

# THE TIME DOES NOT FIT THE CRIME: ELIMINATING MANDATORY MINIMUMS FOR NONVIOLENT DRUG OFFENDERS IN FAVOR OF JUDICIAL DISCRETION

*Ava Shahani\**

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I. INTRODUCTION

What is the ultimate goal of incarceration? Is it to punish or to rehabilitate the offender in pursuance of preventing future criminal activity? The societal goals of incarceration differ between cultures.<sup>1</sup> These cultural differences and their respective aims for incarceration result in some systems developing to enforce rules, maintain public safety, or rehabilitate wrongdoers, while other systems revolve around the objective to punish offenders.<sup>2</sup>

The American criminal justice system is the latter—developed with the objective of punishing those who have committed crimes, rather than rehabilitating them.<sup>3</sup> This approach to incarceration results in the United States having the largest number of incarcerated persons per capita in the world.<sup>4</sup> Because European countries are culturally similar to the U.S., this statistic is notable, if not surprising. This unprecedented and ever increasing incarceration statistic is likely a firsthand result from the passage of rigorous legislation aimed at fighting the “War on Drugs,” the institution of mandatory minimum sentences for drug offenses in the 1980s, and the stringency of parole eligibility.<sup>5</sup> What naturally follows from mandatory prison sentences and decreasing parole eligibility is an inevitable increase in the number of prisoners.<sup>6</sup> With 189,214 people in federal custody, 46.4% were charged with drug related offenses.<sup>7</sup> According to the Federal Bureau of Prisons (BOP), 82,415 inmates are currently serving time for drug

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1. Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PENN. L. REV. 949, 959, 966 (1966).

2. See generally *id.* at 959-73.

3. Max Fisher, *A Different Justice: Why Anders Breivik Only Got 21 Years For Killing 77 People*, THE ATLANTIC (Aug. 24, 2012), <http://www.theatlantic.com/international/archive/2012/08/a-different-justice-why-anders-breivik-only-got-21-years-for-killing-77-people/261532/>.

4. Katie Ward et al., *Incarceration Within American and Nordic Prisons: Comparison of National and International Policies*, 1 ENGAGE 38 (2013), <https://www.researchgate.net/publication/235948052>.

5. Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners’ Rights in the United States and Europe*, 27 GA. J. INT’L & COMP. L. 1, 4, 5 (1998); Don Johnson, *Towards a Compassionate and Cost-Effective Drug Policy: A Forum on the Impact of Drug Policy on the Justice System and Human Rights*, 24 FORDHAM URB. L. J. 315, 332 (1997).

6. Harding, *supra* note 5.

7. *Population Statistics*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) (last updated Jan. 26, 2017).

offenses.<sup>8</sup> This, as this article will argue, can be directly attributed to the aforementioned “War on Drugs” policy, coupled with the institution of mandatory minimum sentences.

Mandatory minimum sentences in the U.S. primarily targets major drug dealers and kingpins, but has failed to serve its purpose because in the vast majority of cases, the low level dealers and users are sentenced, while major drug dealers and kingpins rarely serve time.<sup>9</sup> A possible reason for the failure of the original legislation to crack down on the kingpins and high level dealers could be credited to them having leverage in the form of information about other criminals.<sup>10</sup> They are able to use this information to be granted leniency in their charge, and serve minimal prison time, if any at all.<sup>11</sup> Meanwhile, the small-scale dealers, who are ordinarily poor individuals trying to earn a little cash and make ends meet, receive outrageous sentences and serve 20 plus years.<sup>12</sup> The legislation by the U.S. Congress condemns the small-scale offenders instead of the big kingpins, and doing so without any real knowledge on the crimes or circumstances surrounding the offense.<sup>13</sup> What results is an inhumane system.

Due to the mandatory sentences and the federal “War on Drugs” policy, which run contrary to studies that indicate incarceration is not the most effective means of deterrence, the U.S. is now faced with overcrowded prisons.<sup>14</sup> The federal government has indicated that it is aware of the issue and is taking steps to address the problem.<sup>15</sup> In October 2015, new sentencing guidelines were introduced by a bipartisan group of senators to reduce mandatory minimum sentences for nonviolent offenders.<sup>16</sup> In the same month, the Justice Department announced that about 6,000 inmates would be released from federal prisons.<sup>17</sup> Even with these steps being taken, and those 6,000 inmates indeed being released, there remains a great deal of work to be done.

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8. *Id.*

9. See Johnson, *supra* note 5, at 331.

10. See *id.* at 331, 350.

11. *Id.*

12. *Id.* at 321, 331.

13. *Id.* at 331-32.

14. CAROLYN W. DEADY, INCARCERATION AND RECIDIVISM: LESSONS FROM ABROAD 1-2 (2014), [https://www.salve.edu/sites/default/files/filesfield/documents/Incarceration\\_and\\_Recidivism.pdf](https://www.salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf).

15. Michael S. Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. TIMES, Oct. 7, 2015, at A1.

16. James A. Baker, *DOJ to Release 6,000 Prisoners: What You Should Know*, BAKER INST. BLOG (Oct. 8, 2015), <http://blog.chron.com/bakerblog/2015/10/doj-to-release-6000-prisoners-what-you-should-know/>.

17. Schmidt, *supra* note 15.

These additional steps that the government needs to take will be explored in this article.

Additionally, the U.S. has the highest recidivism rates in the world, signifying the ineffectiveness of the current system.<sup>18</sup> Thus, it is time to explore the successful components of other European prison systems in order to establish a more effective approach. With the lowest recidivism rate, Scandinavian countries, like Norway, are considered models of effective incarceration practices.<sup>19</sup> Though drug use and trafficking are prevalent in Norway, as they are in the U.S., their humane and compassionate treatment of inmates is a far better method of achieving rehabilitation goals.<sup>20</sup> Norway has an estimated population of 5 million people, yet there are less than 4,000 incarcerated.<sup>21</sup> Further, at 20 percent, Norway has one of the lowest recidivism rates in the world.<sup>22</sup> This finding suggests that the Norwegian prison systems reduces recidivism more effectively than the U.S.<sup>23</sup> The U.S. and Norwegian penal systems are similar in terms of the goals of incarceration.<sup>24</sup> Both punish for the crime committed and attempt to rehabilitate the offender.<sup>25</sup> They differ, however, in their manner of achieving these goals. Norway has not implemented mandatory minimums, meaning when they incarcerate, the term of incarceration are proportionate to the severity of the crime committed.<sup>26</sup> What results is a system more concerned with effective rehabilitation and release of prisoners, not in doling out punishments that do not fit the crime committed.<sup>27</sup>

Unlike the U.S., where judges have been stripped of their authority in terms of determining the length of an offender's sentence,

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18. Ward et al., *supra* note 4, at 38 (recidivism is the tendency for a criminal to reoffend. The American incarceration rate is at over 714 per 100,000 citizens, compared to western European countries at 95 per 100,000 citizens).

