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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.¹ 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.²

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;³ 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.⁴

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.⁵ 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.⁶ At the same time, it has highlighted inadequacies in the design and workings of prisons leading to

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.

³ John Gage, *AOC Floats 'Prison Abolition' to End 'American Apartheid,'* WASH. EXAMINER (Oct. 7, 2019, 6:46 PM), <https://www.washingtonexaminer.com/news/american-apartheid-aoc-floats-prison-abolition> [<https://perma.cc/6ZVD-GKQK>].

⁴ See *infra* Part III.

⁵ See *infra* Part II.

⁶ See *id.*

increased calls to rethink our approach to them.⁷ In the midst of the pandemic, the brutal killing of George Floyd, a Black man, by white police officer Derek Chauvin in Minneapolis on May 25, 2020⁸ highlighted the racism experienced by many African Americans in the criminal legal system and brought the Black Lives Matter movement to national prominence.⁹ 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 movement¹⁰ because "many collateral consequences of mass incarceration have . . . fallen much more heavily on the necks of African Americans than on those of whites."¹¹

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 crime¹²—and specific deterrence—the theory that individual offenders will be dissuaded from reoffending if the

⁷ Sarah Gonzalez, *Coronavirus Pandemic Sparks Movement to Rethink Incarceration*, NPR (July 24, 2020, 4:58 AM), <https://www.npr.org/2020/07/24/894981772/coronavirus-pandemic-sparks-movement-to-rethink-incarceration> [<https://perma.cc/99MA-VLHX>].

⁸ Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/YS7Y-XNAX>].

⁹ Charlotte Alter, *Black Lives Matter Activists Want to End Police Violence. But They Disagree on How to Do It*, TIME (June 5, 2020, 3:54 PM), <https://time.com/5848318/black-lives-matter-activists-tactics/> [<https://perma.cc/42T3-6QQH>]; Martin Austermuhle, *Here's What Black Lives Matter D.C. Is Calling For, and Where the City Stands*, NPR (June 9, 2020), <https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands> [<https://perma.cc/8HVW-CY5A>].

¹⁰ Its objectives include building "power to intervene in violence inflicted on Black communities by the state and vigilantes." *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://perma.cc/QF6U-L6YB>] (last visited March 18, 2021).

¹¹ See Michael Rocque & Steven E. Barkan, *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/URA5-ENW4>].

¹² Mirko Bagaric & Sandeep Gopalan, *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, *Taking Proportionality Seriously*].

sanction they receive is unpleasant.¹³ There is considerable empirical evidence that shows that harsh prison sentences do not achieve general and specific deterrence;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.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

¹³ *Id.* at 187.

¹⁴ *Id.* at 188.

¹⁵ The technological aspects of our proposal are set out in detail in Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *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.¹⁶ 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.¹⁷

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.¹⁸ Total incarceration numbers in the United States peaked at 2,310,300 in 2008.¹⁹ 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 2009.²⁰ Thus, there has been a more than 10% reduction in prison numbers during this period.²¹ By contrast, before 2008, imprisonment numbers increased nearly four-fold in four decades.²²

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%

¹⁶ Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS BULL., 5–6 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [<https://perma.cc/CYZ4-K33U>].

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ See *US Incarceration Rate Drops > 10% From 2007 to 2017*, DEFENDER SERVS. OFF. TRAINING DIV. (May 2, 2019), <https://www.fd.org/news/us-incarceration-rate-drops-10-2007-2017> [<https://perma.cc/7EZS-VYT7>].

²² Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), <https://www.nytimes.com/2011/11/21/us/21iht-letter21.html> [<https://perma.cc/PP53-WPUR>].

during the decade.²³ This may be attributable to some states moderating their previous emphasis on an offender's prior criminal history in determining the appropriate sanction.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.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 1971.²⁶ Moreover, the United States remains the highest incarcerator in the world by a large margin.²⁷ It imprisons more people than any other nation²⁸ and at a rate that is, remarkably, ten times higher than that of some other developed nations.²⁹

Mass incarceration is a relatively new phenomenon in the United States.³⁰ As noted, prison numbers have grown massively during the past four

²³ BLACK LIVES MATTER, *supra* note 10.

²⁴ See John MacDonald & Steven Raphael, *The Effect of Scaling Back Punishment on Racial Disparities in Criminal Case Outcomes* 5 (Goldman Sch. of Pub. Pol'y, Working Paper, 2019), <https://gspp.berkeley.edu/research/working-paper-series/the-effect-of-scaling-back-punishment-on-racial-disparities-in-criminal-case-outcomes-5d8baa37b8b511.99269557> [<https://perma.cc/VA4G-QDH3>].

²⁵ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/PGA2-3JD2>].

²⁶ Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), <https://www.brennancenter.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.*

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>].

²⁸ *Id.*

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/UC7L-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.*

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.³¹ 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.³² 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.³³

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.³⁴ This spending necessarily reduces the government resources that can be spent on essential social services.³⁵ 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.³⁶ Further, a study by the Marshall Project demonstrated that

Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307 (2009); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 GA. ST. U. L. REV. 965 (2012).

³¹ NAT’L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1* (Jeremy Travis et al. eds., 2014).

³² *Id.* at 68–69, 118–20.

³³ Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503, 516 (2014); William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 after Booker and Its Progeny*, 40 CONN. L. REV. 631, 633 (2008).

³⁴ MELISSA S. KEARNEY, BENJAMIN H. HARRIS, ELISA JÁCOME & LUCIE PARKER, *Ten Economic Facts About Crime and Incarceration in the United States*, HAMILTON PROJECT 13 (May 2014), https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_TP_HP_10CrimeFacts.pdf [<https://perma.cc/P96J-9TGQ>].

³⁵ For an analysis of why mass incarceration is flawed from a financial perspective, see Jason Furman & Douglas Holtz-Eakin, *Why Mass Incarceration Doesn’t Pay*, N.Y. TIMES (Apr. 21, 2016), <http://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html> [<https://perma.cc/4GNL-SCB9>]; NAT’L RSCH. COUNCIL, *supra* note 31, at 314; see also KEARNEY, HARRIS, JÁCOME & PARKER, *supra* note 34.

