{69} Id.

\textsuperscript{70} Id. at Table 2, https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/home [https://perma.cc/W7GP-TZJD].

\textsuperscript{71} Id. at Table 3, https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/home [https://perma.cc/2ES9-P8K9].
III. MOVES TO LOWER INCARCERATION NUMBERS AND ABOLITIONISM

The negative effects of mass incarceration are so widespread and evident that many sectors of the community are no longer reflexively embracing the “tough on crime” mantra. We now discuss the current momentum for genuine reform to sentencing and imprisonment policy.

A. MOOD FOR CHANGE

Because mass incarceration leads to considerable problems, there is now widespread recognition that incarceration numbers have reached unacceptable levels.72 Political momentum is building to abolish the tougher sentencing and increased incarceration that bipartisan politicians demanded throughout the 1980s and 1990s.73 By a margin of two to one, most American voters believe that the United States relies too heavily on incarceration.74 This attitude knows no political bounds, with 68% of Republicans, 78% of Independents, and 80% of Democrats supporting significant reforms.75 Unsurprisingly, elected officials have responded and begun to push for more lenient sentences for minor crimes, as well as the use of alternative punishments to incarceration. In a recent New York Times article, Tina Rosenberg highlighted the bipartisan move for change:

Creating mass incarceration 30 years ago was a bipartisan project. So it’s fitting that undoing it is as well. One reason for bipartisanship is that the criminal justice system has affected so many people — 30 percent of American adults have a criminal record, which the F.B.I. defines as an arrest on a felony charge . . . . On criminal justice reforms, the language from left and right seems to be converging. “Originally, conservatives talked about these issues in terms of public safety, recidivism reduction, curbing government spending and big government,” Ms. Harris said. (The prison system is a perfect conservative target: a hugely expensive failure of a government program that deprives people of their freedom.) “And progressives talked in terms of reducing racial disparities and increasing fairness . . . .”76

74 See id.
75 See id.
A key theme—particularly popular with Democratic politicians—in calls to reduce incarceration rates is a recommendation to abolish mandatory sentencing. This is significant given that some commentators blame the Democratic Party for the mass incarceration crisis. In a commentary titled *The Democrats’ Shameful Legacy on Crime*, Marie Gottschalk stated:

For decades, a growing number of Democrats had been trying to reposition themselves as the party of law enforcement and to lure white voters away from the GOP. The $30 billion law [known as the 1994 Crime Bill], passed 25 years ago this month, was the capstone of their efforts. Its main thrust was a vast array of punitive measures. The crime bill did not significantly lower crime rates; it did, however, help transform the United States into the world’s warden, incarcerating more of its residents than any other country.

Most candidates during the 2020 Democratic presidential primary made campaign promises to lower incarceration numbers. All of the candidates were committed to abolishing or reducing harsh mandatory penalties, which operate to some extent in most U.S. jurisdictions. For instance, before exiting the race, then-Senator Kamala Harris promised to “[e]nd mandatory minimums at the federal level and incentivize states to do the same.” Likewise, Senator Bernie Sanders asserted that he would “[s]top excessive sentencing with the goal of cutting the incarcerated population in half...”

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82 Douglas A. Berman, *Senator Bernie Sanders Releases Criminal Justice Reform Plan Under Banner “Justice and Safety for All”*, SENT’G L. & POL’Y BLOG (Aug. 18, 2019, 6:32...
Biden’s team during the election campaign claimed he would “[e]liminate mandatory minimums . . . . As president, he will work for the passage of legislation to repeal mandatory minimums at the federal level. And, he will give states incentives to repeal their mandatory minimums.”83 Biden promised to:

Create a new $20 billion competitive grant program to spur states to shift from incarceration to prevention . . . . In order to receive this funding, states will have to eliminate mandatory minimums for non-violent crimes, institute earned credit programs, and take other steps to reduce incarceration rates without impacting public safety . . . .84

As indicated above, many politicians have considered mandatory minimum penalties to be a major contributor to mass incarceration, leading to a groundswell of momentum to abolish them.

The massive Black Lives Matter protests following the killing of George Floyd85 have provided a further catalyst for fundamental reform of the criminal justice system, so far as it imposes disproportionate hardships on African Americans.86 The focus of the Black Lives Matter demonstrations has been to end police violence against African Americans, leading to calls to defund police departments.87 The criminal legal system has a number of stages. Sentencing is the sharp end of this process because it is the stage where the state imposes hardships on offenders. It is in this forum where the community imposes its most coercive measures against its citizens. The most serious criminal sanction is imprisonment—with the obvious exception of capital punishment, which is relatively rarely employed.88 As noted above,
African Americans are imprisoned at more than three times the rest of the community. It has always been morally unacceptable to not redress the disproportionate carceral burden inflicted on African Americans. It is now no longer socially or politically acceptable for this to occur either. There is an urgent need to implement measures that will demonstrably ameliorate the over-imprisonment of African Americans. The abolition of prisons is one such pathway.

B. CALLS FOR THE ABOLITION OF PRISONS

There are now wide-ranging calls for reforms that will reduce prison numbers. The most radical of these reforms is to abolish prisons altogether. The concept of prison abolition is not new. It has for many decades been discussed in academic literature. There are numerous reasons abolitionists give for this view. One common theme is that a state which imposes criminal sanctions—rather than protecting society from harmful acts—usually provokes criminality and, in this way, punishment is destructive to society. It has also been charged that punishment is inherently unfair because it is employed mainly against the underprivileged and deprived sectors of the community: “rulers will never prosecute their own class associates. Or at least, it is very exceptional.” A popular proposed alternative to the institution of punishment is to treat what are presently categorized as criminal acts in the same manner as civil wrongs, where the emphasis is on reconciliation and reparation.
These arguments and reasons have by and large failed to resonate with the wider community. However, very recently, the concept of prison abolition has started to attract wider interest and support. It was the theme of a recent edition of the *Harvard Law Review* and is expressly advocated by a Congresswoman and a number of prominent people and groups. We now elaborate on the abolitionist movement.

### 1. Prison Abolition: An Overview

The prison abolition movement has a long past, and it is viewed today as a “loose collection of people and groups who, in many different ways, are calling for deep, structural reforms to how we handle and even think about crime in our country.” Although the movement itself does not have a centralized structure, there are figureheads—namely Angela Y. Davis and Ruth Wilson Gilmore—organizations, and different political ideologies, all of which unite behind a common goal and mantra: “We want freedom.”

Gilmore, for instance, focuses on policy work with the aim of reducing the footprint of the carceral system “by stopping new prison construction and closing prisons and jails one facility at a time” and insists that “state funding benefit, rather than punish, vulnerable communities.” Generally, as compared to other social justice movements, abolitionists support the move to abolish prison because of a belief that incarceration, no matter the form, “harms society more than it helps.” As noted by Davis, “prisons are an obsolete institution because they exacerbate societal harms instead of fixing them.” The prison abolition movement differs from other reform movements in that it does not just manage the pain, it addresses the “actual

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94 Id.
96 Id., supra note 93.
97 Id.
source of the pain.” For this reason, some abolitionists argue that reforms aimed at prisons have done no more than “reinforce the system.”

Because of the belief that mass incarceration “reproduce[s] the very conditions that lead people to prison,” abolitionists have looked for ways to stop the practice altogether. This has become even more evident as calls to abolish prison are now seen in mainstream media. For instance, TV host Van Jones (a reformist as opposed to strict abolitionist) launched the #cut50 campaign, which was intended to reduce the prison population in the United States by half. Jeremy Travis, who oversees criminal justice issues on behalf of Arnold Ventures, has adopted a mantra of his own: “NO NEW JAILS. NO MORE MONEY FOR POLICE. ABOLISH ICE. ABOLISH PRISONS.” Representative Alexandria Ocasio-Cortez indicated that America needs “just alternatives to incarceration” and that everyone should come together to find a way to make the prison system “dramatically smaller than it is today.”

Although abolition has been publicized as the goal of a younger generation, it has been around for decades. Regardless of the time period in which abolition is examined, not all of those who advocate for abolition envision a world where there is no protection and serial killers are left to run amok. On the contrary, the current view of abolition is either to abolish the conditions that make prison appropriate or necessary, or an ideal that supports a “repeal and replace” mindset, meaning if prisons were abolished, we must consider what should replace them. If it is not possible to completely abolish prisons, these individuals focus on how we could better

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98 Id.
99 Id.
100 Id.; see also Kushner, supra note 95 (noting that “[i]nstead of asking whether anyone should be locked up or go free, why don’t we think about why we solve problems by repeating the kind of behavior that brought us the problem in the first place?”).
102 Next Frontier in Criminal Justice, supra note 101.
103 Gage, supra note 3.
104 Next Frontier in Criminal Justice, supra note 101.
105 Id.
106 Id.
use prisons, and many argue that the role prisons fill could be reduced dramatically.  

a. Objectives of Abolitionism

Abolitionists are interested in “how we resolve inequalities and get people the resources they need long before . . . they ‘mess up.’” Abolitionists generally have two objectives. The first objective is to delegate public safety responsibility to local communities, an effort also known as “civilianizing safety.” The other objective is to redistribute government spending and invest it in community needs like housing and education instead of prisons. According to Ruth Wilson Gilmore, “[a]bolition means not just the closing of prisons but the presence, instead, of vital systems of support that many communities lack.” The abolitionist movement has also expanded beyond just scholars and activists and has taken up residence in the very criminal justice systems it hopes to change, as judges and prosecutors have started to question whether some crimes can be handled via out-of-court remedies.

Even as the movement has progressed, abolitionists realize that change will not occur overnight. According to DeAnna Hoskins, president of JustLeadershipUSA, specifically regarding the movement to close Rikers Island in New York: “When we talk about abolishing prisons and abolishing law enforcement, it’s actually reducing the power and the reach of those entities.” Abolitionists do not focus only on jails and prisons; they also focus on the parole and probation systems because at least 4.5 million people—twice as many as are confined—are impacted by these systems. Regardless of their objectives, abolitionists can agree that prison actually has little to do with a decrease in crime or an increase in public safety.