19. DEADY, *supra* note 14, at 3.

20. Ward et al., *supra* note 4, at 38-39.

21. Christina Sterbenz, *Why Norway's Prison System Is So Successful*, BUS. INSIDER (Dec. 11, 2014), <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> ("Norway also has a relatively low level of crime compared to the US, according to the Bureau of Diplomatic Security. The majority of crimes reported to police there are theft-related incidents, and violent crime is mostly confined to areas with drug trafficking and gang problems").

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

23. *Id.*

24. Fisher, *supra* note 3.

25. *Id.*

26. *Id.*

27. See *Inside Norway's Progressive Prison System*, VICE (Aug. 3, 2011), <http://www.cnn.com/2011/WORLD/europe/08/02/vbs.norwegian.prisons/>; Sterbenz, *supra* note 21.

judges in Norway have retained this power.<sup>28</sup> The Norwegian system views criminals as individuals who have made mistakes and who are capable of being rehabilitated.<sup>29</sup> Thus, instead of punishment, the main objective of Norway's prison system is rehabilitation.<sup>30</sup> In addition, Norway advocates the "principle of normalization," meaning that their rehabilitation includes programs that ensure that recently released prisoners can easily integrate back into society.<sup>31</sup>

The American criminal justice system must shift its focus from punishment to rehabilitation, particularly for nonviolent drug offenders.<sup>32</sup> A good starting point for the shift is to abolish mandatory minimums that remove judicial authority to take into account facts surrounding the crime and the criminal, and instead force judges to sentence offenders for a set period of time specified by statute.<sup>33</sup> Part II of this paper will examine the background of U.S. and Norwegian drug laws and further examines the current governing laws and policies. Part III will analyze the problems with mandatory minimums and explain why judicial discretion is a superior method. Part IV will compare the incarceration goals in the U.S. criminal justice system with Norway's to determine what aspects of the Norwegian criminal justice system may be reasonably adopted in the U.S. Although members of Congress are coming together to decrease the duration of mandatory minimum sentences, I propose eliminating them altogether in favor of judicial discretion.

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28. See Hilde K. Kvalvaag, *Norway Prisons Rehabilitate Criminal Offenders*, U. OF BERGEN (Aug. 24, 2016), <http://www.uib.no/en/news/100126/norwegian-prisons-rehabilitate-criminal-offenders>; Mark Lewis & Sarah Lyall, *Norway Mass Killer Gets the Maximum: 21 Years*, N.Y. TIMES, Aug. 25, 2012, at A3.

29. See William Lee Adams, *Norway Builds the World's Most Humane Prison*, TIME (May 10, 2010), <http://content.time.com/time/magazine/article/0,9171,1986002,00.html>; Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html>.

30. Fisher, *supra* note 3.

31. See NORDIC COUNCIL OF MINISTERS, NORDIC PRISON EDUCATION: A LIFELONG LEARNING PERSPECTIVE 15, 123 (2009), [http://epeamalta.org/uploads/3/0/6/4/3064611/nordic\\_prison\\_education.pdf](http://epeamalta.org/uploads/3/0/6/4/3064611/nordic_prison_education.pdf); Benko, *supra* note 29; Sterbenz, *supra* note 21.

32. For purposes of this paper nonviolent crimes include drug offenses such as possession, possession with intent to distribute, manufacture, sale, and trafficking of controlled substances.

33. Johnson, *supra* note 5, at 332.

## II. THE DEVELOPMENT OF GOVERNING DRUG LAWS AND POLICIES UNTIL NOW: UNITED STATES VS. NORWAY

### A. *The United States*

The United States has been at war with drugs for decades, but it has been a losing battle as it has failed to produce any evidence of success.<sup>34</sup> In the 1930s, Congress formed the Federal Bureau of Narcotics to better enforce the then criminal prohibition of alcohol and other narcotics.<sup>35</sup> In 1951, Congress enacted two-year mandatory minimum sentences, doubling down on the ill-perceived effectiveness of incarceration.<sup>36</sup> Nevertheless, drugs became the symbol of youthful rebellion in the late 1960s.<sup>37</sup> In response, President Nixon declared a war on drugs in 1971, increasing both the size and presence of drug control agencies, and enacting legislation that further extended mandatory minimum sentences.<sup>38</sup> Further, President Reagan focused on “Getting Tough” on drugs, from which incarceration rates skyrocketed.<sup>39</sup> Between 1980 and 1996, only 12 percent of the incarceration rate increase was due to actual increases in crime—the remaining 88 percent of the increase was due to the institution of certain sanctions and mandatory minimum sentences.<sup>40</sup> These changes in sentencing policy resulted in more than half of the population in federal prisons being incarcerated for drug related offenses.<sup>41</sup>

One of the main culprits responsible for more than half of the U.S. prison population being incarcerated for drug offenses is the

34. See Nick Clegg & Richard Branson, *We Have Been Losing the War On Drugs for Four Decades*, GUARDIAN (Mar. 3, 2015), <https://www.theguardian.com/commentisfree/2015/mar/03/war-on-drugs-british-politicians-nick-clegg-richard-branson>.

35. Johnson, *supra* note 5, at 321.

36. *Id.*

37. Herron Keyon Gaston, *Race, Morality, and the Law: The Lingering Effects of the War on Drugs*, HUFFINGTON POST (Jan. 27, 2015), [http://www.huffingtonpost.com/herron-keyon-gaston/race-morality-and-law-the\\_b\\_6544286.html](http://www.huffingtonpost.com/herron-keyon-gaston/race-morality-and-law-the_b_6544286.html).

38. See Robert C. NeSmith, *Tough on Crime or Tough Luck for the Incarcerated? Exploring the Adverse Psychological Impacts of Mandatory Minimum Sentencing and Pushing for Action*, 39 LAW & PSYCHOL. REV. 253, 255-56 (2015); Karim Ismaili, *Some Reflections on the Origins and Implications of Mass Imprisonment in the U.S.*, 44 J. CATH. LEGAL STUD. 411, 414-15 (2005).

39. NeSmith, *supra* note 38, at 256.

40. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 43 (1999).

41. See DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 1, at 14 (2001), <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>. The proportion of drug offenders in federal prison has declined only marginally since 1996. At the time this article went into press, drug offenders compose of 46% of the federal prison population. See *Offenses*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last updated Dec. 24, 2017).