³⁶ See Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> [<https://perma.cc/UGT4-6YYX>].

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

³⁷ Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the U.S. 2* (Concordance Inst. for Advancing Soc. Just., Working Paper No. CI072016, 2016), <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf> [<https://perma.cc/UH5A-USEJ>].

³⁸ See Mirko Bagaric, Sandeep Gopalan & Marissa R. Florio, *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663, 1693–1710 (2017) [hereinafter Bagaric, Gopalan, & Florio, *Redefining Excessive Imprisonment as a Human Rights Abuse*].

³⁹ GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 67–68 (2007).

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 *Id.* 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.*

⁴⁴ *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Oct. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html [<https://perma.cc/FCM8-ECPX>].

virtually no capacity to reduce their contact with other people.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.”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,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.”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.⁴⁹ However, most jurisdictions have been slow to take any effective action.⁵⁰ The full extent of the release of

⁴⁵ Mirko Bagaric & Jennifer Svilar, *The Cruelty of Supermax Detention and the Case for a Hard-Time Sentencing Discount: A Pragmatic Solution to a Moral Shortcoming*, 60 SANTA CLARA L. REV. 101, 109–12 (2020).

⁴⁶ David Montgomery, *Prisons Are Bacteria Factories’; Elderly Most at Risk*, STATELINE (Mar. 25, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/25/prisons-are-bacteria-factories-elderly-most-at-risk> [<https://perma.cc/38T3-CVH5>].

⁴⁷ Eleanor Bird, *COVID-19 Cases 5 Times Higher in Prisons Than General Population*, MED. NEWS TODAY (July 15, 2020), <https://www.medicalnewstoday.com/articles/covid-19-cases-5-times-higher-in-prisons-than-general-population> [<https://perma.cc/Q7CG-943W>].

⁴⁸ *Id.*

⁴⁹ The federal jurisdiction has released a large number of prisoners due to the pandemic. See Douglas A. Berman, *Pleased to See Growing Number of COVID-Influenced Grants of Sentence Reductions Using § 3582(c)(1)(A)*, SENT’G L. & POL’Y BLOG (Apr. 3, 2020, 3:40 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2020/04/pleased-to-see-growing-number-of-covid-influenced-grants-of-sentence-reductions-using-3582c1a.html [<https://perma.cc/L6G7-V5VR>]; see also Blake Nelson, *N.J. Lawmakers Approve Bill to Release More Prisoners Early During Coronavirus Crisis*, NJ.COM (last updated July 30, 2020), <https://www.nj.com/coronavirus/2020/07/nj-lawmakers-approve-bill-to-release-more-prisoners-early-during-coronavirus-crisis.html> [<https://perma.cc/9XHH-A58R>].

⁵⁰ See Emily Widra & Dylan Hayre, *Failing Grades: States’ Responses to COVID-19 in Jails & Prisons*, ACLU SMART JUST., PRISON POL’Y INITIATIVE (June 25, 2020), https://www.aclu.org/sites/default/files/field_document/failing_grades_states_responses_to_covid-19_in_jails_prisons_063020.pdf [<https://perma.cc/6K6H-PS2U>] (“State responses ranged from disorganized or ineffective, at best, to callously nonexistent at worst.”).

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>].

⁵² See Mirko Bagaric & Theo Alexander, *First-Time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing*, 78 ALB. L. REV. 397, 432–33 (2015) [hereinafter Bagaric & Alexander, *First-time Offender*]; see also Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. JUST. J. (Mar. 1, 2017), <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children> [<https://perma.cc/SY7E-5KJB>].

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

⁵⁴ Bronfenbrenner Ctr. for Translational Rsch., *The Ripple Effects of Mass Incarceration*, PSYCH. TODAY (Mar. 13, 2019), <https://www.psychologytoday.com/au/blog/evidence-based-living/201903/the-ripple-effects-mass-incarceration> [<https://perma.cc/8Z88-7SR3>].

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

⁵⁶ See generally Sara Wakefield & Christopher Wildeman, *How Parental Incarceration Harms Children and What to Do About It*, NAT'L COUNCIL ON FAM. RELS. (2018), https://www.ncfr.org/sites/default/files/2018-01/How%20Parental%20Incarceration%20Harms%20Children%20NCFR%20Policy_Full%20Brief_Jan.%20202018_0.pdf [<https://perma.cc/L65S-BQQC>] (capturing the impact of imprisonment on children).

⁵⁷ Emily Nagisa Keehn & J. Wesley Boyd, *How Mass Incarceration Harms U.S. Health, in 5 Charts*, CONVERSATION (Jan. 31, 2018, 6:42 AM), <https://theconversation.com/how-mass-incarceration-harms-u-s-health-in-5-charts-90674> [<https://perma.cc/SG5F-3PDG>].

⁵⁸ David Murphey & P. Mae Cooper, *Parents Behind Bars: What Happens to Their Children?*, CHILD TRENDS 1 (Oct. 2015), <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf> [<https://perma.cc/NN68-ZXVR>].

⁵⁹ Murphey & Cooper, *supra* note 58, at 1.

monitoring.⁶⁰ 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.⁶¹

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.⁶² Second, when incarcerated people are integrated back into the community, most of them reoffend within three years of their

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/4NKM-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/c/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.⁶³ Part of the explanation for this seems to be that imprisonment actually increases the risk of reoffending.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.”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.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.⁶⁷ For the most part, mid-size and small cities experienced larger declines than big cities and rural communities.⁶⁸ Robbery rates decreased the most across all populations.⁶⁹ Each region experienced general declines, but the Midwest and the South noticeably outpaced the Northeast and West regions of the country.⁷⁰ In total, crime trends have significantly improved since 2014.⁷¹ Against this backdrop, we now examine changed community attitudes to mass incarceration.

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)).

⁶⁴ See generally U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [<https://perma.cc/NS9W-A8L5>] (capturing the impact of prison conditions on rates of recidivism).