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107 For example, Martin Horn, a former New York State parole director, indicated his belief that while prisons would always play a role in the criminal justice system, that role could be reduced to about ten percent of what it is now. See id.
108 Kushner, supra note 95.
109 Next Frontier in Criminal Justice, supra note 101.
110 Id.
111 Kushner, supra note 95.
112 See Next Frontier in Criminal Justice, supra note 101.
113 See Kushner, supra note 95.
114 Next Frontier in Criminal Justice, supra note 101.
115 See id. (noting that “the parole-to-prison pipeline is a major feeder of mass incarceration”).
116 Kushner, supra note 95.
b. Pillars of Abolitionism

Abolition, as imagined by the Prison Research Education Action Project in 1976, has three pillars: moratorium, decarceration, and excarceration.\textsuperscript{117} The first pillar, moratorium, is perhaps best summarized by Critical Resistance co-founder Rachel Herzing: “stop building cages.”\textsuperscript{118} The construction of new prisons is not as expansive as it once was, but according to data from the Congressional Research Services, the state prison population has increased by around 700\% since the 1970s.\textsuperscript{119} The principle of supply and demand underlies moratorium—where fewer spaces for prisoners are provided, there will be fewer prisoners.\textsuperscript{120}

Decarceration, on the other hand, is about getting people out of prison.\textsuperscript{121} The process is geared toward determining why people are in prison, whether they in fact should be in prison, and for how long.\textsuperscript{122} For instance, abolitionists favor reviewing the convictions of those punished for marijuana possession in states that have since legalized marijuana possession—and not keeping them in prison for years on end—because not all of these individuals pose a threat to society, particularly when the criminalization of marijuana possession has relaxed nationally.\textsuperscript{123} Abolitionists also turn their eyes toward states that enforce a three-strikes rule, as this rule often results in even longer stays for individuals who have violated the rule.\textsuperscript{124}

Excerceration gets to the heart of what abolitionists hope to improve: keeping individuals from ending up in prison in the first place.\textsuperscript{125} In his article explaining the goals of abolitionism, John Washington highlights key methods that could help with this, such as “[d]ecriminalizing mental-health episodes, fighting homelessness, or decriminalizing drug use.”\textsuperscript{126} This is where the abolitionist movement goes even further than other reform movements because it is geared towards correcting the source of the pain, and for this reason, abolitionists support adequate funding for mental health, providing housing to the homeless, and offering rehabilitation for individuals who have substance abuse issues.\textsuperscript{127}

\begin{footnotesize}
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\item[\textsuperscript{117}] Washington, supra note 93.
\item[\textsuperscript{118}] Id.
\item[\textsuperscript{119}] Id.
\item[\textsuperscript{120}] Id.
\item[\textsuperscript{121}] Id.
\item[\textsuperscript{122}] See id.
\item[\textsuperscript{123}] See id.
\item[\textsuperscript{124}] See id.
\item[\textsuperscript{125}] See id.
\item[\textsuperscript{126}] Id.
\item[\textsuperscript{127}] See id.
\end{itemize}
\end{footnotesize}
c. Other Parts of Abolitionism

One thing that could radically change the criminal justice system and help achieve abolitionists’ goals is to change the way we view crime. For instance, Justin Piché, Director of Carceral Studies Research Collective, claims that “[w]hen we no longer call something a crime, we can define the phenomena differently, and we can respond to [it] differently.” 128 Piché’s theory suggests that if we reframe how we view crimes, we may find that we can handle many issues without turning to the criminal justice system and that our desire as a society to cage or punish someone will also lessen.129

Even with these views, abolitionists understand that this process is about a lot more than just closing down prisons. After all, there must still be a way to deal with particularly dangerous individuals, such as rapists and murderers. Many abolitionists approach this issue with restorative justice, which allows people to be held accountable for their transgressions.130 The goal is to “restore the victim, the community, and the offender, to how they were before the transgression occurred.”131 This is normally sought to be achieved through “the offenders and victims (sometimes together with their respective families) meeting and reaching an agreement for the offender to repair the damage to the victim caused by the crime.”132 Restorative justice is not new, and its roots can be traced to those indigenous and religious practices that focus not only on justice for the offenders, but also on reparations for victims and communities impacted by certain acts.133 Beyond restorative justice is transformative justice, which focuses on determining what causes a person to commit an act and what can be done to change the conditions that led to the act.134

d. Campaigns for Prison Abolition

In addition to the aforementioned #cut50 campaign, other efforts have been established to argue in favor of abolition or at least significant prison reduction. For instance, the American Civil Liberties Union (ACLU) launched its Smart Justice campaign, which has a goal of “reducing the prison population by 50% through local, state and federal initiatives to reform bail,
prosecution, sentencing, parole and re-entry."¹³⁵ This movement, like many other abolitionist movements, has a goal of redirecting money used to fund the prison system to the communities that need it most.¹³⁶ Gilmore herself has noted her excitement about this campaign, particularly because it is working across multiple jurisdictions and may provide the opportunity to "revise [the] approach from the exclusionary First Step Act."¹³⁷ Campaign director Udi Ofer has said that "[t]o genuinely end mass incarceration in America, we have to transform how the justice system responds to all offenses."¹³⁸ To that end, abolitionists are also working to shift the narrative to address what will be done if prisons go away, particularly what will be done with people who cause serious harm.¹³⁹

It has also been suggested that efforts must be made to approach the problem with prisons by creating a movement focusing on both racial and economic justice.¹⁴⁰ From an abolitionist’s perspective, to revolutionize the way prison is viewed, one must also consider how people of color are viewed and other issues that contribute to "gaping economic inequalities."¹⁴¹ The “Abolitionist Toolkit,” as provided by Critical Resistance, focuses on “chipping away at oppressive institutions rather than helping them live longer.”¹⁴² The goal of abolitionism is to “build models today that can represent how we want to live in the future.”¹⁴³

2. Abolition Defined; History and Prominence of the Concept Today

In April 2019, Harvard Law Review published a special edition: Developments in the Law — Prison Abolition.¹⁴⁴ Prison abolition is an issue that many talk about, but it is also an issue that “will rarely leave a lawyer’s

¹³⁵ Kushner, supra note 95.
¹³⁶ Id.
¹³⁷ Id.
¹³⁸ Id.
¹³⁹ See id. (quoting Michelle Alexander: “I think the failure of some academics like myself to squarely respond to the question of violence in our work has created a situation in which it almost seems like we’re approving of mass incarceration for violent people. Those of us who are committed to ending the system of mass criminalization have to begin talking more about violence. Not only the harm it causes, but the fact that building more cages will never solve it.”).
¹⁴⁰ Washington, supra note 93.
¹⁴¹ Id.
mouthe." The fact that many take on this task, however, leads to the potential for a difference of opinion on the very definition of “abolition,” as evidenced by the contributors to the aforementioned special edition of Harvard Law Review. For instance, Professor Allegra M. McLeod, who makes a political argument about prison abolition, describes abolition as “the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture.” For legislative analyst and law student Angel Sanchez, abolition requires prison to be treated like a “social cancer: we should fight to eradicate it but never stop treating those affected by it.” Patrisse Cullors, cofounder of Black Lives Matters, describes it as “a cultural intervention.” Finally, Professor Dylan Rodriguez describes abolition as “a practice, an analytical method, a present-tense visioning, an infrastructure in the making, a creative project, a performance, a counterwar, an ideological struggle, a pedagogy and curriculum, an alleged impossibility that is furtively present.”

Abolitionism and imprisonment are not new concepts—they are firmly entrenched in U.S. history. According to Angela Y. Davis, “[i]mprisonment itself was new neither to the United States nor to the world, but until the creation of this new institution called the penitentiary, it served as a prelude to punishment . . . . With the penitentiary, incarceration became the punishment itself.” As Professor Rodriguez notes, the increased use of prison today “is a direct outcome of the liberal-progressive ‘prison reform’ successes of the 1970s.” Abolition finds its history in a “Black radical genealogy of revolt and transformative insurgency against racial chattel enslavement and the transatlantic trafficking of captive Africans.” Professor Rodriguez presents proof of this history with Frederick Douglass’s words clarifying that the abolitionist’s work was not finished following

145 Id. at 1568.
146 See id. at 1569.
147 Id. (citing Allegra M. McLeod, Envisioning Abolition Democracy, in Developments in the Law — Prison Abolition, 132 Harv. L. Rev. 1613, 1617 (2019)).
148 Id. (citing Angel E. Sanchez, In Spite of Prison, in Developments in the Law — Prison Abolition, 132 Harv. L. Rev. 1650, 1652 (2019)).
149 Id. (citing Patrisse Cullors, Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability, in Developments in the Law — Prison Abolition, 132 Harv. L. Rev. 1684, 1694 (2019)).
150 Introduction, supra note 144 (citing Dylan Rodriguez, Abolition as Praxis of Human Being: A Foreword, in Developments in the Law — Prison Abolition, 132 Harv. L. Rev. 1575, 1578 (2019)).
151 Davis, Are Prisons Obsolete, supra note 89, at 26.
152 Rodriguez, supra note 150, at 1601 (footnote omitted).
153 Id. at 1576 (citations omitted).
passage of the Thirteenth Amendment. According to McLeod, abolitionists “understand their work to be related to the historical struggles against slavery and its afterlives, against imperialism and its legacies in more recent practices of racial capitalism, and against immigration enforcement and border fortification.” The abolition of slavery came about because of the successful, organized social movements that helped “social circumstances transform and popular attitudes shift,” and this is exactly what is needed to abolish the prison system.

The ties between the movement to abolish prisons and the movement to abolish slavery are normatively and socially coherent. As Angela Y. Davis has noted, “[t]he belief in the permanence of slavery was so widespread that even white abolitionists found it difficult to imagine black people as equals.” Slavery is described as a “peculiar institution,” and the prison system could also be described as such. According to Davis, people living under Jim Crow during the time after slavery was outlawed “could not envision a legal system defined by racial equality.” There are similarities between slavery and prison, and just as many believed a racist legal system was permanent, there has long been a similar belief in the permanence of prisons, as evidenced by the lack of viable alternatives to deal with serious offenders that have been created or proposed during the past few centuries.