Anti-Drug Abuse Act of 1986, which “established the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses.”<sup>42</sup> Under this framework, the mandatory minimums “ranged from five years without parole to life imprisonment” with “the quantities triggering mandatory minimums [varying] for [different] drugs.”<sup>43</sup> For example, the 1986 Act distinguished between powder cocaine and crack cocaine by treating quantities of crack cocaine differently than powder cocaine for purposes of sentencing using the “100-to-1” ratio as specified statute.<sup>44</sup> This disparity is evidenced by the “mandatory minimum of five years imprisonment for trafficking offenses which involved at least five grams of crack cocaine, whereas trafficking offenses involving powder cocaine required at least 500 grams of the substance to trigger the same mandatory minimum.”<sup>45</sup> Congress established this ratio, however, due in large part to the fact that crack cocaine was more affordable than powder cocaine, and thus increasing in popularity.<sup>46</sup> Because of this arbitrary ratio and related legislation, imprisonment rates continue to rise as crime rates have fallen.<sup>47</sup> Therefore, it is obvious that enactment of stringent legislation aimed at fighting the “War on Drugs” and the “Get Tough on Crime” policies has led to an increased number of incarcerations for drug related offenses.<sup>48</sup> In order to combat mass incarceration, Congress passed the Fair Sentencing Act of 2010.<sup>49</sup> The Act sought to reduce mandatory minimum sentences for drug related offenders by reducing the 20 years mandatory minimum to 15 years, and reducing the life imprisonment mandatory minimum to 25 years.<sup>50</sup>

In sum, more drug offenders are going to prison because the U.S. criminal justice system perceives no other option for these individuals aside from sending them to prison.<sup>51</sup> This is the result of a combination of the reduction in treatment and legislation requiring mandatory

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42. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002- 1302, 100 Stat. 3207 (1986); U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23 (2011).

43. U.S. SENT. COMM’N, *supra* note 42.

44. *Id.* at 23, 25.

45. *Id.* at 25.

46. *See id.*

47. *See* NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 47 (2014).

48. Harding, *supra* note 5.

49. Fair Sentencing Act, 21 U.S.C. § 801 (2010); U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 3, 7 (2015).

50. *Id.*

51. Harding, *supra* note 5.

minimum sentences.<sup>52</sup> The sheer number of those incarcerated for drug related offenses indicate that the war on drugs has failed. Because of this, criminologists are increasingly asking the same question: does the U.S. penal system run counter to its goals of offender rehabilitation?<sup>53</sup>

### B. Norway

Norway, along with Denmark, Finland, Iceland, and Sweden, commonly referred to as Scandinavia, stand out in many respects due to its liberal criminal justice policies and moralistic position on drug offenses.<sup>54</sup> These liberal policies are evidenced by Scandinavia's abandonment of the idea of a "drug-free society" as "unrealistic" and implementing policies "based on harm reduction ideas."<sup>55</sup> Similar to the U.S., Norway is divided between judicial, executive, and legislative branches, each of which is mutually independent.<sup>56</sup> It is also similar in terms of law and court structure, as their laws are "codified and the court systems consist of local courts, regional appellate courts, and a Supreme Court."<sup>57</sup> However, unlike the U.S., which has mandatory minimum sentencing, Scandinavia's "sentencing is preserved as an area of normal judicial decision making, guided by valid sources of sentencing law such as the General Civil Penal Code (GCPC)."<sup>58</sup>

Norwegian laws prescribe reasonable minimum and maximum penalties for each offense.<sup>59</sup> Sections 162 of the GCPC states:

Any person who unlawfully manufactures, imports, exports, acquires, stores, sends or conveys any substance that pursuant to statutory provision is deemed to be a drug shall be guilty of a drug felony and liable to fines or imprisonment for a term not exceeding two years. An aggravated drug felony shall be punishable by imprisonment for a term not exceeding 10 years.<sup>60</sup>

Further, "[w]hether or not a drug offense is judged as serious depends on the type of drug involved, its quantity and the nature of the

52. See *United States v. Williams*, 788 F. Supp. 2d 847, 871 (N.D. Iowa 2011).

53. Symposium, *Towards a Compassionate and Cost-Effective Drug Policy: A Forum on the Impact of Drug Policy on the Justice System and Human Rights*, 24 *FORDHAM URB. L.J.* 315, 320-324, 326, 333 (1997).

54. Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, 36 *CRIME & JUST.* 217, 221 (2007).

55. *Id.* at 261.

56. *Id.* at 221.

57. *Id.* at 222.

58. *Id.* at 225; *ALMINDELIG BORGERLIG STRAFFELOV* [Civil Code] pt. II, ch.14, § 162 (Nor.).

59. JENNIFER TURNER & WILL BUNTING, *ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES* 201 (Vanita Gupta ed., 2013).

60. *STRAFFELOV* § 162 (Nor.).

offense. If the quantity is ‘very significant’ imprisonment will be imposed for a period of 3 to 15 years.”<sup>61</sup>

However, unlike the U.S. mandatory minimum sentencing laws, the sentencing guidelines set forth in the GCPC are discretionary.<sup>62</sup> Influenced by both rational and traditional factors, the Norwegian criminal justice system thoroughly details criminal charges and considers factors such as “age, former behavior, and personal characteristics” beyond the statutes.<sup>63</sup> The system has recognized that crime is a result of innate propensities in the individual, of upbringing, and numerous other environmental influences.<sup>64</sup> The Norwegian criminal justice system has recognized that “these various factors do not operate separately or independently of one another, but are woven together in a complicated pattern.”<sup>65</sup> As a result, milder sentences are handed down after understanding the reasons behind the offense.<sup>66</sup> The courts in Norway, unlike the courts in the U.S., have realized that leniency, rather than traditional justice, provides better dividends in the form of quicker reintegration.<sup>67</sup> What results is a justice system that functions effectively by being fair to its criminals, rather than simply punishing them irrespective of the circumstances surrounding their offense.<sup>68</sup>

Although the crime rates in Norway are high, similar to other industrialized countries, the imprisonment rates are among the lowest in Western democracies largely due to their commitment to liberal values, human rights, and rational policymaking. Although the length of sentencing is milder in Norway, the courts still punish the offender while compensating those harmed by the offender.<sup>69</sup> This is largely

61. *Norway Criminal Codes*, CRIME & SOCIETY, <https://www-rohan.sdsu.edu/faculty/rwin-slow/europe/norway.html> (last visited Jan. 26, 2017) (citing STRAFFELOV § 162 (Nor.)).