⁶⁵ JAMES AUSTIN, LAUREN-BROOKE EISEN, JAMES CULLEN & JONATHAN FRANK, BRENNAN CTR. FOR JUST., HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 5 (2016); see also Mirko Bagaric, *The Punishment Should Fit the Crime – Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343 (2014) [hereinafter Bagaric, *The Punishment Should Fit the Crime*] (summarizing studies on the issue).

⁶⁶ See FED. BUREAU OF INVESTIGATION, PRELIMINARY SEMIANNUAL UNIFORM CRIME REPORT, JANUARY–JUNE (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/home> [<https://perma.cc/82XW-48R9>] (detailing in Table 1 how crime rates declined in communities of different sizes).

⁶⁷ *Id.* at Table 1, <https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/tables/table-1> [<https://perma.cc/BGE7-JQ23>].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at Table 2, <https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/tables/table-2> [<https://perma.cc/W7GP-TZJD>].

⁷¹ *Id.* at Table 3, <https://ucr.fbi.gov/crime-in-the-u.s/2018/preliminary-report/tables/table-3> [<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

⁷² The momentum for change is further outlined in Mirko Bagaric, Gabrielle Wolf & Daniel McCord, *Sentencing Developments in the United States in 2019: Shifting from the ‘Tough on Crime’ Mantra to (Seriously) Contemplating the Abolition of Prisons*, 44 CRIM. L. J. 54 (2020) (on file with authors).

⁷³ See Alex Busansky & Eli Lehrer, *Voters Are Driving Justice Reform*, HILL (Apr. 3, 2019, 6:00 PM), <https://thehill.com/opinion/criminal-justice/437174-voters-are-driving-justice-reform> [<https://perma.cc/Z5R9-M6QX>].

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ Tina Rosenberg, *On One Issue, Americans Are United. Too Many Are Behind Bars.*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/opinion/on-one-issue-americans-are-united-too-many-are-behind-bars.html> [<https://perma.cc/J4W6-22B9>].

A key theme—particularly popular with Democratic politicians—in calls to reduce incarceration rates is a recommendation to abolish mandatory sentencing.⁷⁷ 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 [I]ts 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.⁷⁸

Most candidates during the 2020 Democratic presidential primary made campaign promises to lower incarceration numbers.⁷⁹ All of the candidates were committed to abolishing or reducing harsh mandatory penalties, which operate to some extent in most U.S. jurisdictions.⁸⁰ 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.”⁸¹

Likewise, Senator Bernie Sanders asserted that he would “[s]top excessive sentencing with the goal of cutting the incarcerated population in half . . . [and] . . . [e]nd mandatory sentencing minimums.”⁸² President Joe

⁷⁷ See generally Caitlin Oprysko, *Mandatory Minimum Sentencing Reform*, POLITICO (last updated Dec. 19, 2019), <https://www.politico.com/2020-election/candidates-views-on-the-issues/criminal-justice-reform/mandatory-minimum-sentences-reform/> [<https://perma.cc/46QD-QBXX>] (capturing views of some Democratic politicians on mandatory minimum sentencing reforms).

⁷⁸ Marie Gottschalk, *The Democrats' Shameful Legacy on Crime*, NEW REPUBLIC (Sept. 11, 2019), <https://newrepublic.com/article/154631/democrats-shameful-legacy-crime> [<https://perma.cc/SN2N-6KWU>].

⁷⁹ For more information on various candidates' stance on criminal justice and the potential for lowering incarceration rates, see Josiah Bates, *Criminal Justice Reform Is Proving a Tricky Subject for Many of These 2020 Democrats*, TIME (July 2, 2019), <https://time.com/5615053/2020-democrats-criminal-justice-reform/> [<https://perma.cc/833F-7DF4>].

⁸⁰ See Katie Park & Jamiles Lartey, *2020: The Democrats on Criminal Justice*, MARSHALL PROJECT (last updated Apr. 8, 2020, 6:00 PM), <https://www.themarshallproject.org/2019/10/10/2020-the-democrats-on-criminal-justice> [<https://perma.cc/MM5Y-TP5D>].

⁸¹ Douglas A. Berman, *Senator Kamala Harris Releases Her Plan “to Fundamentally Transform Our Criminal Justice System”*, SENT’G L. & POL’Y BLOG (Sept. 9, 2019, 1:29 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/09/senator-kamala-harris-releases-her-plan-to-fundamentally-transform-our-criminal-justice-system.html [<https://perma.cc/DZ5E-H7PR>].

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 safety⁸⁴

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,

PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/08/senator-bernie-sanders-releases-criminal-justice-reform-plan-under-banner-justice-and-safety-for-all.html [https://perma.cc/63H4-8265].

⁸³ Douglas A. Berman, *Former Veep Joe Biden Releases Extended "Plan for Strengthening America's Commitment to Justice"*, SENT'G L. & POL'Y BLOG (July 23, 2019, 10:12 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/07/former-veep-joe-biden-releases-extended-plan-for-strengthening-americas-commitment-to-justice.html [https://perma.cc/P3JC-B22N].

⁸⁴ *Id.*

⁸⁵ See Buchanan, Bui & Patel, *supra* note 8.

⁸⁶ See Patrisse Cullors, *'Black Lives Matter' Is About More than the Police*, ACLU (June 23, 2020), <https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police/> [https://perma.cc/2CZL-KBWW].

⁸⁷ See *id.*; see also Buchanan, Bui & Patel, *supra* note 8 (noting significant changes that have occurred in the short amount of time following George Floyd's death).