Prisons do not have to be a permanent part of the criminal justice system, and though calls to abolish the prison system may not be resounding
within the legal system, many others have begun to make the call.161 In 2016, the #LetUsBreathe Collective “sought justice, not through recourse to the criminal courts or civil litigation, but instead by reconceptualizing justice in connection with efforts to end reliance on imprisonment and policing.”162 The Vision for Black Lives, for instance, called for an end to capital punishment.163 The group We Charge Genocide (WCG) formed and proposed legislation that called for “a center for torture victims and families’ to offer rehabilitative support and treatment, community education, and vocational assistance.”164 Most recently, abolitionists have called for the shutdown of Rikers Island jail, and, as of October 2019, their calls were successful.165 This charge has been led by Critical Resistance, which “has long been at the forefront of abolitionist organizing.”166 Additionally, many student organizations have requested their universities “divest from the prison industrial complex.”167 Scholars, many of whom are referred to throughout this Article, have also called for abolition. Professor Paul Butler, who at one point distanced himself from the abolitionist movement,168 discussed the concept of prison abolition for an entire chapter in his recent book, Chokehold: Policing Black Men.169 Professor Tracey Meares also

161 See Introduction, supra note 144, at 1568 (citing Harv. L. Sch., HLS in the World | The Changing Political and Intellectual Landscape of Criminal Justice Reform at 33:01, YOUTUBE (Nov. 17, 2017), https://www.youtube.com/watch?v=cWjlL9-bVq0 [https://perma.cc/WSS 4-Z79V]) (“People on the streets, people who are organizing, are gonna put certain things on the table that will rarely leave a lawyer’s mouth. Like police abolition. Abolishing the carceral state. Ending prisons.”).
163 Introduction, supra note 144, at 1569–70.
164 Id. (citing McLeod, supra note 147, at 1627).
166 Introduction, supra note 144, at 1570 (citing History, CRITICAL RESISTANCE, http://criticalresistance.org/about/history/ [https://perma.cc/Y8Y8-RK9L] (last visited Nov. 23, 2019)).
167 Id. at 1571.
168 Id. at 1571 (citing PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 4 (2009) (“What I am not saying: prison should be abolished . . . .”)).
169 Id. (citing PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 230 (2017)).
supported prison abolition, concluding in an essay that “policing as we know it must be abolished before it can be transformed.”

Even outside of calls to abolish prisons, movements have formed that have a common goal of providing “real alternatives to police and jail intervention.” McLeod summarizes several of these movements that promote community involvement before conflicts escalate. For example, Cure Violence involves mediators in “conflicts likely to escalate into gun violence or other violent assaults.” Advance Peace also involves mediators, but differs in that it provides mentorship and financial support to at-risk youth. The Oakland Power Project, on the other hand, offers training by “community street medics and healthcare workers . . . in de-escalation and other tactics” meant to help community members dealing with a loved one’s mental health crisis. The Harm Free Zone Project and the Audre Lorde Project’s Safe OUTside the System Safe Neighborhood Campaign educate the community in preventing harm without getting the police involved. Another program—White Bird Clinic’s Crisis Assistance Helping Out on the Streets (CAHOOTS)—“assists in teams composed of at least one nurse or EMT and one crisis worker in cases of ‘drug and substance abuse, poverty-related issues, and mental health crises’ without involving police . . . .” All these programs exist to convince communities that police intervention may not be as necessary as they believe and “to thereby build local power in support of more peaceable means of collective democratic governance.”

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171 Id.
172 Id. at 1628–29 (citing Essential Elements, CURE VIOLENCE, http://cureviolence.org/the-model/essential-elements/ [https://perma.cc/E8D6-UKG2] (last visited Nov. 23, 2019)).
173 See id. at 1629 (citing The Solution, ADVANCE PEACE, https://www.advancepeace.org/about/the-solution/ [https://perma.cc/4LY2-HUSW] (last visited Nov. 23, 2019)).
174 Id. (citing Candice Bernd, Community Groups Work to Provide Emergency Medical Alternatives, Separate from Police, in WHO DO YOU SERVE, WHO DO YOU PROTECT?: POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 151–55 (Maya Schenwar et al. eds., 2016) [hereinafter WHO DO YOU SERVE]).
175 Id. (citing Rachel Herzing, Big Dreams and Bold Steps Toward a Police-Free Future, in WHO DO YOU SERVE, supra note 175, at 111, 116).
177 Id.
178 Id.
3. Arguments in Favor of Abolition

Just as the definition of abolition may vary depending on who you ask, there are many different arguments made in favor of abolition. In the next part of this Article, we focus on the arguments made in *Developments in the Law — Prison Abolition*, which primarily fall in the political, pragmatic, and ethical arenas.

a. Political Arguments

Professor Allegra M. McLeod approaches the idea of abolition with democracy at the forefront, requiring a “constellation of democratic institutions and practices to displace policing and imprisonment while working to realize more equitable and fair conditions of collective life.”

Under McLeod’s political approach, abolitionist justice is achieved by exposing the problems underlying the legal system while trying to create peace and allocate resources to where they are needed. It is not about removing justice altogether, but rather eliminating “existing punitive institutions while identifying meaningful forms of accountability and prevention to respond to actual violence and wrongdoing.”

McLeod’s vision includes a system where accountability is key, where ills are repaired, and where “discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence.”

McLeod embraces the fact that abolitionist work in the prison system is related to struggles against slavery, imperialism, racism, and border strengthening. Even though the abolition movement draws inspiration and guidance from previous reform movements, contemporary abolition is somewhat different in that it takes a dual-pronged approach. In particular, McLeod acknowledges two sides to the contemporary abolition coin: one deconstructs the current penal systems, while the other focuses on improving the world so that these systems are not part of everyday life. She follows the same line of thinking as many other abolitionists, including Mariame Kaba, who relates that prison abolition consists of two parts: “It’s the complete and utter dismantling of prisons, policing, and surveillance as they

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179 *Id.* at 1618.
180 *Id.* at 1615.
181 *Id.* at 1616.
182 *Id.*
183 See *id.* at 1617.
184 See *id.* at 1619.
185 See *id.* at 1617.
currently exist within our culture. And it’s also the building up of new ways of . . . relating with each other.”\textsuperscript{186} Davis echoes this notion of repair by “propos[ing] the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison . . . .”\textsuperscript{187} Beyond Davis, many abolitionists attack the problems in the prison system from a political angle. For instance, Rachel Herzing, cofounder of Critical Resistance, identifies abolition as a “set of political responsibilities” to create protective systems that do not involve police or incarceration.\textsuperscript{188} Charlene Carruthers defines abolition as “a long-term political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment.”\textsuperscript{189} Professors Fred Moten and Stefano Harney support the idea that the abolitionist movement must primarily focus on a post-abolition future because abolition’s purpose is “[n]ot so much the abolition of prisons but the abolition of a society that could have prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society.”\textsuperscript{190}

The key point of many of these abolitionists is that the movement should not be geared toward only the abolition of prisons; it must also include efforts “to distribute resources and opportunities more equitably.”\textsuperscript{191} The issue abolitionists face is that the method for how to accomplish the latter goal (and even the former to some extent) is not completely mapped out in any context, most likely because the world is so unequal that one cannot conceive of how to accomplish the goal of prison abolition.\textsuperscript{192} Many abolitionists have ideas of how this could occur. For instance, Davis believes that there should be “some form of democratic-socialist governance with rights to employment, housing, healthcare, and education,”\textsuperscript{193} while Moten and Harney imagine a

\textsuperscript{186} Id. (quoting Episode 29 — Mariame Kaba, AIRGO (Feb. 2, 2016)), https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba [https://perma.cc/EF5N-A9F8].

\textsuperscript{187} Id. at 1618 (citing ANGELA Y. DAVIS, ABOLITION DEMOCRACY 95–96 (2005) [hereinafter DAVIS, ABOLITION DEMOCRACY]).


\textsuperscript{189} McLeod, supra note 147, at 1618 (quoting CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS x (2018)).

\textsuperscript{190} Id. (quoting Fred Moten & Stefano Harney, The University and the Undercommons: Seven Theses, 22 SOC. TEXT 101, 114 (2004)).

\textsuperscript{191} Id. at 1619.

\textsuperscript{192} See id.

\textsuperscript{193} Id. (citing DAVIS, ABOLITION DEMOCRACY, supra note 187, at 103).
system that “at least calls for a politics and economy that are cooperative, solidaristic, and egalitarian.” Additionally, individual abolitionists are not the only ones with useful views of the goals. The Movement for Black Lives project wages war against many inequities with a goal of “government repair of the harms that have been done” through ‘targeted long-term investments.”

In her article, McLeod focuses mostly on abolitionist efforts in Chicago, which she claims differ from other, more conventional efforts. Efforts in Chicago did not focus just on what could be accomplished through litigation, but they embraced a public effort that was driven by formerly incarcerated people and organizers. By this point, survivors of incarceration knew that justice could not be achieved through the legal system, and the focus turned to ensuring “an ongoing and public dialogue between survivors, activists, and educators.” The movement was a success and serves as an example of what can happen when democratic processes are relied upon instead of punitive responses to resolve harm.