62. KATJA FRANKO AAS, SENTENCING IN THE AGE OF INFORMATION: FROM FAUST TO MACINTOSH 99 (2005).

63. Johannes Andenaes, *Choice of Punishment*, 2 SCANDINAVIAN. STUD. L. 55, 60 (Swed.) (1958); Tapio Lappi-Seppälä, *Nordic Youth Justice*, 40 CRIME & JUST. 199-201 (2011); STRAFFELOV § 46, 55 (Nor.).

64. Liliana Segura, *In Sentencing Criminals, Is Norway Too Soft? Or Are We Too Harsh?*, THE NATION (Aug. 28, 2012), <https://www.thenation.com/article/sentencing-criminals-norway-too-soft-or-are-we-too-harsh/>.

65. Andenaes, *supra* note 63.

66. *Id.* at 68; ANNE BUKTEN ET AL., NORWEGIAN CENTRE FOR ADDICTION RES., THE NORWEGIAN OFFENDER MENTAL HEALTH AND ADDICTION STUDY – DESIGN AND IMPLEMENTATION OF A NATIONAL SURVEY AND PROSPECTIVE COHORT STUDY (2015).

67. See Su-Syan Jou, *Norwegian Penal Norms: Political Consensus, Public Knowledge, Suitable Sentiment and a Hierarchy of Otherness*, 9 NAT'L U. L. REV., 283, 303 (2014).

68. Segura, *supra* note 64.

69. Nicholas C. Katsoris, *The European Convention on the Compensation of Victims of Violent Crimes: A Decade of Frustration*, 14 FORDHAM INT'L L.J. 186, 204 (1990).

due to the fact that anger and a desire for vengeance are socially undesirable in Norway.<sup>70</sup> To them, deprivation of freedom is enough of a punishment, and thus there is a major focus on rehabilitation of inmates.<sup>71</sup> Further, instead of utilizing mandatory minimum sentencing laws, Norway has defined the maximum sentence for a particular offense as 21 years with possible extensions.<sup>72</sup> Thus, not only is there no death penalty in Norway, it has abolished the life sentence and replaced it with a 21-year maximum term for most crimes—even mass murder.<sup>73</sup> Although it is rare, the 21-year imprisonment can be “extended in five-year increments” if prison authorities, while the offender is in treatment, “determines that an offender is not rehabilitated by the end of the initial term.”<sup>74</sup> The U.S. should take note of Norway’s penal system, which has achieved its incarceration goals while keeping inmate populations low by focusing on rehabilitating and releasing inmates, rather than simply punishing them by use of lengthy prison terms.

### III. PROBLEMS POSED BY MANDATORY MINIMUMS AND HOW ELIMINATING THEM IN FAVOR OF JUDICIAL DISCRETION IS A BETTER APPROACH FOR THE UNITED STATES

The American criminal justice system’s decades of relentless “War on Drugs” and “Tough on Crime” policies have fueled the passage of unnecessarily long sentencing laws such as mandatory minimum penalties and life without possibility of parole (LWOP).<sup>75</sup> Prolonged prison terms for nonviolent drug offenders are generated by these mandatory sentences and associated limits on judicial discretion.<sup>76</sup> The passage of mandatory minimum laws in the U.S. have resulted in the statutory requirement that judges punish people by sentencing them to at least a mandatory minimum number of years in

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70. See Jou, *supra* note 67.

71. See Benko, *supra* note 29.

72. STRAFFELOV § 162 (Nor.); Lappi-Seppälä, *supra* note 54, at 223.

73. STRAFFELOV § 17 (Nor.); See Bob Cameron, *Why Does Norway Have a 21-Year Maximum Prison Sentence?*, THE LOCAL (Aug. 24, 2012 4:04 PM), <http://www.thelocal.no/20120824/why-norways-maximum-sentence-is-just-21-years>.

74. See Bob Cameron, *Why Does Norway Have a 21-Year Maximum Prison Sentence?*, SLATE (May 7, 2013), [http://www.slate.com/blogs/quora/2013/05/07/why\\_does\\_norway\\_have\\_a\\_21\\_year\\_maximum\\_prison\\_sentence.html](http://www.slate.com/blogs/quora/2013/05/07/why_does_norway_have_a_21_year_maximum_prison_sentence.html).

75. Harding, *supra* note 5, at 4-5.

76. Johnson, *supra* note 5, at 324 (Mandatory minimum sentencing means that the judge has little to no discretion, and must give the sentence that the legislators have determined is appropriate, based on the quantity of the drug).

prison.<sup>77</sup> However, there is no direct correlation between the offender's role in the offense and term of imprisonment; thus, the offender's blameworthiness is irrelevant to the minimum sentence length.<sup>78</sup> By enacting these mismatched laws, the American criminal justice system has unduly inhibited judges from carrying out their profession, that is, to evaluate the circumstances surrounding the offenders' individual cases and assign the punishment they find most appropriate.<sup>79</sup> On the other hand, these laws have vastly assisted prosecutors through empowering them to control the fates of offenders by giving them inherent discretion to charge a defendant with a sentencing enhancement that triggers LWOP.<sup>80</sup> As of 2012, the BOP and Department of Corrections estimates that approximately 79% of the 3,278 federal prisoners serving LWOP are for nonviolent drug crimes.<sup>81</sup>

By requiring judges to apply mandatory sentences, the judges' hands are tied and they have to sentence offenders to a certain term in prison, regardless of whether or not the judge agrees that the sentence is in the best interest of justice.<sup>82</sup> In cases reviewed by the American Civil Liberties Union (ACLU), the sentencing judges went on record, time after time, and objected to the mandatory sentences as being disproportionately severe but declared that they had no discretion to take individual circumstances into account.<sup>83</sup> For instance, Federal District Judge James R. Spencer is one of many judges who have voiced their opposition to mandatory sentences. He went on record to protest while sentencing a man, who was a drug addict, to a mandatory LWOP because the man had sold small amounts of crack cocaine out of a hotel room for a few weeks to support his addiction.<sup>84</sup> During the man's sentencing, Honorable Judge Spencer stated:

I think a life sentence for what you have done in this case is ridiculous. It is a travesty. I do not have any discretion about it. I do not agree with it, either. And I want the record to be clear on that. This is just silly. But as I say, I do not have any choice.<sup>85</sup>

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77. *Id.*

78. *See id.* at 331.

79. *See id.* at 332 (consideration that can be taking into account include: former behavior, environment, guilt, personal characteristics, etc.).

80. *Id.* at 331.

81. TURNER & BUNTING, *supra* note 59, at 2.

82. *See id.* at 115 (Judge McClendon reasoned in a concurring opinion that she did not agree with the mandatory sentence, but was forced to follow the mandate of the legislature).

83. *Id.* at 74.

84. *Id.* at 4.

