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The Case for Second Chances: A Pathway to Decarceration in Maine

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Cover Page Footnote

Catherine Besteman is the Francis F. and Ruth K. Bartlett Professor of Anthropology at Colby College. She founded Freedom & Captivity, the Freedom & Captivity Curriculum Project, the Freedom & Captivity Archive of carceral experience, the Colby Across the Walls prison education program, and the Colby College Justice Think Tank and is a host for Justice Radio. Her research and publications focus on carcerality, security, militarism, displacement, and community-based activism and transformation. She thanks Jackie Stevens, Professor of Political Science at Northwestern University, for encouraging her to write a law review article about the pathway to decarceration in Maine. Leo Hylton is a PhD student in Peace and Conflict Resolution. His education and work are based in trauma-informed, healing-centered Restorative Justice practices, and are focused on Social Justice Advocacy and Activism, with a vision toward an abolitionist future. Thanks to all those who continue to work towards co-creating a future grounded in healing-centered justice, accountability, and repair.

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Catherine Besteman & Leo Hylton

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THE CASE FOR SECOND CHANCES: A PATHWAY TO DECARCARATION IN MAINE

Catherine Besteman* & Leo Hylton**

ABSTRACT

The Article argues that Maine incarcerates too many people, for too long, for too many things, at too great of an expense. We offer evidence to support this claim, briefly review some of the criminal legal legislation that shaped our present reality, and show how recent efforts at reform have been, at best, only modestly successful. In concert with a growing number of expert voices across the country calling for strategies of decarceration, our goal is to demonstrate the need for second chance legislation in Maine in the form of the reinstatement of parole, an effective clemency process, a far-reaching reevaluation of custody levels, and a new revision of the Maine Criminal Code. We argue that Maine needs a restorative pathway to decarceration that would meaningfully reduce the number of people in prison and recidivism rates, while emplacing broader and more effective responses to harm than that afforded by incarceration alone.

INTRODUCTION: INCARCERATION IN MAINE

At first glance, Maine's use of incarceration does not seem particularly problematic. Maine has one of the lowest crime rates as well as one of the lowest rates of incarceration in the country.¹ From January through September 2023, Maine's adult prisons held an average of 1,732 adults, including 1,564 men and 168 women.² In 2022, the Long Creek Youth Development Center held an additional 27 children.³ In 2021, 694 people entered Maine prisons to begin their sentences, and 769 departed at the conclusion of their sentences (although 2022 showed a net gain

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1. *Safest States 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/safest-states> [https://perma.cc/SY5X-4EVU] (last visited Dec. 11, 2023); Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

2. RANDALL LIBERTY & ANTHONY CANTILLO, ME. DEP'T OF CORR., SEPTEMBER 2023 MDOC ADULT DATA REPORT 3 (2022).

3. Callie Ferguson, *Maine Kids in Youth Prison Are Often Locked in Cells Because of Staff Shortages*, ME. PUB. (Oct. 24, 2022), <https://www.mainepublic.org/news/2022-10-24/maine-kids-in-youth-prison-are-often-locked-in-cells-because-of-staff-shortages>.

of 13.75 individuals).⁴ Currently, another 62 people are finishing out their sentences on the Supervised Community Confinement Program (SCCP), and 3,321 are on probation.⁵ In total, about 0.6% of the state's population is currently under some form of Maine Department of Corrections (MDOC) confinement or supervision, a figure that is low by national standards.⁶

MDOC is celebrated as one of the most progressive in the country, with an expanding educational program that includes prison residents earning master's and PhD degrees; increasingly accessible communications infrastructure for residents; vocational and skills development programs; an Earned Living Unit at Maine State Prison (MSP) that is a model of "normalization" followed by other states; new opportunities for incarcerated Mainers to teach and work remotely while incarcerated; the near-eradication of solitary confinement; the introduction of medication assisted treatment for opioid use disorder; a top-down expectation of respectful language and behavior; and more.⁷ Maine is one of two states that allows incarcerated citizens to vote,⁸ one of a handful that allows those with criminal records to run for public office with no waiting period or pardon,⁹ and the only state that allows those with criminal records to serve on a jury post-release.¹⁰

And yet, serious problems remain. This review offers an argument that the State incarcerates too many people, for too long, for too many things, at too great of an expense. We offer evidence to support this claim, briefly review some of the legislation that shaped our present reality, and show how recent efforts at reform have been, at best, only modestly successful. In concert with a growing number of expert voices across the country calling for strategies of decarceration, our goal is to demonstrate the need for second-chance legislation in Maine in the form of the

4. RANDALL LIBERTY & RYAN THORNELL, ME. DEP'T OF CORR., 2021 YEAR END MDOC ADULT DATA REPORT 14 (2022); RANDALL LIBERTY & RYAN THORNELL, ME. DEP'T OF CORR., DECEMBER 2022 MDOC ADULT DATA REPORT 17 (2023).