One goal of abolitionists is to “reconceptualize what actually constitutes criminal wrongdoing and to advocate for a democratization of local political economies as a means of reducing harm and ensuring collective well-being.” As McLeod points out, many activities on which the criminal justice system focuses should not be considered criminal at all. Abolitionists also focus on the budgeting processes, hoping to redirect funds

194 Id. (citing Fred Moten & Stefano Harney, The University and the Undercommons: Seven Theses, 22 SOC. TEXT 101, 114–15).
195 Id. at 1619 (quoting Platform, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/platform/ [https://perma.cc/BW55-7Y9V] (last visited Nov. 2, 2019)).
196 Specifically, McLeod explains how the abolition movement gained steam and reacted to Jon Burge, who was from Chicago and was “a corrupt, vicious, and brutal white police commander who presided over a regime of terror from the 1970s until the 1990s.” Id. at 1624 (citing Natalie Y. Moore, Payback, MARSHALL PROJECT (Oct. 30, 2018, 6:00 AM), https://www.themarshallproject.org/2018/10/30/payback [https://perma.cc/JY98-KBPR]).
197 Id. at 1627.
198 See id.
199 Id.
200 Id. at 1627–28. According to McLeod, the movement encouraged Chicago “to launch an ongoing torture memorial project, to appropriate more than five million dollars in reparations for survivors, and to create a center that provides medical, mental health, and other support services to survivors of police trauma.” Id. at 1627 (citing Hal Dardick, John Byrne & Steve Mills, Mayor Backs $5.5 Million Reparations Deal for Burge Police Torture Victims, CHI. TRIB. (Apr. 14, 2015, 7:14 PM), https://www.chicagotribune.com/news/cr-burge-reparations-emanuel-met-20150414-story.html [https://perma.cc/G8KP-2XXG]).
201 Id. at 1633.
202 Id.
from policing efforts to social projects. For instance, BYP100 conducted a study to determine how “participatory budgeting” could improve public spending, and, as a result of its findings, BYP100 Chicago launched a campaign to empower the public “to defund police and reinvest resources” for the public’s benefit.203

Patrisse Cullors, cofounder of Black Lives Matter, includes a political approach in her argument for abolition, noting that because the United States is “the world’s greatest perpetrator of war and the most extensive purveyor of human rights atrocities at home and abroad,” any approach to abolition “must address and settle this dilemma of global U.S. state violence, injustice, and devastation.”204 Cullors’s other arguments take an ethical approach and will be discussed later in this Article.

b. Pragmatic Arguments

In addition to politically based arguments in favor of abolishing prisons, proponents have also made a number of pragmatic arguments. According to McLeod, abolitionist Harsha Walia takes a useful approach to abolition, proposing that social change should occur through prefiguration—that is, “as ways to prefigure and thereby begin to realize incrementally the sort of changed world we would want to live in.”205 Joining with other abolitionists who realize change will not occur overnight, Walia warns that the movement is about more than just struggles against power:

[It] is also the imagining and generating of alternative institutions and relations . . . resistance that is responsible to dismantling current systems of colonial empire and systemic hierarchies, while also prefiguring societies based on equity, mutual aid, and self-determination . . . a fundamental reorientation of ourselves, our movements, and our communities to think and act with intentionality, creativity, militancy, humility, and above all, a deep sense of responsibility and reciprocity.206

McLeod also takes a pragmatic approach with her abolition democracy. She undergoes a thoughtful comparison between abolition and legal theory, noting that, although abolition democracy leaves some questions unanswered, conventional legal theories “consist of formal, abstract, and well-settled but seldom-examined constructions.”207 Despite the fact that conventional legal theories are well-settled, their approach to justice is not a problem of “as-yet-imperfect implementation.”208 According to McLeod,

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203 McLeod, supra note 147, at 1635.
204 Cullors, supra note 149, at 1685.
205 McLeod, supra note 147, at 1623.
206 Id. (quoting HARSHA WALIA, UNDOING BORDER IMPERIALISM 249 (2013)).
207 Id. at 1637.
208 Id.
when it comes to prison abolition, “the very foundations of existing conceptions of legal justice are inadequate, compromised, limited in the ideas of justice exhort, and corrupted by inescapably vicious and inegalitarian institutional histories and cultures.” 209 Therefore, abolition is needed to actually accomplish change. 210 Abolition is meant to address the underlying problems that lead to imprisonment, whereas the criminal justice system does not address these issues. 211 Another difference between the two is that the abolitionist movement, at least when it came to police torture in Chicago, sought to make survivors whole again, while any sort of redress granted through the criminal legal system is “typically deeply inequitable, violent, and at odds with any conception of meaningful amends or principled accountability.” 212 Further, this goal of making survivors whole again goes to show that abolitionists are not ignoring violent crimes in their arguments for the abolishment of prisons, but rather they recognize that violence exists and are trying to find a way to respond without making the problem even worse.

For an abolitionist, justice is also about observing harm and the aftereffects, addressing survivors’ needs, and (for some) holding people accountable “in ways that do not degrade but seek to reintegrate, while understanding the root causes of wrongdoing and working to address them.” 213 In this way, abolitionists utilize transformative justice strategies, which seek to meet the needs of those harmed, reduce future harm, and encourage responsibility. 214 Even beyond this idea, “justice in abolitionist terms is also concerned with preventing harm in ways that more equitably distribute material resources . . . .” 215 Abolitionists understand that “to realize ‘freedom or safety . . . passive punishments must be replaced with active amends and accountability.’” 216

Although many note that the lack of direction could be a shortcoming for abolitionists, McLeod argues that perhaps it must remain “unfinished so that the abolitionist movement may evolve with experience.” 217 McLeod

209 Id.
210 Id. at 1640.
211 See McLeod, supra note 147, at 1638.
212 Id. at 1638, 1640.
213 Id. at 1646.
214 Id.
215 Id.
216 Id. at 1647 (citing Kelly Hayes & Mariame Kaba, The Sentencing of Larry Nassar Was Not “Transformative Justice.” Here’s Why, APPEAL (Feb. 5, 2018), https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/ [https://perma.cc/L2ZH-LR64]).
217 McLeod, supra note 147, at 1647.
urges those involved to “remain open to change in response to changing needs and changing times.” 218 As previously discussed, legal theories are generally made up of well-developed ideas, and while some may view the abolitionist movement as less-developed, we would argue that this is intentional and useful to the movement’s success.

Professor Dylan Rodriguez argues in favor of abolition as a practice, noting that it is a “dream toward futurity vested in . . . genealogies of collective genius that perform liberation under conditions of duress.” 219 As part of this “dream toward futurity,” Rodriguez notes that contemporary criminal justice—including the use of incarceration as a form of punishment—falls “within a longer national tradition of anti-Black nation-building and racist statecraft.” 220 Many abolitionists have expressed concern about race disparities present in and perpetuated by the incarceration system. 221 As a result, “contemporary abolitionist praxis thus amplifies the notion that abolition is an unfinished project precisely because the slave relation has never been abolished and instead has been constantly reanimated through changing regimes of carceral domestic war.” 222

For Rodriguez, “abolition is not merely a practice of negation—a collective attempt to eliminate institutionalized dominance over targeted peoples and populations—but also a radically imaginative, generative, and socially productive communal (and community-building) practice.” 223 Further, abolition calls for “a radical reconfiguration of justice, subjectivity, and social formation that does not depend on the existence of either the carceral state . . . or carceral power as such . . . .” 224 Rodriguez clearly favors abolitionist as opposed to reformist approaches, considering his criticism that reformist approaches “fail to recognize that the very logics of the overlapping criminal justice and policing regimes systemically perpetuate racial, sexual, gender, colonial, and class violence through carceral power.” 225 The fact that the carceral system perpetuates the very activities that often put prisoners behind bars in the first place is recognized by many abolitionists, particularly

\[\text{Id.} \]
\[\text{Id., supra note 150, at 1575.} \]
\[\text{Id. at 1581.} \]
\[\text{Id., supra note 148, at 1654.} \]
\[\text{Id. at 1576.} \]
\[\text{Id.} \]
those whose approaches are analyzed here.\textsuperscript{226} Rodriguez and other abolitionists find that reform is generally ineffective at stopping vulnerable populations’ exposure to state violence and that it “ultimately reinforce[s] a violent system . . . .”\textsuperscript{227}

For these reasons, Rodriguez calls for a departure from the reformist mindset and the belief that “either the carceral state or carceral power is an inevitable and permanent feature of the social formation.”\textsuperscript{228} Rodriguez further draws distinctions and elaborates on the difference between reformist and abolitionist efforts by noting that:

\begin{quote}
[W]hile liberal-to-progressive reformism attempts to protect and sustain the institutional and cultural-political coherence of an existing system by adjusting and/or refurbishing it, abolitionism addresses the historical roots of that system in relations of oppressive, continuous, and asymmetrical violence and raises the radical question of whether those relations must be uprooted and transformed (rather than reformed or ‘fixed’) for the sake of particular peoples’ existence and survival as such.\textsuperscript{229}
\end{quote}

Rodriguez further elaborates on problems with reformist theory by addressing the “mass incarceration” narrative, alleging that reformists addressing this problem have created “a narrative that obscures rather than clarifies the origins, casualties, and structuring logics of carceral power[.]”\textsuperscript{230} In response to mass incarceration that “was unfolding, flourishing, and metastasizing under [the privileged public’s] noses,” a reformist movement took shape, including social media collectives, nonprofits, foundations, and even public figures like Van Jones, Jared Kushner, and Kim Kardashian West, to combat the problem of mass incarceration.\textsuperscript{231} According to the movement, “[r]eform is imperative, not just for its economic or budgetary benefits, but for individuals who deserve a second chance and the families and communities who stand beside them.”\textsuperscript{232}

In classifying the problem as a moral grievance, it becomes “a betrayal of American values . . . .”\textsuperscript{233} By reframing the problem of mass incarceration

\textsuperscript{226} Id.
\textsuperscript{227} Id. at 1576–77.
\textsuperscript{228} Rodriguez, supra note 150, at 1577.
\textsuperscript{229} Id. (footnote omitted).
\textsuperscript{230} Id. at 1590.
\textsuperscript{233} Id. at 1591.
in such a way, the problem, in theory, can be reformed by using the current justice system. 234 Rodriguez notes, however, that “carceral domestic war cannot be ‘reformed’; it can only be eliminated (abolished); to do otherwise is to sustain it under revised executive/policy directives, policing tactics, jurisprudential approaches, and cultural discourses.” 235 Furthermore, reframing the issue as a moral grievance and promising “futurity, redeemed citizenship, and revalued civil life” may lead to negative consequences. 236 Such reform “rests on allegations of unfairness, systemic bias, racial disparity, and institutional dysfunction that in turn demand vigorous reforms of the racial state, largely by way of internal auditing, aggressive shifts in law and policy, and piecemeal rearrangements of state infrastructure.” 237 Rodriguez specifically addresses reform efforts by the Brennan Center for Justice, noting that its effort to reform mass incarceration “is tantamount to endorsing an expanded policing regime guided by neoliberal managerial methods and personnel assessments.” 238 Mass incarceration reform may “declare[] an anticarceral intention,” but it in fact expands carceral practices. 239