85. *Id.*

Honorable Judge Robert Sweet has also voiced his opposition for his compelled sentencing of an eighteen-year-old to a ten-year mandatory term. Judge Sweet was outraged for having to impose such a lengthy sentence for a first-time offender who was employed at a dispensary as a security guard.<sup>86</sup>

Other cases in which people were sentenced to LWOP for nonviolent drug crimes include the following:

acting as a go-between in the sale of \$10 of marijuana to an undercover officer . . . [,] verbally negotiating another man's sale of two small pieces of fake crack to an undercover officer . . . [,] having a trace amount of cocaine in clothes pockets that was so minute it was invisible to the naked eye . . . [,] possession of a crack pipe . . . [,] and [selling] methamphetamine to pay for a lifesaving bone marrow transplant . . . for his son.<sup>87</sup>

In light of these stories, there is a great deal of injustice being done by the American criminal justice system. When considering the impact that American drug policy has had on human rights and the U.S. justice system, it is clear that mandatory minimum sentences have failed. Instead of mandatory minimums, the American criminal justice system should focus on the rational humane treatment of the individual offender, while continuing its education on the different treatment facilities offered by various institutions.

I propose abolishing mandatory minimum sentences in favor of allowing judges to award appropriate and just sentences in proportion to the offender's guilt and circumstances. In the spirit of the law, mandatory minimums should be discretionary guidelines. We should permit judges to decide an offender's punishment based on a sense of what is just by considering the circumstances of individual cases. Many Americans disagree, but frequently, what a nonviolent drug offender truly needs is rehabilitation, not prolonged imprisonment.<sup>88</sup> We can learn from other countries such as Norway, which emphasizes rehabilitation as its primary goal of incarceration.<sup>89</sup>

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86. Johnson, *supra* note 5, at 324.

87. TURNER & BUNTING, *supra* note 59, at 4, 80.

88. Johnson, *supra* note 5, at 332; DOUG McVAY, VINCENT SCHIRALDI, AND JASON ZIEDENBURG, JUSTICE POLICY INSTITUTE, TREATMENT OR INCARCERATION? NATIONAL AND STATE FINDINGS THE EFFICACY AND COST SAVINGS OF DRUG TREATMENT VERSUS IMPRISONMENT 6 (2004).

89. DEADY, *supra* note 14, at 3.

#### IV. THE CRIMINAL JUSTICE SYSTEM'S APPROACH TO ACHIEVING ITS INCARCERATION GOALS: UNITED STATES VS. NORWAY

When an offender is incarcerated, judicial systems around the world have historically focused their approach to imprisonment on four distinct principles: retribution, incapacitation, deterrence, and rehabilitation.<sup>90</sup> First, retribution, or punishment, focuses on atoning for the wrongdoings of offenders.<sup>91</sup> Second, the objective behind incapacitation is to inhibit criminal offenders from committing future crimes.<sup>92</sup> Third, the idea surrounding deterrence is to educate the offender and the public about the consequences surrounding criminal activity, and to dissuade the general public from committing crimes.<sup>93</sup> Finally, rehabilitation focuses on training and preparing offenders for a “crime-free” life once they are released from prison.<sup>94</sup>

Throughout history, the primary goal of the American criminal justice system has been to punish those who commit crimes.<sup>95</sup> Unlike the U.S., however, Norway has been proactive in approaching their criminal justice system with the primary goal of rehabilitating their offenders.<sup>96</sup> Which is a more effective system? Is it the U.S. with a goal of criminal punishment, or the Norwegian system with a goal of criminal rehabilitation? An analysis of how each country achieves its goals is required to answer this question.

##### A. Retribution

###### 1. The United States

According to the United States Sentencing Commission, “the most commonly-voiced goal of mandatory minimum penalties is the “justness” of long prison terms.”<sup>97</sup> Those in favor of retribution believe that punishing offenders is warranted because the wrongdoer de-

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90. Leslie Patrice Wallace, “*And I Don’t Know Why it is That You Threw Your Life Away*”: *Abolishing Life Without Parole, The Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope, for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 68-69 (2010).

91. Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. PUB. POL’Y 21, 23 (2003).

92. Joanna R. Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, 46 U. MICH. J.L. REFORM 703, 723 (2013).

93. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71.

94. *Id.* at 70.

95. Cameron, *supra* note 74.

96. DEADY, *supra* note 14, at 3.

97. U.S. SENT. COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL JUSTICE SYSTEM 13 (1991).

serves to be reprimanded for the crimes they have committed.<sup>98</sup> In addition, those in favor of retribution believe long-term sentencing is “payback” and a way to provide closure for the affected community.<sup>99</sup> Conversely, critics of the retribution system argue that punishment is more so revenge than it is just.<sup>100</sup> As the world’s model of fairness and justice, the American criminal justice system, should strive more. Instead, the American criminal justice system horrifically imposes ruthless penalties that abuse many of the basic human rights laws.<sup>101</sup> However, in too many circumstances, long-term prison sentences, including life sentence, do not serve the objectives that a criminal justice system strives to achieve. A basic principle followed by many is that “the punishment [should] fit the crime.”<sup>102</sup> But in reality, do they?

## 2. Norway

Unlike the U.S., the Norwegian culture does not approve of the concept of vengeance.<sup>103</sup> Even outside the criminal justice system, the Norwegian community has a strong disregard for retribution.<sup>104</sup> Due to this, the Norwegian criminal justice system is able to more justly and objectively sentence its offenders.

### B. Incapacitation

#### 1. The United States

Incapacitation, or imprisonment, is often defined as the offenders’ physical detention to prevent them from committing new crimes.<sup>105</sup> The Journal of Crime and Justice has noted that incapacitation is a “social experience that places offenders in a unique social domain – the “society of captives” – and that it qualitatively restruc-

98. See David A. Starkweather, *The Retributive Theory of “Just Deserts” and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 866 (1992).

99. See L. Harold de Wolf, *From Retribution to Prevention and Social Restoration*, 33 JURIST 25, 47 (1973); Spear It, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1, 5 (2013); HUMAN RIGHTS WATCH, NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION 7-9 (May 4, 2008), [https://www.hrw.org/sites/default/files/related\\_material/2014\\_US\\_Nation\\_Behind\\_Bars\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/2014_US_Nation_Behind_Bars_0.pdf).

100. See Spear It, *supra* note 99, at 43.

101. See Molly M. Gill, *Let’s Abolish Mandatory Minimums: The Punishment Must Fit the Crime*, 36 HUM. RTS. 4 (2009); see also Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 541, 542 (2004).