⁸⁸ The United States is the only G7 nation apart from Japan that still imposes the death penalty. See *Japan Executes First Foreigner in Years, a Chinese Man Who Killed a Family*, REUTERS (Dec. 26, 2019, 12:03 AM), <https://www.reuters.com/article/us-japan-deathpenalty/>

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.⁸⁹ 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.⁹⁰ 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.”⁹¹ 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.⁹²

japan-executes-first-foreigner-in-years-a-chinese-man-who-killed-a-family-idUSKBNIYU07N [<https://perma.cc/9ZTP-W3SR>]. Since 1976, there have been fewer than 1,600 executions in the United States. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (last updated Jan. 8, 2021), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/D4S4-UJQQ>]. There are twenty-eight states that still have the death penalty. *Id.*

⁸⁹ See NILS CHRISTIE, *LIMITS TO PAIN: THE ROLE OF PUNISHMENT IN PENAL POLICY* 1 (1981) (“[T]he time is now ripe to . . . creat[e] severe restrictions on the use of man-made pain as a means of social control.”); THOMAS MATHIESEN, *PRISON ON TRIAL* 145 (3d ed. 2006) (“The fiasco of the prison rationally requires a contraction of the prison, and an eventual abolition of it.”); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 26 (2003) [hereinafter DAVIS, *ARE PRISONS OBSOLETE?*].

⁹⁰ RENE VAN SWAANINGEN & HERMAN BIANCHI, *ABOLITIONISM: TOWARDS A NON-REPRESSIVE APPROACH TO CRIME: PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE ON PRISON ABOLITION* 116–17 (1986).

⁹¹ *Id.* at 113, 116.

⁹² There has, however, been a recent resurgence in theories of restorative justice, which is largely motivated by the view that each crime is a wrong not only against the community in general, but more particularly against the complainant who, arguably, is far too marginalized by the criminal justice system. The complaint’s role in the criminal justice system has been

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.”⁹³ 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.”⁹⁴ 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.”⁹⁵ 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.”⁹⁶ As noted by Davis, “prisons are an obsolete institution because they exacerbate societal harms instead of fixing them.”⁹⁷ The prison abolition movement differs from other reform movements in that it does not just manage the pain, it addresses the “actual

increased in many jurisdictions over the past decade or so by state compensation schemes for victims of crime (although this has been watered down in the Australian State of Victoria) and by permitting victim impact statements at the sentencing inquiry. However, such changes have not diminished the involvement of the state in the criminal justice process and the apparent need to mete out punishment. The increasing recognition of the interests of the victim presents many theoretical problems in the administration of criminal justice. For a discussion of these and restorative theories in general, see Michael Cavadino & James Dignan, *Reparation, Retribution and Rights*, 4 INT’L REV. VICTIMOLOGY 233 (1997); Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977); Lucia Zedner, *Reparation and Retribution: Are They Reconcilable?*, 57 MOD. L. REV. 228 (1994).

⁹³ John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/what-is-prison-abolition/> [<https://perma.cc/Q5VE-TSJU>].

⁹⁴ *Id.*

⁹⁵ Rachel Kushner, *Is Prison Necessary?*, N.Y. TIMES MAG. (Apr. 21, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/C6E3-RSCD>].

⁹⁶ Washington, *supra* note 93.

⁹⁷ *Id.*

source of the pain.”⁹⁸ For this reason, some abolitionists argue that reforms aimed at prisons have done no more than “reinforce the system.”⁹⁹

Because of the belief that mass incarceration “reproduce[s] the very conditions that lead people to prison,”¹⁰⁰ 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.¹⁰¹ 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.”¹⁰² 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.”¹⁰³

Although abolition has been publicized as the goal of a younger generation, it has been around for decades.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ If it is not possible to completely abolish prisons, these individuals focus on how we could better

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?”).

¹⁰¹ Bill Keller, ‘Abolish Prisons’: the Next Frontier in Criminal Justice Reform, BLOOMBERG (June 12, 2019, 9:00 AM) [hereinafter *Next Frontier in Criminal Justice*], <https://www.bloomberg.com/opinion/articles/2019-06-12/-abolish-prisons-the-next-frontier-in-criminal-justice-reform> [<https://perma.cc/3AC2-93TQ>]. Keller also published the same article on the Marshall Project website. Bill Keller, *What do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [<https://perma.cc/M54S-DWYX>].

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.¹⁰⁷

a. Objectives of Abolitionism

Abolitionists are interested in “how we resolve inequalities and get people the resources they need long before . . . they ‘mess up.’”¹⁰⁸ Abolitionists generally have two objectives. The first objective is to delegate public safety responsibility to local communities, an effort also known as “civilianizing safety.”¹⁰⁹ The other objective is to redistribute government spending and invest it in community needs like housing and education instead of prisons.¹¹⁰ 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.”¹¹¹ 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.¹¹²

Even as the movement has progressed, abolitionists realize that change will not occur overnight.¹¹³ 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.”¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ The first pillar, moratorium, is perhaps best summarized by Critical Resistance co-founder Rachel Herzing: “stop building cages.”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.¹¹⁹ The principle of supply and demand underlies moratorium—where fewer spaces for prisoners are provided, there will be fewer prisoners.¹²⁰

Decarceration, on the other hand, is about getting people out of prison.¹²¹ The process is geared toward determining why people are in prison, whether they in fact should be in prison, and for how long.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.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.¹²⁴

Excarceration gets to the heart of what abolitionists hope to improve: keeping individuals from ending up in prison in the first place.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.”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.¹²⁷

¹¹⁷ Washington, *supra* note 93.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ *See id.*

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,

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *Id.*

¹³² Sam Garkawe, *Restorative Justice From the Perspective of Crime Victims*, 15 QUEENSL. U. TECH. L.J. 40, 40 (1999).

¹³³ *See* Washington, *supra* note 93.

¹³⁴ *See id.*

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.*

¹⁴² *Id.*

¹⁴³ *Id.* (quoting *What Is the PIC? What is Abolition?*, CRITICAL RESISTANCE <http://criticalresistance.org/about/not-so-common-language/> [<https://perma.cc/TC9V-CEPM>] (last visited Jan. 13, 2021)).