Rodriguez supports this view by turning to abolitionist Mariame Kaba who notes that “[t]he prison itself was born out of a reform movement . . . . With every successive call for ‘reform,’ the prison has remained stubbornly brutal, violent[,] and inhumane.” 240 Moreover, mass incarceration reform does not confront the practice of incarceration itself. 241 It may be difficult for true abolitionists to give much credence to reforming prisons as previous reform efforts led to the “expansion and bureaucratic multiplication” of prisons. 242 According to Rodriguez, “[t]he contemporary carceral regime’s roots and sustenance are fundamentally located in the American liberal-progressive impulse toward reforming institutionalized state violence rather than abolishing it.” 243 Professor Paul Butler also expressed this sentiment in his “protoabolitionist conclusion,” which suggests that “attempts to reform

234 Rodriguez, supra note 150, at 1593.
235 Id.
236 Id. at 1594.
237 Id.
238 Id. at 1596.
239 Id. at 1597.
241 Id. at 1598.
242 Id. at 1601.
243 Id. at 1602.
the system might actually hinder the more substantial transformation American criminal justice needs.\textsuperscript{244}

Rodriguez highlights the former Chicago-based group WCG as an organization that “left an indelible imprint on contemporary abolitionist praxis and its accompanying critical public discourse.”\textsuperscript{245} WCG reimagined common reform narratives by addressing the seemingly popular idea of “state violence as abnormal and infrequent rather than entirely systemic and historically widely encountered by policed Black and Brown communities/people.”\textsuperscript{246} Put differently, WCG “constructively displace[d] reformist narratives of police brutality and gendered racist state violence that presume both to be dysfunctional exceptions to the normative operations of state and civil society.”\textsuperscript{247} As such, WCG’s reimagination of reform narratives, which recognized the historical realities of the prison system, created a response similar to those of abolitionists: “perhaps the regime of gendered racist police violence ought not to be incessantly reformed, but rather extinguished.”\textsuperscript{248}

According to Rodriguez, abolition is more than just a theory—it is a praxis that carries with it an obligation to fulfill the job of “constantly remaking sociality, politics, ecology, place, and (human) being against the duress that some . . . identify as slavery and incarceration.”\textsuperscript{249} Therefore, abolition is not just an idea, but a constant call to action. It is “a practice, an analytical method, a present-tense visioning, an infrastructure in the making, a creative project, a performance, a counterwar, an ideological struggle, a pedagogy and curriculum, an alleged impossibility that is furtively present . . . .”\textsuperscript{250} Rodriguez implicitly rejects the argument that abolition is not practical or realistic and “embrace[s] a conception of abolition that is inseparable from its roots in (feminist, queer) Black liberation and (feminist, queer) Indigenous anticolonialism/decolonization.”\textsuperscript{251} Abolition requires constant consideration “of the economic, ecological, political, cultural, and spiritual conditions for the security and liberation of subjected peoples’ fullest collective being” while also ensuring that revolutions are flexible

\textsuperscript{244} Id. (quoting Paul Butler, The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform, 104 GEO. L.J. 1419, 1425 (2016)).
\textsuperscript{245} Id.
\textsuperscript{246} Id. at 1603.
\textsuperscript{247} Id. at 1604.
\textsuperscript{248} Id.
\textsuperscript{249} Id. at 1577.
\textsuperscript{250} Id. at 1578.
\textsuperscript{251} Id.
enough that they “compose the necessary but not definitive or completed conditions for abolitionist praxis.”²⁵²

Rodriguez argues that abolition is a creative praxis.²⁵³ Backing up the other contributors to this focused issue of Harvard Law Review, Rodriguez notes that abolitionist work “must be undertaken with a deeply historical, critical appreciation of how (feminist, queer) Black radicalism and Indigenous anti-/de-colonial praxis have long identified militarized, misogynist, and racist-colonial carcerality as both the spatial method and the preferred conceptual apparatus . . . .”²⁵⁴ Rodriguez notes that, although it is possible to consider and see what a post-abolition future might look like through the current societal system, to fully realize that vision and implement it, one must be willing to create new practices that constantly challenge the idea of the forced universality of white, western civilization.²⁵⁵ Furthermore, “it may be within the complex mess of human praxis engaged by the very peoples incarcerated . . . that abolitionist creativities also flourish — and potentially, flourish into fully articulated revolt against Civilizational carcerality . . . .”²⁵⁶ According to Rodriguez, radical abolition has a long history of “militant struggles to protect the collective spiritual, cultural, and physiological integrity of particular peoples who exist on the underside of liberal futurity and its structure of entitlement.”²⁵⁷

Understanding this history gives life to Rodriguez’s argument that abolition is a creative praxis, and he implores the reader to “[c]onsider abolition as an art form, the kind of creative truth that mixes the stuff of history into memory, survival, breath, and stubborn, vexed, and often-nourishing community that constantly escapes the guarantees of any organizing plan.”²⁵⁸ Rodriguez acknowledges that it may not be the “time to insist on the renewed urgency of a radical abolitionist struggle,” but he combats that argument by framing abolition as “an artful disruption of the presumed futurity.”²⁵⁹ After all, as Ruth Wilson Gilmore noted: “Abolition is a theory of change . . . . It’s about making things.”²⁶⁰ Abolition is about

²⁵² Id. at 1579.
²⁵³ Id. at 1605–06.
²⁵⁴ Id. at 1606.
²⁵⁵ Id. at 1608–09.
²⁵⁶ Id. at 1609.
²⁵⁷ Id. at 1610.
²⁵⁸ Id.
²⁵⁹ Id. at 1610–11.
challenging historical conditions that rely on “criminalization and systemic human immobilization to produce and reproduce a Civilizational order.”

Viewing these historical conditions in this way “informs abolition as a praxis of creativity” and allows an articulation of “a fundamental critique of existing systems of oppression . . . .” Accordingly, “abolition is a generative, imaginative, and productive concept precisely because it entails a radical reconfiguration of relations of power, community, collective identity, and sociality that does not rely on carcerality and its constitutive, oppressive forms of state and cultural violence.”

Compared to Rodriguez’s approach, legislative analyst and law student Angel E. Sanchez may be right in that his piece is not “abolitionist enough” because although he argues that his intent in abolition is to replace prisons “with alternatives that render prisons obsolete,” he also focuses heavily on reforming access to education in prisons. Even so, Sanchez ultimately wishes to see prisons abolished entirely. The fact that his arguments also have a reformist angle does not negate Sanchez’s efforts as an abolitionist.

c. Ethical Arguments

Normative arguments also underpin abolitionism. Sanchez introduces a unique approach to the abolitionist argument: he introduces his own experience as someone who was imprisoned at a young age and is now about to graduate law school. For Sanchez, “jail was expected, almost like a rite of passage.” Sanchez is one of many people who have been able to thrive after prison, and he notes that stories like his are often used to show that prisons are not actually bad and could even be considered effective. Despite his own ability to overcome, Sanchez believes in abolishing prisons, by which he means “contesting the relationships and psyche that create and reinforce the need for prisons and replacing them with alternatives that render prisons obsolete.” Although this goal is the same as other abolitionists’ goals, Sanchez acknowledges that the audience may believe his take is not fully abolitionist. Sanchez indicates “that the prison system is like a social

261 Id. at 1612.
262 Id.
263 Id.
264 Sanchez, supra note 148, at 1651–52.
265 Id. at 1652.
266 Id. at 1652.
267 Id.
268 Id.
269 Id.
270 Id. at 1652.
cancer: we should fight to eradicate it but never stop treating those affected by it.”

For Sanchez, a key goal is “empower[ing] and alleviat[ing] the inhumane treatment of the imprisoned, even if it is within existing structures.”

Sanchez’s article provides a direct response to Angela Y. Davis’s observation that people cannot imagine the world sans prisons, though these same people “are largely unaware of what goes on inside of prison and believe it is reserved for ‘evildoers.’” To help with this problem, Sanchez shares his own story of being behind bars for more than a decade and supports others in sharing their stories to bring the problems with prisons, including social issues that lead many to prison, into the light. For instance, Sanchez addresses the “school-to-prison pipeline,” noting that teachers in his school perpetuated it by threatening that if the kids did not behave, they “were going to end up homeless or in jail when [they] grew up, prophecies their very words helped to fulfill.” As Davis has noted, schools that embrace this idea are essentially “prep schools for prison.” Not only did these ideas occur in school, but also in the very neighborhood where Sanchez grew up. As a child, Sanchez believed that if he was to become somebody, he had to either get shot or thrown in jail. Sanchez learned a lesson that many individuals in this situation learn: “the police can get away with abusing you while at the same time using the law to arrest you.”

Acknowledging assumptions present in schools, neighborhoods, and even in the White House, Sanchez realizes that while it was one thing to “criticize[] the system that laid the traps,” it was another thing entirely to create a culture that supports the avoidance of those traps, and, to date, this has not been accomplished. According to Sanchez, prison groups did not
have a method to protest the system and its views, and "[t]he slightest organizing was labeled a disturbance or riot and resulted in immediate lockdowns and transfers." As Sanchez shows, it is nearly impossible for those behind bars to challenge the justice system and pursue prison abolition, yet these individuals are key in providing information to those who support prison abolition.