102. John Alan Hamilton, *Making the Punishment Fit the Crime*, J. AM. INST. CRIM. L. & CRIMINOLOGY 159 (1921).

103. Jou, *supra* note 67, at 304.

104. *Id.*

105. See Andenaes, *supra* note 63, at 69; *Incapacitation*, U.S. LEGAL DICTIONARY, <https://definitions.uslegal.com/i/incapacitat-sentencing/> (last visited Jan. 25, 2017).

ture their lives from ones of freedom to ones of substantial constraint.”<sup>106</sup> In direct contradiction to its intended purpose, many argue that by confining the offenders together, they expose each other to further levels of criminal influence, which inherently creates an environment where criminal ideals, skills and thought processes are both learned and hardened.<sup>107</sup> According to the social learning theory, a nonviolent drug offender’s likelihood of living a criminal life post-release is significantly increased once they have spent time with other criminals in confinement.<sup>108</sup>

In addition, individuals in support of incapacitation argue that the best way to extinguish the drug epidemic in the U.S. is to imprison drug offenders for long periods of time.<sup>109</sup> Nevertheless, since the U.S. has begun its “War on Drugs,” this strategy has thus far been proven ineffective, as drug use in America today is as high as it has ever been.<sup>110</sup> The system creates a cynical effect, where drug dealers who are eventually incarcerated are simply replaced by new ones.<sup>111</sup>

In addition, lengthy prison sentences lose their value because offenders serving these sentences eventually adapt and endure the punishment.<sup>112</sup> For example, the average prison sentence for federal drug offenders in the U.S. is 11.3 years.<sup>113</sup> Also, the Bureau of Justice Statistics estimates 35 percent of federal drug offenders have either no prior record of imprisonment or at most a minimal criminal history.<sup>114</sup> Furthermore, as of October 2015, 49.5 percent of federal inmates have been incarcerated for drug offenses.<sup>115</sup> With that being said, of the entire drug offender population, only 18 percent of those inmates

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106. Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 125 (2009).

107. *Id.* at 125-26.

108. *Id.* at 126.

109. U.S. SENT. COMM’N, *supra* note 97.

110. See Thomas M. Mieczkowski, *The Prevalence of Drug Use in the United States*, 20 CRIME & JUST. 349 (1996); see also NAT’L INST. ON DRUG ABUSE, DRUG FACTS NATIONWIDE TRENDS (June 2015), [https://d14rmgtrwz5a.cloudfront.net/sites/default/files/drugfacts\\_nationtrends\\_6\\_15.pdf](https://d14rmgtrwz5a.cloudfront.net/sites/default/files/drugfacts_nationtrends_6_15.pdf).

111. ALEX HAROCOPOS & MIKE HOUGH, DRUG DEALING IN OPEN-AIR MARKETS 24 (2011-2012), <https://ric-zai-inc.com/Publications/cops-p067-pub.pdf>.

112. Andenaes, *supra* note 63, at 72.

113. U.S. DEPT. OF JUSTICE, NCJ248648, DRUG OFFENDERS IN FEDERAL PRISONS: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 6 (2015).

114. *Id.* at 1.

115. U.S. DEPT. OF JUSTICE, NCJ 250229, PRISONERS IN 2015, at 15 (2016).

were labeled as violent, because of the involvement of weapons.<sup>116</sup> Therefore, this system is inefficient as a way to combat crime.<sup>117</sup>

It seems as if the American criminal justice system would rather incarcerate the offender for life as opposed to rehabilitating them.<sup>118</sup> Nonviolent drug offenders who are serving LWOP have described their experience as “‘a slow death sentence,’ ‘a slow, painful death,’ ‘a slow, horrible, torturous death,’ ‘akin to being dead, without the one benefit of not having to suffer any more,’ . . . [and] ‘You are dead. You do not exist anymore . . . .’”<sup>119</sup>

There are certainly other methods to decrease drug related offenses that are not as excessive as the methods currently being employed by the U.S.<sup>120</sup> While offenders who have committed and been convicted of a crime should face repercussions, imposing these cruel sentences upon them does not fit the crime.<sup>121</sup> Correctional facilities should instead focus their efforts on educating the offenders in order to provide them with the help and skills they need once they are released from prison.<sup>122</sup>

## 2. Norway

The Norwegian criminal justice system considers incapacitation itself, a limitation of freedom, enough of a punishment.<sup>123</sup> Therefore, the sentencing court does not further limit any other rights, and accordingly, criminal wrongdoers have exactly the same rights as every other Norwegian citizen.<sup>124</sup> For example, in Norway, prisoners do not serve their sentences in conditions stricter than necessary, by placing the offender in the lowest level of the security system.<sup>125</sup> The liberal

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116. U.S. DEPT. OF JUSTICE, *supra* note 113, at 5.

117. See Michael Neminski, *The Professionalization of Crime: How Prisons Create More Criminals*, 23 CORE J. 81, 83-84 (2014).

118. TURNER & BUNTING, *supra* note 59, at 9.

119. *Id.*

120. *Breaking the Cycle of Drugs and Crime*, OFF. OF NAT'L DRUG CONTROL POL'Y (1999), <https://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/iv-d.html> (such efforts are deployed to reduce illicit drug use, manufacturing and trafficking; drug-related crime and violence; and drug-related health consequences).

121. DEADY, *supra* note 14, at 5.

122. *Id.* at 4.

123. Kriminalomsorgen, *About The Norwegian Correctional Service* (Nor.), <http://www.kriminalomsorgen.no/information-in-english.265199.no.html>.

124. *Id.*

125. *Id.*

attitude in Norway suggests that the prisoners' loss of liberty is an adequate form of punishment, regardless of the nature of the crime.<sup>126</sup>

The Norwegian penal philosophy is that the traditional, repressive prison system does not work to achieve the sought after goals, one being the goal of sentencing for the offender to return to the community.<sup>127</sup> In addition, the Norwegian approach suggests that the humane treatment of prisoners will greatly improve the inmates' chances of rejoining society upon release.<sup>128</sup> At the core of this belief is the principle of normalization. This entails the preservation of all rights, except the freedom of movement, and allows prison life to bear a resemblance to life outside of prison, so that upon release, the offender will have an easier journey reintegrating into society.<sup>129</sup>

An excellent example of this is Halden, one of Norway's newest maximum-security prisons.<sup>130</sup> Inside, prisoners are given flat screen televisions and refrigerators in every cell.<sup>131</sup> The cells also have barless windows, which allows for more sunlight, and are given community living space and kitchens in order to create a sense of family and togetherness.<sup>132</sup> Furthermore, inmates at Halden have access to the library, computers, hygienic facilities, and even a recording studio, in addition to educational training and programs that will help inmates develop life skills.<sup>133</sup> In some circumstances, inmates are allowed to enjoy the overnight stay of guests.<sup>134</sup> For offenders who are addicted to drugs, the inmates can enter into agreements with authorities who will provide them with more privileges in exchange for regular drug counseling.<sup>135</sup>

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126. Erwin James, *The Norwegian Prison where inmates are treated like people*, GUARDIAN (Feb. 25, 2013), <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people>.