¹⁴⁴ *Introduction, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1568 (2019) [hereinafter *Introduction*].

mouth.”¹⁴⁵ The fact that many take on this task, however, leads to the potential for a difference of opinion on the very definition of “abolition,”¹⁴⁶ 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.”¹⁴⁷ 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.”¹⁴⁸ Patrisse Cullors, cofounder of Black Lives Matters, describes it as “a cultural intervention.”¹⁴⁹ 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.”¹⁵⁰

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.”¹⁵¹ As Professor Rodriguez notes, the increased use of prison today “is a direct outcome of the liberal-progressive ‘prison reform’ successes of the 1970s.”¹⁵² 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.”¹⁵³ 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 Rodríguez, *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.¹⁵⁴ 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.”¹⁵⁵ The abolition of slavery came about because of the successful, organized social movements that helped “social circumstances transform and popular attitudes shift,”¹⁵⁶ 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.”¹⁵⁷ Slavery is described as a “peculiar institution,”¹⁵⁸ 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.”¹⁵⁹ There are similarities between slavery and prison,¹⁶⁰ 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

¹⁵⁴ *Id.* at 1580–81 (quoting Frederick Douglass, *In What New Skin Will this Old Snake Come Forth?: An Address Delivered in New York, New York, on 10 May 1865*, in *THE FREDERICK DOUGLASS PAPERS* 79, 82, 85 (John W. Blassingame & John R. McKivigan eds., 1991) (“I take this ground: whether this Constitutional Amendment is law [or] not . . . I hold that the work of Abolitionists is not done . . . [Slavery] has been called a great many names, and it will call itself by yet another name; and you and I and all of us had better wait and see what form this old monster will assume, in what new skin this old snake will come forth next . . .”) (emphasis added)).

¹⁵⁵ McLeod, *supra* note 147, at 1617.

¹⁵⁶ DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 89, at 25.

¹⁵⁷ *Id.* at 23.

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 27 (citing ADAM JAY HIRSH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 71 (Yale Univ. Press 1992)) (“One may perceive in the penitentiary many reflections of chattel slavery as it was practiced in the South. Both institutions subordinated their subjects to the will of others . . . Both isolated their subjects from the general population by confining them to a fixed habitat.”).

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=cWjL9-bVq0> [<https://perma.cc/WSS4-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.”).

¹⁶² McLeod, *supra* note 147, at 1613–14 (citing Derrick Clifton, *How Protests in Ferguson Inspired the Occupation of “Freedom Square,”* CHI. READER (Aug. 9, 2016), <https://www.chicagoreader.com/chicago/freedom-square-homansquare-occupation-ferguson/Content?oid=23089791> [<https://perma.cc/67AL-34GZ>]; *Mission & Vision*, #LETUSBREATH COLLECTIVE, <https://www.letusbreathecollective.com/mission-vision> [<https://perma.cc/QW53-UJ5R>] (last visited Nov. 23, 2019)).

¹⁶³ *Introduction*, *supra* note 144, at 1569–70.

¹⁶⁴ *Id.* (citing McLeod, *supra* note 147, at 1627).

¹⁶⁵ *Id.* In October 2019, the City Council of New York voted to close Rikers Island by 2026. Richard Gonzalez, *City Council Votes to Close New York’s Notorious Rikers Island Jail Complex*, NPR (Oct. 17, 2019, 8:32 PM), <https://www.npr.org/2019/10/17/771167909/new-york-to-close-citys-notorious-rikers-island-jail-complex> [<https://perma.cc/J7ED-A6UJ>]. Four smaller jails would be used instead.

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.”¹⁷⁰

Even outside of calls to abolish prisons, movements have formed that have a common goal of providing “real alternatives to police and jail intervention.”¹⁷¹ McLeod summarizes several of these movements that promote community involvement before conflicts escalate.¹⁷² For example, Cure Violence involves mediators in “conflicts likely to escalate into gun violence or other violent assaults.”¹⁷³ Advance Peace also involves mediators, but differs in that it provides mentorship and financial support to at-risk youth.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ 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”¹⁷⁷ 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.”¹⁷⁸

¹⁷⁰ *Id.* at 1571–72 (citing Tracey L. Meares, *Policing: A Public Good Gone Bad*, Bos. REV. (Aug. 1, 2017)), <https://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [<https://perma.cc/B3A2-G7AQ>].

¹⁷¹ McLeod, *supra* note 147, at 1628.

¹⁷² *Id.*

¹⁷³ *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)).

¹⁷⁴ *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)).

¹⁷⁵ *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]).

¹⁷⁶ *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 McLeod, *supra* note 147, at 1630 (citing Herzing, *supra* note 176, at 155).

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.”¹⁷⁹ 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.¹⁸⁰ 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.”¹⁸¹ 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.”¹⁸²

McLeod embraces the fact that abolitionist work in the prison system is related to struggles against slavery, imperialism, racism, and border strengthening.¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ 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

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."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 . . ."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.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."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."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."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.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,"¹⁹³ while Moten and Harney imagine a

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>].

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

¹⁸⁸ *Id.* (quoting *Vision 4 Black Lives Webinar Series: Invest/Divest*, FERGUSON NAT'L RESPONSE NETWORK (Apr. 12, 2017), <http://fergusonresponse.tumblr.com/post/156584034738/vision-for-blacklives-webinar-series-political> [<https://perma.cc/XDV6-UR7Q>]).

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

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

¹⁹¹ *Id.* at 1619.

¹⁹² *See id.*

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.”¹⁹⁴ 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.’”¹⁹⁵

In her article, McLeod focuses mostly on abolitionist efforts in Chicago,¹⁹⁶ which she claims differ from other, more conventional efforts.¹⁹⁷ 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.¹⁹⁸ 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.”¹⁹⁹ 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.²⁰⁰

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.”²⁰¹ As McLeod points out, many activities on which the criminal justice system focuses should not be considered criminal at all.²⁰² 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 McLeod, *supra* note 147, 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/ct-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:

[I]t 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,

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 exhorted, 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

²¹⁸ *Id.*

²¹⁹ Rodriguez, *supra* note 150, at 1575.

²²⁰ *Id.* at 1581.

²²¹ Sanchez, for instance, applies Critical Race Theory (CRT) to prison abolition, not only because of race, class, and gender disparities but because prisoners generally “are a socially constructed minority group.” Sanchez, *supra* note 148, at 1654.