Sanchez also speaks powerfully about education barriers in prison, noting that everyone in prison should have access to education, whether or not they expect to be released. By allowing education barriers to persist in prisons, the system does not prepare the incarcerated to face the real world or allow them to grow as human beings. Sanchez notes, even in his piece’s title, that his education came about “not because of prison, but in spite of it.” Accordingly, “[i]f it were up to the prison system, [he] would have left uneducated, angry, and more likely to commit crimes in the future.” This argument, in many ways, dovetails with the argument that prisons perpetuate the very events that lead people to prison. If prisons cannot prevent violence or provide access to education, individuals become even more violent and uneducated. This dynamic further perpetuates the focus on punishment rather than the need for transformative justice and repair. As Davis asks, “[w]hat societal interest is served by prisoners who remain illiterate? What social benefit is there in ignorance?” According to Sanchez, “[e]ducation humanizes, dignifies, and empowers individuals,” and for this reason, “it is central to the abolition movement.” The abolition movement is crucial because reform efforts fail repeatedly due to misconceptions about access to education within prisons, and it will take “structural and cultural

282 Id.
283 See id.
284 See id. at 1672. Sanchez includes individuals who do not expect to be released in his argument for education for all because he himself “was repeatedly denied access to computer classes simply because of the length of [his] sentence.” Id.
285 Id.
286 Id.
287 Id. at 1662 (citing Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1173–80 (2015)) (“Prisons are places of intense brutality, violence, and dehumanization . . . . the environment of prison itself is productive of further violence as prisoners seek to dominate and control each other . . . .”).
288 Id. at 1667 (quoting DAVIS, ARE PRISONS OBSOLETE?, supra note 89, at 55–57).
289 Id. at 1673 (citing DAVIS, ARE PRISONS OBSOLETE?, supra note 89, at 55–57).
transformation” to improve prisoners’ access to education and other programs that encourage repair and reparation.\textsuperscript{290}

Unfortunately, prisons’ focus is not on reparation, repair, or transformative justice. It is about punishment, and abolitionists seek to change this focus. Prisons do not care about people and who they could be outside of the walls that confine them, but rather prisons care about “warehousing” people, isolating them, keeping the order, and controlling the masses incarcerated.\textsuperscript{291} What’s more, when this works and individuals are eventually released, recidivism becomes a concern, and “[t]he blame ultimately falls on the individual who ‘fails,’ not the institutions that exacerbate or even ensure his or her failure.”\textsuperscript{292} Even though Sanchez questions why many in prison criticize the system without turning their criticisms inward, the system is certainly worthy of criticism. Even so, abolitionists argue that focus must also be on the factors that lead individuals to end up in prison and accountability,\textsuperscript{293} which prison is theoretically meant to encourage. Because of how society views crime and how the system treats prisoners, however, prison does not hold its captives accountable, but rather cages them and takes away their humanity. This is the very thing abolitionists fight against.

Like Sanchez, Patrisse Cullors speaks of abolition through her own life experiences. Before recounting many situations she faced before fully taking on an abolitionist mindset, Cullors suggests that everyone should “deeply ground [them]selves in an abolitionist vision and praxis” because the “combination of theory and practice” is necessary to “upend the systems that make prisons, policing, and domestic and international warfare possible.”\textsuperscript{294} According to Cullors, abolition is about challenging the systems that bring on “displacement, despair, diasporas, trauma, and death,” while also trying to “repair our communities and undermine the systems of oppression we know have facilitated devastation . . . .”\textsuperscript{295} From Cullors’s purview, abolition is guided by previous movements against racism and has roots in “people’s power[,] love, healing, and transformative justice; Black liberation;

\textsuperscript{290} See id. Sanchez notes that education “is perceived by most guards as getting in the way of their ‘job’ and viewed by the greater public as coddling prisoners. This is why moderate efforts at reform will always fall short.” Id.

\textsuperscript{291} See id. at 1676 (“Prisons are not structured to invest in reentry or foster their prisoners’ success.”).

\textsuperscript{292} Id. at 1676.

\textsuperscript{293} Id.

\textsuperscript{294} Cullors, supra note 149, at 1684.

\textsuperscript{295} Id.
internationalism; anti-imperialism; dismantling structures; and practice, practice, practice."

For Cullors, abolition is not just about removing oppressive systems—it is about focusing on repairing harm and transformative justice. It is also about reparations, which have a place in U.S. history and, under Cullors’s view, “should include restoring a balance from within our communities and carrying our autonomous healing and reparatory work through the arts, culture, language, and emotional and mental health services.” In fact, in all of Cullors’s vignettes, a key theme is that punishment has been a priority in many situations where repair and healing should have been at the forefront. For instance, Cullors notes that in an experience as a teacher, she was taken aback by the fact that the initial response to an instance of child abuse was “punitive and default[ed] to criminalization.” She notes there was “nothing restorative in place” as the “system punished and left more disaster in its wake.” After each vignette, Cullors repeats how abolitionist theory should be considered in similar situations. In detailing her dissatisfaction with a justice system that immediately punished rather than restored someone accused of child abuse, Cullors notes that abolition is about “restorative practices for all, even when that implies working with the perpetrator of said violence.” It is about rethinking how people should act in a “society that considers its members disposable.”

Like Sanchez, Cullors also details how society treats individuals released from prison. In her retelling of an incident in which her brother had been released from prison and was experiencing mental health difficulties, Cullors was informed that the Psychiatric Emergency Team she tried to have help him was unable to help if a person had been recently released from prison. Unfortunately, police were her only option, and the police were not prepared to handle Cullors’s brother if the situation escalated, promising they would “tase him if he escalates.” In part because of the impact the police’s

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296. Id. at 1685.
297. See id. at 1686.
298. Id. at 1687.
299. See generally id. (recounting events where the focus should have been on healing instead of punishment).
300. Id. at 1688.
301. Id.
302. Id. at 1687–91.
303. Id. at 1688.
304. Id.
305. Id. at 1689.
306. Id. at 1689.
involvement had on her brother.\textsuperscript{307} Cullors argues that abolition should protect loved ones, teach children about accountability, make sure everyone has access to health services, provide means other than the police as “first responders to mental and emotional health crises,” and eliminate imprisonment.\textsuperscript{308} Cullors also argues against borders, Border Patrol, and involvement of the United States in wars at home and overseas.\textsuperscript{309}

Many of the vignettes shared by Cullors point to one issue that is rampant in the justice system: isolation.\textsuperscript{310} For Cullors, abolition is about community—“[a]bolition does not isolate individuals. Abolition invites people in.”\textsuperscript{311} This principle is similar to that conveyed by Sanchez, who throughout his imprisonment, spent nearly three years of his twelve-year sentence in confinement and alleged that “[c]onfinement is the logical extension of imprisonment—the prison within the prison—even if it borders on torture.”\textsuperscript{312}

In her argument in favor of abolition, Cullors makes multiple points, including that punishment should not always be the gut reaction, and that repair is an extremely important part of the process.\textsuperscript{313} In detailing her experiences in certain personal relationships, Cullors notes the importance of transformative justice and the need to repair damage.\textsuperscript{314} Embodying these practices allows one to move “beyond the harm, toward transformation.”\textsuperscript{315}

Cullors does not try to identify a single abolition tactic, but rather identifies an “abolitionist journey” of her own that may be useful to others.\textsuperscript{316} According to Cullors, her abolition journey consists of twelve principles:

- (1) Have courageous conversations;
- (2) commit to response versus reaction;
- experiment: nothing is fixed;
- (4) say yes to one’s imagination;
- (5) forgive actively versus passively;
- (6) allow oneself to feel;
- (7) commit to not harming or abusing others;
- (8) practice accountability for harm caused;
- (9) embrace non-reformist reforms;
- (10)

\textsuperscript{307} Cullors notes that as soon as police entered, “[s]he realized that [s]he had made a terrible mistake. [H]er brother instantly dropped to his knees, hands in the air, and pleaded with the officers for his life.” Id.

\textsuperscript{308} Id. at 1690.

\textsuperscript{309} Id. at 1691.

\textsuperscript{310} Id. at 1692 (“We need a culture that does not epitomize, isolate, and center romantic relationships.”).

\textsuperscript{311} Id.

\textsuperscript{312} Sanchez, supra note 148, at 1665 (citing McLeod, supra note 287, at 1178–79).

\textsuperscript{313} See generally Cullors, supra note 149 (arguing that repair should be an important part of the justice system).

\textsuperscript{314} Id. at 1694.

\textsuperscript{315} Id.

\textsuperscript{316} Id. at 1687.
build community; (11) value interpersonal relationships; (12) fight the U.S. state and do not make it stronger.317

By fulfilling these principles, the United States can work toward abolition of prisons. According to Cullors, it has to be a “cultural intervention”; it must be about care and dignity; it must be “about how we respond to harm caused and how we respond when we cause harm.”318 In addition to arguing for the twelve principles and a “cultural intervention” that will move the nation forward toward abolition, Cullors challenges her readers to “never forget the consequences of a draconian and antiquated system.”319

4. Problems with Abolitionism

One obvious response to calls to abolish prisons is that it would be impossible to provide a strong criminal justice system without the ability to punish criminals with imprisonment. Though abolitionists do envision a world without prisons, most are not pragmatically naïve.320 In fact, abolitionists generally “know [they] won’t bulldoze prisons and jails tomorrow . . . . We’re in a long game.”321 One major area that abolitionists continually discuss in search of the best solutions is what should replace prisons if they are gone.322 Although this is a more difficult question, one goal is to return power to local communities instead of the criminal justice system.323 Moreover, abolition, for many, is less about having no detainment and more about “reducing the power and reach of those entities.”324 This has included efforts to revolutionize the parole system, as it is easy for a parolee to end up back in prison over even the slightest infraction.325

One could also argue that differences in conceptions of abolitionism could lead to a weakened movement. McLeod combats this by noting that despite differences in abolitionists’ “visions” of abolition, “contemporary abolitionists hold in common a commitment to transforming criminal legal processes in connection with expanding equitable social-democratic forms of

317 Id.
318 Id. at 1694.
319 Id.
320 See Introduction, supra note 144, at 1569.
322 See generally Next Frontier in Criminal Justice, supra note 101.
323 Id.
324 Id.
325 See id. (detailing efforts to replace parole officers with kiosks that allow parolees to check in with a fingerprint or providing parolees with vouchers for education, drug treatment services, or housing).
collective governance.”\textsuperscript{326} Additionally, she notes that though many questions about the logistics of abolitionism are unanswered, this must remain the case to allow the movement to evolve.\textsuperscript{327}

Another problem with the abolition movement is that it may not be popular with the American public. As Keller notes, “[t]he electorate may want the system to be less cruel and more rehabilitative, but voters also want a professional answering that 911 call when their kid gets shot — and not a member of neighborhood watch.”\textsuperscript{328} Another goal of abolition is to encourage the public to view crime differently.\textsuperscript{329} This may be more difficult, as the effort to destigmatize marijuana use shows.\textsuperscript{330} But, if we stop characterizing certain acts as crimes, abolitionists argue, we will be able to decrease our need for law enforcement intervention.\textsuperscript{331} Despite this potential for unpopularity and the difficulty in encouraging Americans to reconfigure their view of crime generally, as captured earlier in this Article, there are movements afoot that address the shortcomings and unintended consequences of the prison system.