5. SEPTEMBER 2023 MDOC ADULT DATA REPORT, *supra* note 2, at 17. But a separate MDOC document states that there are sixty-six people serving the conclusion of their sentences on SCCP. ME. DEP'T OF CORR., *DOC Responses to Other Information Requests* 1, <https://legislature.maine.gov/doc/9093> (prepared for the Commission to Examine Reestablishing Parole in Maine). SCCP is administered by MDOC and is a program through which incarcerated residents can apply to serve up to the final thirty months of their sentence on community confinement under MDOC supervision. See 34-A M.R.S. § 3036-A(2)(C-1) (2023).

6. *Maine Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/ME.html> [<https://perma.cc/JG44-PVEC>] (last visited Dec. 11, 2023); see also E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES 2021 - STATISTICAL TABLES 7 (2023), <https://bjs.ojp.gov/document/cpus21st.pdf> (demonstrating comparative figures).

7. See generally *MSP Programs & Services*, ME. DEP'T OF CORR., <https://www.maine.gov/corrections/msp/programs> [<https://perma.cc/83ZZ-J89B>] (last visited Dec. 9, 2023). The Department's mission statement is "Making our communities safer by reducing harm through supportive intervention, empowering change and restoring lives." *About*, STATE OF ME. DEP'T OF CORR., <https://www.maine.gov/corrections/about> [<https://perma.cc/K84T-YFCQ>] (last visited Dec. 11, 2023).

8. *Felon Voting Rights*, NAT'L CONF. OF STATE LEGIS., <https://www.ncsl.org/elections-and-campaigns/felon-voting-rights> [<https://perma.cc/MC9W-S9HX>] (last updated Dec. 5, 2023).

9. J. Brian Charles, *On Felons' Rights, 2 States Take 2 Different Directions*, GOVERNING (Oct. 26, 2018), <https://www.governing.com/archive/gov-florida-louisiana-felon-voting-rights-elected-office.html>.

10. James M. Binnall, *Felon Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 ME. L. REV. 71, 81 (2018).

reinstatement of parole (alongside an expansion of the SCCP and good time credits), an effective clemency process, a far-reaching reevaluation of custody levels, and a new revision of the Maine Criminal Code. We argue that Maine needs a restorative pathway to decarceration that would meaningfully reduce the number of people in prison and recidivism rates, while establishing broader and more effective responses to harm than those afforded by incarceration alone.

Our conclusion offers suggestions for how Maine could build a restorative pathway to decarceration that would address some of the most egregious injustices in our current system, save Maine millions annually in taxpayer dollars, and contribute in productive ways to reducing harm and enhancing public safety.

I. THE PROBLEM

While Maine may lead the United States with its low rate of incarceration, Maine still incarcerates more people per capita than most countries on earth do.¹¹ Maine's sentencing and incarceration practices reflect those of the United States more generally, although at a somewhat more modest level. As is often repeated, the United States is the world's largest jailer, with less than 5% of the global population but almost 25% of the world's prisoners¹² (although the United States' global share of prisoners declined slightly from 2019 to 2022 due to the COVID-19 pandemic).¹³ The United States incarcerates a disproportionately high number of people of color, with Black men incarcerated at six times the rate of white men.¹⁴ The rate of female incarceration has skyrocketed since 1975, primarily due to crimes related to drug use and possession.¹⁵

Overall, the rate of imprisonment in the United States more than quadrupled between 1970 and 2010; by 2021, 5.4 million adults were under correctional supervision of some kind.¹⁶ Changes in the law, and not rising crime rates, drove the 222% increase in the rate of incarceration in state prisons between 1980 and 2010.¹⁷ Nationally, one in forty-seven adults is under some form of corrections supervision,

11. *Maine Profile*, *supra* note 6.

12. *Human Rights and Criminal Justice*, ACLU, <https://www.aclu.org/issues/human-rights/human-rights-and-criminal-justice> [<https://perma.cc/WJV4-T5TZ>] (last visited Dec. 11, 2023).