127. DEADY, *supra* note 14, at 3.

128. Kriminalomsorgen, *supra* note 123.

129. Gerhard Ploeg, Opinion, *Norway's Prisons Are Doing Something Right*, N.Y. TIMES (Dec. 18, 2012), <http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/norways-prisons-are-doing-something-right>.

130. William Lee Adams, *Sentenced to Serving the Good Life in Norway*, TIME (July 12, 2010), <http://content.time.com/time/magazine/article/0,9171,2000920,00.html>.

131. *Id.*

132. *Id.*

133. *Inside Norway's Halden Prison*, STORY INST., <http://www.thestoryinstitute.com/halden/> (last visited Jan. 23, 2017).

134. Eleanor Muffitt, *The old debate: punish prisoners, or rehabilitate them?* TELEGRAPH (Dec. 18, 2013), <http://www.telegraph.co.uk/news/uknews/crime/10514678/The-old-debate-punish-prisoners-or-rehabilitate-them.html>.

135. Casey Tolan, *Inside the Most Humane Prison in the World, Where Inmates Have Flat-screen TVs and Cells are like Dorms*, FUSION (Sept. 16, 2016), <http://fusion.net/story/340235/norway-halden-prison-most-humane/>.

Bastoy, founded in 1982, is another example of a successful prison in Norway.<sup>136</sup> With no armed guards or fences, inmates and guards are not assigned uniforms and are encouraged to dress freely.<sup>137</sup> Located on an island, Bastoy provides ocean views and housing accommodations for up to six inmates with each holding their own key.<sup>138</sup>

Every inmate at Bastoy is assigned a paid job from 8:30 a.m. to 3:30 p.m. such as gardening, farming, and cutting trees for firewood.<sup>139</sup> An example of an interesting job is supervising horses that are utilized to cart wood and various supplies around the island.<sup>140</sup> Inmates are not required to wear shackles or electronic monitor bracelets, at times without guard supervision.<sup>141</sup> Another example of how Bastoy prepares inmates for life outside is that only one meal per day is given in the prison's dining hall.<sup>142</sup> Inmates are given a monthly allowance for food where they can shop at the island's supermarket where they purchase food and prepare breakfast and dinner.<sup>143</sup>

Now, why treat prisoners this humanely when they are incarcerated for crimes such as murder, drug trafficking or rape? This is because the goal in Norway is to rehabilitate the offender and get them ready to rejoin the population as normal, law-abiding citizens.<sup>144</sup> To dehumanize prisoners is to take away their ability to survive on their own.<sup>145</sup> Prisons such as Bastoy and Halden teach their inmates to become better citizens. Thus, this model of open prisons where inmates are given a chance to live like regular citizens should be used by the American criminal justice system.

### C. Deterrence

#### 1. The United States

Unlike retribution, deterrence focuses on the prevention of crime in the future.<sup>146</sup> Deterrence theorists purport that offenders calculate

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136. John D. Sutter, *Welcome to the World's Nicest Prison*, CNN (May 24, 2012), <http://www.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/>.

137. *Id.*

138. James, *supra* note 126; Sutter, *supra* note 136.

139. Sutter, *supra* note 136.

140. *Id.*

141. *Id.*

142. James, *supra* note 126.

143. Sutter, *supra* note 136.

144. *See id.*

145. *See id.*

146. Frase, *supra* note 93.

prison as an outcome when they choose to commit a crime.<sup>147</sup> Mandatory minimum sentences are proposed to keep inmates incarcerated, so that they do not commit future crimes, and to discourage citizens from committing similar crimes.<sup>148</sup> Nevertheless, the overflowing American prison population has come to represent the failure that is the U.S. criminal justice system. Rather than prevent future victims, our justice system is predicated on a resulting fearful population, a political class that validates the public's fears, and a punitive approach that highly regards retribution by victims, their families and society.<sup>149</sup> This understanding of "deterrence" is not conducive to discouraging current inmates from committing further crimes.

## 2. Norway

In Norway, deterrence takes on an entirely different meaning.<sup>150</sup> There, it is believed that the concept of deterring crime can be manifested, not through fear but through the development of a collective sense of morals and values.<sup>151</sup> In turn, Norwegian citizens tend to abstain from criminal activity because it goes against the moral fiber of the community, and not because the criminal act would be followed by a horrid punishment.<sup>152</sup> In response to critics of the Norwegian criminal justice system who often view it as being too lax, the Norwegian Ministry of Justice has said, "Prisoners are required to take responsibility for their actions – past, present and future, we believe that it is more effective for a person to want to stay away from crime than for our system to try and scare them away from it."<sup>153</sup> Although it is unclear whether this approach would work in the U.S., because Norway's cultural beliefs and trust in people are vastly different than that in the U.S., it is a possibility to consider.

### D. Rehabilitation

#### 1. The United States

Rehabilitation, or treatment, refers to "any measure taken to change an offender's character, habits, or behavior patterns so as to

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147. Daniel S. Nagin et al., *supra* note 106.

148. U.S. SENT. COMM'N, *supra* note 97, at 13.

149. *The Norwegian Prison Where Inmates are Treated like People*, NEWS FORAGE (Aug. 22, 2013), <http://www.newsforage.com/2013/08/the-norwegian-prison-where-inmates-are.html>.

150. Lappi-Seppälä, *supra* note 54, at 350.

151. *Id.*

152. *Id.* at 351.

153. Ploeg, *supra* note 129.

diminish his criminal propensities.”<sup>154</sup> While there are many strategies to accomplish this goal, the U.S. criminal justice system is geared towards punishing offenders rather than rehabilitation.<sup>155</sup> According to the BOP report, three out of four prisoners involved in drug related offenses are rearrested within five years.<sup>156</sup> Instead of mainly focusing on punishing prisoners, the U.S. should implement more rehabilitation programs such as education and workshops, which build life skills. This is necessary because the high recidivism rate is generally attributed to parolees lacking basic life skills and education.<sup>157</sup> Without such resources, nonviolent drug offenders are most likely to resort to the same behaviors that put them in prison in the first place.<sup>158</sup> In turn, this will continue to keep prisons overcrowded.<sup>159</sup>

Unfortunately, Americans want their prisoners punished first and rehabilitated second, despite the fact that research proves that certain forms of rehabilitation have been shown to reduce the risk of future offending.<sup>160</sup> The BOP has confirmed the importance of treatment in reducing recidivism and future drug use.<sup>161</sup> According to the BOP reports, studies on drug use show that prisoners who participated in a residential drug abuse treatment program were less likely to have evidence of post-release drug use.<sup>162</sup> Their research concluded that 49.9 percent of male inmates who fulfilled the drug abuse program were likely to use drugs within 36 months after being released.<sup>163</sup> In comparison, 58.5 percent of inmates who did not participate in the treatment program were likely to use drugs in the same amount of time after release.<sup>164</sup> These statistics highly suggest that drug treatment programs have a significant impact on the inmates’ post-release lifestyle.<sup>165</sup>

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154. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 11 (Marshall Cohen et al. eds., 1976).