²²² Rodriguez, *supra* note 150, at 1582 (citations omitted).

²²³ *Id.* at 1576.

²²⁴ *Id.*

²²⁵ *Id.*

those whose approaches are analyzed here.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"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."²²⁸ Rodriguez further draws distinctions and elaborates on the difference between reformist and abolitionist efforts by noting that:

[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.²²⁹

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[.]"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.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."²³²

In classifying the problem as a moral grievance, it becomes "a betrayal of American values"²³³ By reframing the problem of mass incarceration

²²⁶ *Id.*

²²⁷ *Id.* at 1576–77.

²²⁸ Rodriguez, *supra* note 150, at 1577.

²²⁹ *Id.* (footnote omitted).

²³⁰ *Id.* at 1590.

²³¹ *Id.* at 1591–92 (citing Jeremy Diamond & Alex Rogers, *How Jared Kushner, Kim Kardashian West and Congress Drove the Criminal Justice Overhaul*, CNN (Dec. 21, 2018, 3:49 PM), <https://www.cnn.com/2018/12/18/politics/criminal-justice-overhaul/index.html> [<https://perma.cc/2QJZ-PJFD>]).

²³² *Id.* at 1592 (quoting Jason Furman & Douglas Holtz-Eakin, Opinion, *Why Mass Incarceration Doesn't Pay*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html> [<https://perma.cc/63TP-WJJ2>]).

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.

²⁴⁰ *Id.* (quoting Mariame Kaba, *Prison Reform’s in Vogue and Other Strange Things . . .*, TRUTHOUT (Mar. 21, 2014), <https://truthout.org/articles/prison-reforms-in-vogue-and-other-strange-things/> [https://perma.cc/YZ3L-QDWB]).

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.”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.”²⁴⁵ WCG reimaged 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.”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.”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.”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.”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”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.”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

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)).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1603.

²⁴⁷ *Id.* at 1604.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1577.

²⁵⁰ *Id.* at 1578.

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.

²⁶⁰ *Id.* at 1611 (citing Clément Petitjean, *Prisons and Class Warfare: An Interview with Ruth Wilson Gilmore*, VERSO (Aug. 2, 2018), <https://www.versobooks.com/blogs/3954-prisons-and-class-warfare-aninterview-with-ruth-wilson-gilmore> [<https://perma.cc/3HS7-8FGH>]).

challenging historical conditions that rely on “criminalization and systemic human immobilization to produce and reproduce a Civilizational order.”²⁶¹ 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 . . .”²⁶² 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.*”²⁶³

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,”²⁶⁴ he also focuses heavily on reforming access to education in prisons.²⁶⁵ Even so, Sanchez ultimately wishes to see prisons abolished entirely.²⁶⁶ 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.”²⁶⁷ 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.²⁶⁸ 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.”²⁶⁹ Although this goal is the same as other abolitionists’ goals, Sanchez acknowledges that the audience may believe his take is not fully abolitionist.²⁷⁰ 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 1651.

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.”²⁷¹ For Sanchez, a key goal is “empower[ing] and alleviat[ing] the inhumane treatment of the imprisoned, even if it is within existing structures.”²⁷²

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.’”²⁷³ 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.²⁷⁴ 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.”²⁷⁵ As Davis has noted, schools that embrace this idea are essentially “prep schools for prison.”²⁷⁶ 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.²⁷⁷ 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.”²⁷⁸ According to Sanchez, people further propagated these beliefs by espousing theories such as the “‘super-predator’ teenager of the 1990s who allegedly was without conscience and irredeemable” as Hillary Clinton coined that term.²⁷⁹

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,”²⁸⁰ it was another thing entirely to create a culture that supports the avoidance of those traps, and, to date, this has not been accomplished.²⁸¹ According to Sanchez, prison groups did not

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 1654 (citing DAVIS, ARE PRISONS OBSOLETE?, *supra* note 89, at 15–16).

²⁷⁴ *See generally id.*

²⁷⁵ *Id.* at 1655–56.

²⁷⁶ *Id.* at 1656 n.26 (quoting DAVIS, ARE PRISONS OBSOLETE?, *supra* note 89, at 38–39).

²⁷⁷ *Id.* at 1657.

²⁷⁸ *Id.* at 1658 (citing Butler, *supra* note 244, at 1446).

²⁷⁹ *Id.* at 1660; Taylor Wofford, *Bill Clinton Appears to Defend Hillary’s “Super Predator” Remarks*, NEWSWEEK (Apr. 7, 2016, 5:37 PM), <https://www.newsweek.com/bill-clinton-super-predators-black-lives-matter-445338> [<https://perma.cc/MUX2-UVMP>].

²⁸⁰ Sanchez, *supra* note 148, at 1669.

²⁸¹ *See id.*

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.”²⁸² 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.²⁸³

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.²⁸⁴ 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.”²⁸⁵ 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.”²⁸⁶ 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 violent²⁸⁷ 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?”²⁸⁸ According to Sanchez, “[e]ducation humanizes, dignifies, and empowers individuals,” and for this reason, “it is central to the abolition movement.”²⁸⁹ 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.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.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.”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,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.”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”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;

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.*

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

²⁹² *Id.* at 1676.

²⁹³ *Id.*

²⁹⁴ Cullors, *supra* note 149, at 1684.