The professors, students, and activists addressed in these sections all make powerful arguments in favor of the abolition of prison. These arguments range from political to pragmatic to ethical, and many of these arguments are also seen in the mainstream media, as more groups unite to bring about change in the criminal justice system. As with any widespread effort to change, we must give thought to what comes next. What can be used to replace the prisons many so desperately want to see gone?

The absence of a tangible alternative to imprisonment that can secure the key objectives of a rational and coherent sentencing system is the greatest weakness in the abolition argument. The weakness is so profound that it will logically undercut the pragmatic utility and persuasiveness of the argument. It is one thing for the abolitionists discussed above to argue that we must close prisons; it is quite another thing to explain how exactly we can do this in a manner which prevents people who are determined to harm others from doing so. The fact that prisons are used in every country and there is no other

\begin{itemize}
\item \textsuperscript{326} McLeod, \textit{supra} note 147, at 1619.
\item \textsuperscript{327} See id. at 1647.
\item \textsuperscript{328} \textit{Next Frontier in Criminal Justice}, \textit{supra} note 101.
\item \textsuperscript{329} See Washington, \textit{supra} note 93.
\item \textsuperscript{330} See id. (noting that, according to \textit{The New York Times}, even though there has been “what seems like a national relaxation of arrests and convictions for marijuana use, black and Hispanic residents of some parts of New York City are arrested at a rate 15 times higher than that of white people—for the same ‘crime.’”) (emphasis in original).
\item \textsuperscript{331} See id. (“We need to open up the possibility to react to wrongdoing, injury, difference, and culturally ingrained prejudice without merely seeking to punish or encage someone.”).  
\end{itemize}
prototype for containing the determinedly wicked people from harming others speaks loudly about the plausibility of the abolitionist ideal. Of course, many abolitionists do not perceive the lack of an alternative to prison as a flaw in their thesis, but in our view an appeal to delete conventional prisons from the landscape must be accompanied by a tangible solution. Otherwise, the abolitionist ideal will remain an abstract concept. An abolitionist retort that we should instead focus on transforming the conditions that facilitate harm occurring is rebutted by the entire history of humankind, which has never seen a period where harm is not a mainstay of human activity. The next section therefore addresses this fundamental shortcoming in the traditional abolitionist argument and explains how we can use a connected series of technologies as an alternative to prison.

IV. TECHNOLOGICAL IMPRISONMENT INSTEAD OF CONCRETE WALLS

A. FRAMEWORK FOR ESTABLISHING ALTERNATIVE TO PRISON

To persuasively agitate for calls to abolish or greatly reduce the use of prisons, it is necessary to provide an alternative sanction that courts can impose on all or at least most offenders who are currently in prison or who would, according to current laws, be most likely to receive a term of imprisonment. In proposing an alternative to imprisonment, the criteria that should be pursued are essentially two-fold. First, the alternative should achieve the advantages associated with prison. Second, it should operate to eliminate or reduce the disadvantages associated with prison.

There are two demonstrated benefits stemming from incarceration: community protection and securing the proportionality principle. Community protection is only justifiable in relation to offenders who would have committed crimes if they were in the community. There is no sure way to predict which offenders will recidivate. The available data shows that the offenders who are most likely to reoffend are minor property offenders; however, it is misguided to spend considerable public funds imprisoning these specific offenders given the—concededly relative—triviality of their

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possible future offenses.\textsuperscript{335} The offenders who cause the most harm to victims are serious sexual and violent offenders. The proportionality principle justifies imposing a considerable hardship on these offenders. Additionally, these offenders reoffend at a rate that is 20\% to 50\% greater than the general population and, hence, it is legitimate to impose a “recidivist loading” of between 20\% and 50\% on their sanctions if they repeat their serious offenses.\textsuperscript{336}

The other principal advantage of prison is that it is a means of ensuring that the severity of the crime matches the hardship of the penalty. This reflects the application of the principle of proportionalism, which is a component of U.S. sentencing law. The Supreme Court has held that the Eighth Amendment implies proportionality.\textsuperscript{337} It is also a formal requirement of the sentencing regimes of ten states\textsuperscript{338} and is a core principle that supposedly informs the Federal Sentencing Guidelines.\textsuperscript{339} Proportionality has two elements: the seriousness of the crime and the harshness of the sanction.\textsuperscript{340} Further, the principle has a quantitative component, in that those

\begin{itemize}

\item \textsuperscript{336}  Bagaric, \textit{The Punishment Should Fit the Crime, supra} note 65.


\item \textsuperscript{339}  See Nat’l Rsch. Council, supra note 31, at 23. In addition to this, a survey of state sentencing law by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to prohibiting excessive penalties or treatment, and twenty-two states have constitutional clauses that prohibit cruel and unusual penalties, including eight states with proportionate-penalty clauses. See Thomas Sullivan \\& Richard S. Frase, \textit{Proportionality Principles in American Law: Controlling Excessive Government Actions} 155–56 (2009).

\item \textsuperscript{340}  Bagaric, \textit{The Punishment Should Fit the Crime, supra} note 65, at 348.
\end{itemize}
two elements must match.341 Thus, to satisfy the principle, the seriousness of the crime must equal the harshness of the penalty.342

Research shows that the crimes that have the most detrimental effect on victims are serious sexual and otherwise violent offenses,343 and the most severe sanction (apart from capital punishment) is imprisonment. Hence, in theory, society should reserve prison for the most serious sexual and otherwise violent offenders. This approach would result in a considerable reduction in prison numbers.344 However, as we have demonstrated, although there is considerable public interest in reforming the sentencing system, this has not led legislators to implement concrete steps towards reserving imprisonment only for serious sexual and violent offenders.

Thus, imprisonment has two valid purposes: punishing offenders where the seriousness of their crimes is commensurate with the hardship inflicted on them by incarceration; and protecting the community. The value of any proposed substitute to conventional imprisonment must be assessed by reference to its capacity to achieve these two justifiable objectives of incarcerating offenders.

Additionally, it is important to also evaluate the extent to which any proposed alternative to prison reduces the adverse effects of prison, specifically its prohibitive fiscal cost to the community; the incidental hardships inflicted on offenders; and the damaging impact that is has on offenders’ families. Against this backdrop, we now explain the three key features of our proposed alternative to prison.345

B. ELECTRONIC MONITORING, COMPUTER SURVEILLANCE OF MOVEMENTS, AND REMOTE IMMOBILIZATION

The most established aspect of our technological monitoring proposal is the use of radio frequency (RF) or Global Positioning System (GPS) monitoring.346 As of 2016, approximately 130,000 inmates were subject to

341 Id.
343 See Bagaric & Gopalan, Taking Proportionality Seriously, supra note 12, at 208.
344 Id.
345 These reforms are discussed at length in Bagaric, Hunter & Wolf, supra note 15, at 73–135, and hence the foregoing is an overview of the key features of technological incarceration.
electronic monitoring, which, in the United States, is generally reserved only for offenders who have not committed a serious violent or sexual offense.

Electronic monitoring works by pairing an offender with a transmitter, which communicates with local authorities, allowing them to monitor an offender’s position. The device alerts both the authorities and the offender when an offender leaves their designated area. Transmitters are embedded in tracking devices, typically ankle bracelets, and are charged by a twenty-four-hour battery. Officers affix monitors, consisting of a hard plastic shell containing a GPS chip and a fiberoptic cable, to the offender’s ankle with a rubber strap. If anyone attempts to tamper with or remove the device, it

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notifies local enforcement authorities. \(^{351}\) Tracking bracelets are between one tenth and one sixth the cost of typical imprisonment. \(^{352}\)

However, GPS is not infallible. Although it is difficult for an offender to remove the device without setting off the alarm, \(^{353}\) sub-standard monitoring by law enforcement has resulted in inadequate responses to triggered alarms. \(^{354}\) This limitation, however, is human rather than technological, and it can be resolved by allocating more resources to the departments that monitor these devices. \(^{355}\) Another limitation of electronic monitoring is that offenders can still harm others while within their assigned physical boundaries. \(^{356}\) This shortcoming results from the fact that electronic tracking does not involve monitoring people’s actions other than whether they leave physical boundaries. We hope this limitation will be relieved by monitoring an offender’s behavior, and we discuss below how authorities can adapt and implement technology to meet this aim.

In addition to monitoring an offender’s location, we propose live monitoring of an offender’s actions. Existing technology allows real-time monitoring of whether an offender is behaving in a criminal, aggressive, threatening, or problematic way. By using artificial intelligence-based monitoring of a lawbreaker’s behavior, we can deter them from reoffending by detecting the commission of other offenses that occur during their sentence.

\(^{351}\) Morri, supra note 350.


\(^{356}\) Nevertheless, studies show that offenders who are subject to house arrest and are electronically monitored are 94.7% less likely to commit an offense than those that are not. Stuart S. Yeh, The Electronic Monitoring Paradigm: A Proposal for Transforming Criminal Justice in the USA, 4 Laws 60, 64 (2015).
Previously, authorities have monitored offenders’ actions by confining them to one location overseen by closed-circuit televisions and employing people to watch footage from several residences on several screens simultaneously.\textsuperscript{357} However, this surveillance is impractical for a number of reasons, most notably because it is unrealistic to confine an offender in a small number of locations, and in any event, it would be prohibitively expensive to hire correctional officers to conduct real-time monitoring of millions of prisoners across numerous environments. More than this, human monitoring is laborious, difficult, and prone to human error.\textsuperscript{358}

A more cost-effective, efficient, and reliable alternative is to use recent advances in signal processing and machine learning to perform constant, automated processing of all offenders and their actions.\textsuperscript{359} The key to this method is using and adapting current developments in sensor technology and machine learning algorithms.