155. TURNER & BUNTING, *supra* note 59, at 200.

156. FED. BUREAU OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 7 (Apr. 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

157. DEADY, *supra* note 14, at 4.

158. *See id.* at 2.

159. *See* Pearl Jacobs, *The Challenge of Prison Overcrowding and Recidivism*, in SACRED HEART U. CRIM. JUST. FAC. PUB. 156 (2005).

160. DEADY, *supra* note 14, at 2; FED. BUREAU OF PRISONS, *TRIAD DRUG TREATMENT EVALUATION PROJECT* 13 (2000).

161. FED. BUREAU OF PRISONS, *supra* note 160.

162. *Id.* at 3.

163. *Id.* at 11.

164. *Id.*

165. *Id.* at 13.

Further, LWOP for nonviolent drug crimes does not consider the inmates' ability for rehabilitation and fails to provide public safety benefits.<sup>166</sup> Further, the imprisonment of inmates is unjustified because of dwindling community drug treatment programs and mental health resources.<sup>167</sup> The ACLU has documented numerous examples, where offenders violated the law due to a drug addiction; however, the state never offered these offenders state-sponsored drug treatment even though the offenders were agreeable to treatment.<sup>168</sup> In sum, rehabilitation aimed at treating inmates' drug addiction, will reduce both recidivism and crime rate.<sup>169</sup>

## 2. Norway

The Norwegian criminal justice system has a very progressive approach to sentencing. The criminal justice system in Norway prioritizes rehabilitation as their primary strategy, as it is proven to reduce recidivism. It aims to ensure that those who have gone off on the wrong track in life get a fair chance to come back.<sup>170</sup> No matter what horrific crime they have committed, prisoners are treated as normal citizens and maintain their right to be treated fairly and compassionately.<sup>171</sup> Imprisonment is used less frequently and for shorter durations because nonviolent drug offenders are given sanctions, probation and community service instead of incarceration if it is feasible.<sup>172</sup> For those offenders who end up in prison, incarceration is geared toward reducing an offender's risk of returning to a life of crime after release.<sup>173</sup> This is achieved by great emphasis on rehabilitation and teaching life skills rather than focusing on punishment alone.<sup>174</sup>

This approach has a very successful result in terms of reducing the risk of re-offense.<sup>175</sup> There are scholars who argue that the Norwe-

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166. TURNER & BUNTING, *supra* note 59, at 12.

167. *Id.*

168. *Id.* at 5.

169. Redonna Chandler, Bennett Fletcher & Nora Volkrow, *Treating Drug Abuse and Addiction in the Criminal Justice System*, 301 JAMA 183, 184 (2009).

170. Willow Robinson, *Prisoners Deserve Chance at New Life*, THE OLYMPIAN (Dec. 25, 2016), <http://www.theolympian.com/opinion/letters-to-the-editor/article122679274.html>.

171. See Sean K. Moynihan, *They Don't Do It Like My Clique: How Group Loyalty Shapes the Criminal Justice Systems in the United States and Norway*, 33 ARIZ. J. INT'L & COMP. L. 423, 429 (2016).

172. See DEADY, *supra* note 14, at 3.

173. *Id.*

174. *Id.*

175. Ploeg, *supra* note 129.

gian criminal justice system is too lax and weak on crime due to its focus on compassion and rehabilitation, but the numbers suggest otherwise.<sup>176</sup> For example, only 20 percent of inmates who serve time in Norway's prisons reoffend within two years of being released.<sup>177</sup> Bastoy's recidivism rate, at 16 percent, is even lower.<sup>178</sup> When compared to U.S.'s recidivism rate of 40 percent, the data suggests that Norway's penal system works much better than the American penal system.<sup>179</sup> The Norwegian criminal justice system assures that every prisoner feels respected and welcomed back in society.<sup>180</sup> With a major focus on rehabilitation, Norwegian prison systems fight crime by giving the offenders the tools to be productive members of society and avoid crime upon their release.<sup>181</sup>

## V. CONCLUSION

What are the fundamental goals of incarceration? Theoretically, the goals of incarceration in the American justice system are retribution, incapacitation, deterrence, and rehabilitation. In reality, however, not all of these objectives are successfully accomplished. In order to guarantee the successful implementation of these theoretical goals, the U.S. criminal justice system must shift its focus from punishment to rehabilitation, particularly for nonviolent drug offenders. What these offenders really need is rehabilitation, not prolonged imprisonment. The first step in changing this senseless system is to eliminate mandatory minimum sentences for nonviolent drug offenders to enable judicial discretion, which has proved to be a successful method in Norway.

In determining the appropriate punishment for wrongdoers, judges in Norway primarily evaluate the circumstances surrounding individual cases, and secondarily employ sentencing guidelines to their discretion. The Norwegian criminal justice system does not promote or utilize severe punishment, but it is guided by righteousness and perceived fairness. The reason that incarceration goals in Norway are better accomplished is due to their compassionate and humane treatment of inmates. Further, the Norwegian criminal justice system sets out

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176. DEADY, *supra* note 14, at 4-5.

177. Sutter, *supra* note 136.

178. *Id.*

179. *Id.*

180. See Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. OF AM. LEGAL STUD., 263, 293 (2013).

181. Moynihan, *supra* note 171.

guidelines and resources to appropriately rehabilitate their offenders so that they may successfully reintegrate into society.

Bearing in mind America's long history of its war on drugs and cultural values, numerous political leaders and other members of society would almost certainly have intense objections to this superior approach, which has proven workable in Norway, and which places a greater emphasis on rehabilitation rather than on punishment. The American criminal justice system's desire to punish results in tremendous counterproductive effects on both society and the offender. Statistical evidence has proven that there are other available alternatives that are more effective at significantly reducing crime. Perhaps punishment with a predominant purpose to punish a wrongdoer is not to serve justice, but it is just a cover to attain retribution. Shouldn't the American criminal justice system aspire to achieve more than that? The goal in the U.S. should be to make prisoners better citizens, which will, in turn, reduce the recidivism rate, crime rate, and ultimately the prison population.