²⁹⁵ *Id.*

internationalism; anti-imperialism; dismantling structures; and practice, practice, practice.”²⁹⁶

For Cullors, abolition is not just about removing oppressive systems—it is about focusing on repairing harm and transformative justice.²⁹⁷ 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.”²⁹⁸ 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.²⁹⁹ 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.”³⁰⁰ She notes there was “nothing restorative in place” as the “system punished and left more disaster in its wake.”³⁰¹ After each vignette, Cullors repeats how abolitionist theory should be considered in similar situations.³⁰² 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.”³⁰³ It is about rethinking how people should act in a “society that considers its members disposable.”³⁰⁴

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.³⁰⁵ 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.”³⁰⁶ In part because of the impact the police’s

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,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.³⁰⁸ Cullors also argues against borders, Border Patrol, and involvement of the United States in wars at home and overseas.³⁰⁹

Many of the vignettes shared by Cullors point to one issue that is rampant in the justice system: isolation.³¹⁰ For Cullors, abolition is about community—“[a]bolition does not isolate individuals. Abolition invites people in.”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.”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.³¹³ In detailing her experiences in certain personal relationships, Cullors notes the importance of transformative justice and the need to repair damage.³¹⁴ Embodying these practices allows one to move “beyond the harm, toward transformation.”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.³¹⁶ According to Cullors, her abolition journey consists of twelve principles:

- (1) [H]ave courageous conversations; (2) commit to response versus reaction; (3) 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)

³⁰⁷ Cullors notes that as soon as police entered, “[she] realized that [she] had made a terrible mistake. [Her] brother instantly dropped to his knees, hands in the air, and pleaded with the officers for his life.” *Id.*

³⁰⁸ *Id.* at 1690.

³⁰⁹ *Id.* at 1691.

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

³¹¹ *Id.*

³¹² Sanchez, *supra* note 148, at 1665 (citing McLeod, *supra* note 287, at 1178–79).

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

³¹⁴ *Id.* at 1694.

³¹⁵ *Id.*

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.

³²¹ Ruth Wilson Gilmore & James Kilgore, *Commentary: The Case for Abolition*, MARSHALL PROJECT (June 19, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> [<https://perma.cc/YH73-VDHS>].

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.”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.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.”³²⁸ Another goal of abolition is to encourage the public to view crime differently.³²⁹ This may be more difficult, as the effort to destigmatize marijuana use shows.³³⁰ But, if we stop characterizing certain acts as crimes, abolitionists argue, we will be able to decrease our need for law enforcement intervention.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

³²⁶ McLeod, *supra* note 147, at 1619.

³²⁷ *See id.* at 1647.

³²⁸ *Next Frontier in Criminal Justice*, *supra* note 101.

³²⁹ *See* Washington, *supra* note 93.

³³⁰ *See id.* (noting that, according to *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).

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 engage someone.”).

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.³³² 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.³³³ The available data shows that the offenders who are most likely to reoffend are minor property offenders,³³⁴ however, it is misguided to spend considerable public funds imprisoning these specific offenders given the—concededly relative—triviality of their

³³² Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 77 (2018).

³³³ See Mirko Bagaric, Dan Hunter & Nigel Stobbs, *Erasing the Bias Against Using Artificial Intelligence to Predict Future Criminality: Algorithms are Color Blind and Never Tire*, 88 U. CIN. L. REV. 1037, 1058 (2020).

³³⁴ Bagaric, *The Punishment Should Fit the Crime*, *supra* note 65.

possible future offenses.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.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.³³⁷ It is also a formal requirement of the sentencing regimes of ten states³³⁸ and is a core principle that supposedly informs the Federal Sentencing Guidelines.³³⁹ Proportionality has two elements: the seriousness of the crime and the harshness of the sanction.³⁴⁰ Further, the principle has a quantitative component, in that those

³³⁵ William Spellman, *What Recent Studies Do (and Don't) Tell Us about Imprisonment and Crime*, 27 CRIME & JUST. 419, 420, 485 (2000); NAT'L RSCH. COUNCIL, *supra* note 31, at 4; Don Weatherburn, Jiuzhao Hua, & Steve Moffat, *How Much Crime Does Prison Stop? The Incapacitation Effect on Burglary*, 2 INT'L J. PUNISHMENT & SENTENCING 8, 8–9 (2006); Jacqueline Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 187, 209 (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978); Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009); *Prison and Crime: A Complex Link*, PEW CHARITABLE TRUSTS (Sept. 11, 2014), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/prison-and-crime> [<https://perma.cc/2BHS-W9HM>].

³³⁶ Bagaric, *The Punishment Should Fit the Crime*, *supra* note 65.

³³⁷ The principle of proportionality applies only to invalid sentences that are grossly disproportionate to the seriousness of the relevant offense. See *Ewing v. California*, 538 U.S. 11, 31 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991); *Solem v. Helm*, 463 U.S. 277, 288–89 (1983).

³³⁸ See Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 250 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia).

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, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* 155–56 (2009).

³⁴⁰ Bagaric, *The Punishment Should Fit the Crime*, *supra* note 65, at 348.

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.*

³⁴² JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* 6 (2004).

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.

³⁴⁶ MATTHEW DEMICHELE & BRIAN PAYNE, *OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY: COMMUNITY CORRECTIONS RESOURCE* 10–12, 14, 16–17, 20 (2d ed. 2009), https://www.appa-net.org/eweb/docs/APPA/pubs/OSET_2.pdf [<https://perma.cc/8SG7-BA>]

electronic monitoring,³⁴⁷ which, in the United States, is generally reserved only for offenders who have not committed a serious violent or sexual offense.³⁴⁸

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.³⁴⁹ 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.³⁵⁰ If anyone attempts to tamper with or remove the device, it

HC]; Mike Nellis, *Electronic Monitoring: Exploring the Commercial Dimension*, 58 CRIM. JUST. MATTERS 12, 12 (2005). For a summary of its introduction and use in the United States, see Lars H. Andersen & Signe H. Andersen, *Effect of Electronic Monitoring on Social Welfare Dependence*, 13 CRIMINOLOGY & PUB. POL'Y 349, 350–51 (2014); see also Matthew DeMichele, *Electronic Monitoring: It Is a Tool, Not a Silver Bullet*, 13 CRIMINOLOGY & PUB. POL'Y 393, 395–97 (2014); Mike Nellis, *Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews*, 1 EUR. J. PROBATION 41, 41 (2009); Brian K. Payne, *It's A Small World, but I Wouldn't Want to Paint It: Learning from Denmark's Experience with Electronic Monitoring*, 13 CRIMINOLOGY & PUB. POL'Y 381, 382–83 (2014).