Sensors exist that detect all human movement and simultaneously monitor the geographical whereabouts of people wearing the sensors.\textsuperscript{360} Equipment visually and aurally records the person’s actions, and machine learning systems then analyze the data streams to detect anomalous, dangerous, or criminal behavior. In broad terms, the technology can detect suspicious movement, triggering an alarm notifying the offender that within a short period of time authorities will visually observe his or her actions. The data from this technology, even prior to an alarm’s activation, would always be stored to record the actions and location of the offender.\textsuperscript{361} Moreover, officials can make the sensor tamperproof, much like current electronic ankle bracelet monitors, so that offenders cannot remove it.\textsuperscript{362} If an offender attempts to remove the sensor, it triggers an alarm and notifies the police to the offender’s last location.

Such a system conducting constant monitoring relies on three main technical requirements: a mandatory body sensor harness worn by all offenders (at all times on the top half of their body), a stable and secure


\textsuperscript{359} Bagaric, Hunter & Wolf, \textit{supra} note 15, at 104–07.

\textsuperscript{360} Id. at 103.

\textsuperscript{361} Enrique Bermejo, Oscar Déniz & Gloria Bueno, \textit{Security System Based on Suspicious Behavior Detection}, 25 BURAN 12, 14 (Apr. 2010).

\textsuperscript{362} Bagaric, Hunter & Wolf, \textit{supra} note 15, at 134.
communication system, and a remote, machine-learning-based signal processing system that can recognize suspicious behavior.

A core aspect of this process is the need for the transmitted video and audio stream to be analyzed by a remote signal processing architecture. This system will analyze the signals in real time and trigger an alarm if offenders attempt to commit crimes, engage in unauthorized activity, or deactivate or remove their sensor harnesses. Although this is the most technologically sophisticated requirement of our proposal, it is not impossible. The recent publicity surrounding self-driving cars provides ample evidence of the strides made in real-time sensor analysis using machine learning algorithms. Self-driving cars rely on a range of environmental sensors—typically ultrasonic sonar, lidar, and radar arrays363—together with a neural network-based signals processing system, to drive a car more safely than humans.364 People saw this feat as virtually impossible only a few years ago, and many thought it would take decades to achieve.365 We are now at the same point in a range of signals processing fields that can be applied to technological incarceration.

When one connects all of these advances, real-time, automatic analysis of offenders’ behavior becomes possible. It is now feasible to develop a system that can determine whether an offender is having a psychotic episode (from speech recognition and audio processing of emotional states), is threatening another person (from audio processing of emotional states of all within the room, as well as video processing of the offender’s behavior), or is seeking to leave a designated zone (from GPS tracking).366 We are now at the point where the automatic, technological monitoring of all offenders is possible, allowing us to incarcerate technologically, rather than physically.

The likely benefits of this technology are two-fold. First, all offenders will be aware that their actions and whereabouts will be constantly and continually monitored. Applying the theory of absolute general deterrence and assuming its efficacy, it is unlikely that offenders will commit offenses


364 Clark, supra note 363.


under these circumstances. Offenders who perform harmful acts will be detected as they perform the crime, and the greatest deterrent to crime is the realization that if one commits an offense, they will be detected and punished. Knowledge that their location, movements, and conduct will be surveilled will have a strong deterrent effect on criminal behavior, as surveillance results may provide powerful, incriminating evidence of their crimes. This knowledge is the reason that so little overt crime is committed in locations where offenders know they will likely be detected, such as police stations. For the relatively few offenders who commit offenses while being monitored, it is likely that they will be detected and apprehended in a short period of time. Of course, this analysis most strongly applies to crimes that involve conduct the system identifies as suspicious. The sensors would not detect crimes committed through innocuous behavior, such as fraud committed over the internet. However, offenders would still be strongly discouraged from committing such crimes because the monitoring system would constantly track their exact location and actions, making it easy for police to gather at least circumstantial evidence of their crimes. Once the device reports the crime and identifies the offender as a suspect, such evidence can be used against them. The other significant advantage of this sanction, as discussed further below, is that it likely will be considerably cheaper than the current costs of probation and parole.

Important features of this sanction include its flexibility and capacity to be adapted to different offenses based on severity and offender risk profiles. Thus, for less serious offenses, the sanction may enable offenders to move around freely in the community with few restrictions (apart from, for example, exclusion zones such as bars and restaurants) or restricted movements (like not allowing offenders to pick up items that could be used as weapons). For offenders who have committed more serious offenses, officials could apply the sanction far more strictly, allowing, for example, confinement to a residence; prevention from picking up all but pre-tagged implements, such as certain pens and cutlery; and prohibition from all quick movements, such as running.

The final component of the technological incarceration proposal sets out how this monitoring would prevent offenders from harming other people while subjected to this sanction. In the event that prisoners leave their designated areas or commit violent or unauthorized acts, a Conducted Energy Device (CED)—commonly found in items such as stun guns and Tasers—

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367 See id. at 73–135, and hence the foregoing is an overview of the key features of technological incarceration.
would be remotely activated to immobilize offenders.\footnote{Id. at 107–10.} This part of our proposal guarantees enforcement. Prisoners will be remotely immobilized where electronic monitoring, computer surveillance, or both indicate that they: (1) are leaving the geographical areas to which they have been confined; (2) have disabled, turned off, or removed their body cameras; or (3) are in the process of committing dangerous acts against others, including people who reside with them. For instance, if the computer detects that a prisoner is at a location he or she is prohibited from entering, is picking up an object to use as a weapon, or his or her body camera has been deactivated, a CED would be remotely activated to shock the prisoner with volts of electricity, causing involuntary muscle contractions and temporary incapacitation.\footnote{Geoffrey P. Alpert, Michael R. Smith, Robert J. Kaminski, Lori A. Fridell, John MacDonald & Bruce Kubu, U.S. Dep’t of Just., Police Use of Force, Tasers and Other Less-Lethal Weapons 2 (May 2011), https://www.ojp.gov/pdffiles1/nij/232215.pdf [https://perma.cc/T5B4-MPBF].} Once this occurs, the device will summon law enforcement officers to investigate the breach of the conditions of technological incarceration.

The conventional manner of using CEDs effectively is to point the device at the target from a maximum of 4.6 meters away.\footnote{Id. at 12.} There is, however, no obstacle to developing technology to activate CEDs remotely. As noted above, the operative unit could be installed in the ankle bracelet that offenders wear when technologically incarcerated. If they attempt to escape, commit harmful acts, or disable or remove their body sensors, the computers monitoring the events will instantly activate the CEDs embedded in their ankle bracelets to administer the electric shock while also alerting law enforcement officers. This will incapacitate offenders until law enforcement officers arrive. Tasering offenders is obviously a significant act, which interferes with offenders’ right to bodily integrity. However, the possibility of being tased in rare circumstances is far less harmful than the damage associated with the total loss of liberty stemming from conventional imprisonment and the elevated risk of physical harm that all prisoners face. This is especially the case given that tasing usually does not cause people long-term injury.\footnote{Bagaric, Hunter & Wolf, supra note 15, at 108–09.} The state should not subject people who are especially vulnerable to the effects of being tased (namely pregnant women and people with heart conditions) to this aspect of technological incarceration.\footnote{Id.} Thus,
from the offender’s perspective, the prospect of being tased to be freed from the violence and stricture of actual prison is arguably a small price to pay.

We acknowledge that the reforms proposed in this Article are ambitious and substantial. Hence, we recommend gradual implementation of technological incarceration, which will provide necessary time for communities to accept and recognize the advantages of technological incarceration, as well as for testing and refining the required technology. We suggest that a timeframe of approximately fifteen years should be set for the full roll-out of technological incarceration. At that point, all prisons in the United States would be emptied and repurposed, except for a small number of prisons to house offenders who have committed the most serious sexual and violent offenses (of the type that constitute capital offenses) or seriously breached the conditions of technological incarceration.

CONCLUSION

There is wide-ranging acceptance that the mass incarceration that has occurred in the United States during the past five decades is a failure. Imprisoning more than two million Americans places an unsustainable financial toll on the community, inflicts considerable unintended suffering on offenders, and has devastating effects on offenders and their families. Moreover, there is no compelling countervailing benefit that mass incarceration confers on the community. Empirical data shows that there is no little correlation between prison numbers and crime rates. Thus, it is not surprising that there now exists a wide-ranging consensus to reduce prison numbers. This has crystalized into such a firm commitment that influential people are now seriously proposing the abolition of prisons. There are strong arguments in favor of abolitionism.

These arguments have gained considerable momentum recently due to two impactful societal developments: the COVID-19 pandemic and the BLM movement. Together, these developments have fundamentally altered considerable aspects of community life. Neither development is principally focused on incarceration numbers, but the fallout from these developments further highlights incarceration in prisons’ failings as the principal community response to crime.

The pandemic has swept through a large number of prisons due to overcrowding and the poorly equipped nature of these institutions. This has resulted in the early release of some prisoners and the need to fundamentally

373 Id. at 132.
rethink the way in which prisons operate. The Black Lives Matter movement, though principally focused on police aggression against African Americans, also highlighted more wide-ranging injustices inflicted on African Americans by the criminal justice system. This includes their gross over-representation in prisons and jails, which provides a further reason to abolish prison as the main form of punishment of criminal offenders.

Although abolitionism has gained significant currency in recent times, there is one seemingly intractable weakness of the proposal: there is no logical or pragmatic alternative to prison. This Article suggests a prison alternative that overcomes the pragmatic difficulties with the abolitionist position.

We propose that society should replace prison with a technological means of effectively incarcerating offenders, in a manner that more effectively achieves the appropriate and attainable objectives of prison, namely, community protection and proportionality. The proposed alternative to prison would also significantly reduce the considerable disadvantages of prison, including the harsh harms inflicted on inmates and their families and the prohibitive financial cost of imprisonment. The only offenders who would continue to be incarcerated in physical prisons are those who breach the conditions of technological confinement and those who commit serious sexual or otherwise violent offenses which are as severe as capital offenses. This would comprise a small fraction of current inmates, thereby providing an alternative to pure abolitionism that can make reducing the prison population a pragmatic reality.