³⁴⁷ This number has grown from 53,000 in 2005. *Use of Electronic Offender-Tracking Devices Expands Sharply*, PEW CHARITABLE TRUSTS (Sept. 7, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply> [<https://perma.cc/6QMH-GGP8>] [hereinafter *Use of Electronic Offender-Tracking Devices Expands Sharply*].

³⁴⁸ See, e.g., WASH. REV. CODE § 9.94A.734 (2018), <http://app.leg.wa.gov/rcw/default.aspx?cite=9.94A.734> [<https://perma.cc/UW4W-PXVK>]; Juliet Lapidos, *You're Grounded! How Do You Qualify For House Arrest?*, SLATE (Jan. 28, 2009), http://www.slate.com/articles/news_and_politics/explainer/2009/01/youre_grounded.html [<https://perma.cc/99BV-CJ4S>]; Brandon Martin & Ryken Grattet, *Alternatives to Incarceration in California*, PUB. POL'Y INST. CAL. (Apr. 2015), http://www.ppic.org/main/publication_quick.asp?i=1146 [<https://perma.cc/W47S-CNR7>].

³⁴⁹ Juliet Lapidos, *You're Grounded! How Do You Qualify For House Arrest?*, SLATE (Jan. 28, 2009), http://www.slate.com/articles/news_and_politics/explainer/2009/01/youre_grounded.html [<https://perma.cc/99BV-CJ4S>].

³⁵⁰ Mark Morri, *New Electronic Anklets a Tougher Collar for Prisoners*, DAILY TELEGRAPH (Dec. 11, 2014), <http://www.dailytelegraph.com.au/news/nsw/new-electronic-anklets-a-tougher-collar-for-prisoners/news-story/c2e00e5356bbf7a8e7596d4285df4971> [<https://perma.cc/664B-V4FQ>]; Rob Walker, *Reconsidering the Ankle Monitor*, GOOD (Jan. 5, 2016), <https://www.good.is/features/issue-35-ankle-monitors> [<https://perma.cc/R6MQ-ZFLY>].

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.

³⁵² *Use of Electronic Offender-Tracking Devices Expands Sharply*, *supra* note 347. A review in 2006 of the electronic monitoring of offenders found that the cost is about one-fifth that of imprisonment and 'robust' in detecting violations of the term of the order. See NAT'L AUDIT OFF., THE ELECTRONIC MONITORING OF ADULT OFFENDERS (2006), http://www.nao.org.uk/publications/0506/the_electronic_monitoring_of_a.aspx [<https://perma.cc/DV6F-QZUJ>]; see also U.S. DEP'T OF JUST., NCJ 234460, ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf> [<https://perma.cc/5K9Z-VM7Z>]; Natasha Alladina, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration*, 28 ALASKA L. REV. 125, 144 (2011).

³⁵³ Eric Markowitz, *Why GPS Doesn't Always Work for Tracking Convicts*, VOCATIV (Apr. 17, 2014), <http://www.vocativ.com/underworld/crime/gps-doesnt-always-work-trackin-g-convicts> [<https://perma.cc/M9FV-QV46>].

³⁵⁴ See, *Analysis Finds Not Enough Monitoring of Monitoring Bracelets in US*, FOX NEWS (last updated Nov. 28, 2015), <http://www.foxnews.com/us/2013/07/28/analysis-finds-not-enough-monitoring-monitoring-bracelets-in-us.html> [<https://perma.cc/8JVF-CA46>].

³⁵⁵ Bagaric, Hunter & Wolf, *supra* note 15, at 101.

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.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.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.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.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.³⁶¹ Moreover, officials can make the sensor tamperproof, much like current electronic ankle bracelet monitors, so that offenders cannot remove it.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

³⁵⁷ See M. Sivarathinabala & S. Abirami, *An Intelligent Video Surveillance Framework for Remote Monitoring*, 2 INT'L J. ENG'G. SCI. & INNOVATIVE TECH. 297, 297 (2013).

³⁵⁸ *Id.*; Dimitrios Georgakopoulos, Donald Baker, Marian Nodine & Andrzej Cichoki, *Event-Driven Video Awareness Providing Physical Security*, 10 WORLD WIDE WEB J. 85 (2007).

³⁵⁹ Bagaric, Hunter & Wolf, *supra* note 15, at 104–07.

³⁶⁰ *Id.* at 103.

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

³⁶² Bagaric, Hunter & Wolf, *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

³⁶³ See Ryan Bradley, *Tesla Autopilot*, MIT TECH. REV. (Feb. 23, 2016), <https://www.technologyreview.com/technology/tesla-autopilot/> [https://perma.cc/AD6Z-WYAU]; Bryan Clark, *How Self-Driving Cars Work: The Nuts and Bolts Behind Google's Autonomous Car Program*, MAKE USE OF (Feb. 21, 2015), <http://www.makeuseof.com/tag/how-self-driving-cars-work-the-nuts-and-bolts-behind-googles-autonomous-car-program> [https://perma.cc/J2PB-G7S9].

³⁶⁴ Clark, *supra* note 363.

³⁶⁵ For a simple and accessible overview of artificial intelligence, and especially the modern advances in convolutional and multi-layer/deep neural networks, along with their social significance, see Gideon Lewis-Kraus, *The Great A.I. Awakening*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/magazine/the-great-ai-awakening.html> [https://perma.cc/U8VU-NV8F].

³⁶⁶ Bagaric, Hunter & Wolf, *supra* note 15, at 107.

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.³⁶⁷ 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—

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.³⁶⁸ 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.³⁶⁹ 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.³⁷⁰ 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. Tasing 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.³⁷¹ 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.³⁷² Thus,

³⁶⁸ *Id.* at 107–10.

³⁶⁹ 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>].

³⁷⁰ *Id.* at 12.

³⁷¹ Bagaric, Hunter & Wolf, *supra* note 15, at 108–09.

³⁷² *Id.*

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.³⁷³ 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.³⁷⁴ 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.

³⁷⁴ RYAN S. KING, MARC MAUER & MALCOM C. YOUNG, THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 8 (2005).

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 overrepresentation 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.