13. See John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/>; ASHLEY NELLIS, THE SENTENCING PROJECT, MASS INCARCERATION TRENDS 2 fig.1 (2023); E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2020 - STATISTICAL TABLES (2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

14. TONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES 58 (2018); NELLIS, *supra* note 13, at 4; see also NAT'L ACADS. OF SCIS., ENG'G & MED., REDUCING RACIAL INEQUALITY IN CRIME AND JUSTICE: SCIENCE, PRACTICE, AND POLICY 297 (Bruce Western et al. eds., 2023).

15. See NELLIS, *supra* note 13, at 7; Tiana Herring, *Since You Asked: What Role Does Drug Enforcement Play in the Rising Incarceration Rates of Women?*, PRISON POL'Y INITIATIVE (Nov. 10, 2020), <https://www.prisonpolicy.org/blog/2020/11/10/women-drug-enforcement/>.

16. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1 (Jeremy Travis et al. eds., 2014); CARSON & KLUCKOW, *supra* note 6, at 1.

17. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 16, at 53.

and one in every two people in the United States has had a close relative incarcerated.¹⁸ Prison sentences in the United States are far longer, on average, than in all other countries.¹⁹

Additionally, the United States has one of the highest recidivism (return to incarceration) rates in the world.²⁰ According to the U.S. Department of Health and Human Services, “each year, more than 600,000 individuals are released from state and federal prisons. Another nine million cycle through local jails. More than two-thirds of prisoners are rearrested within three years of their release and half are reincarcerated.”²¹

The United States is one of the only countries on earth that sentences people to life sentences without the possibility of parole, or “death by incarceration” (DBI), holding 83% of the people serving “life without parole” (LWOP) sentences in the entire world.²² Many argue that the United States—with expenditures on police, prisons, and courts that are twice as much as those reserved for income supplements, food stamps, and welfare—has turned to incarceration as an ill-fated solution to social problems, pouring money into a consistently failing system.²³ As one report from 2015 asks, “[w]hat other social intervention has a cost of over \$50 billion annually, a failure rate of 60% to 75%, and has been tolerated for nearly four decades?”²⁴

18. RICH KLUCKOW & ZHEN ZENG, U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 - STATISTICAL TABLES 1 (2022), <https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf>; FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA’S FAMILIES 7 (2018), <https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf>.

19. LILA KAZEMIAN, LONG SENTENCES: AN INTERNATIONAL PERSPECTIVE 3, 5–6 (2022), https://assets.foleon.com/eu-central-1/de-uploads-7e3kk3/41697/international_comparison_kazemian.e64a9058586b.pdf.

20. *Recidivism Rates by State 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/recidivism-rates-by-state> [<https://perma.cc/C2TG-RPRT>] (last visited Dec. 11, 2023).

21. *Id.*; *Incarceration & Reentry*, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0> [<https://perma.cc/R2N5-F84N>] (last visited Dec. 11, 2023).

22. *See, e.g.*, Terrell Carter et al., *Redeeming Justice*, 116 NW. U. L. REV. 315, 350 (2021); Memorandum from Signatory Organizations to United Nations Special Procedures (Sept. 15, 2022) (discussing DBI); KAZEMIAN, *supra* note 19, at 4.

23. *See generally* Christopher Ingraham, *U.S. Spends Twice as Much on Law and Order as It Does on Cash Welfare, Data Show*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/business/2020/06/04/us-spends-twice-much-law-order-it-does-social-welfare-data-show/>; Ed Lazere, *Using Federal Relief Funds to Invest in Non-Police Approaches to Public Safety*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 18, 2021), <https://www.cbpp.org/research/state-budget-and-tax/using-federal-relief-funds-to-invest-in-non-police-approaches-to> [<https://perma.cc/N8ST-YAVG>] (discussing spending); PLATT, *supra* note 14; DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION AND A ROAD TO REPAIR (2019); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JORDAN T. CAMP, INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE (2016); Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL’Y REV. 1, 8 (2022) (discussing using prisons as a solution for social problems).

24. Carrie Pettus-Davis & Matthew W. Epperson, *Smart Decarceration: Guiding Concepts for an Era of Criminal Justice Transformation* 18 (Wash. Univ. Ctr. for Soc. Dev., Working Paper No. 15-53, 2015), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1573&context=csd_research. The current cost is now estimated to be even greater. Michael McLaughlin et al., *The Economic Burden of*

Despite its low incarceration rates, Maine demonstrates many of these same problems. The number of people incarcerated in Maine has been rising, beginning in the early 1970s and rapidly increasing following the 1976 revision of the Maine Criminal Code.²⁵ The revision introduced “truth in sentencing,” eradicated parole, created new categories of crime, expanded the number of behaviors that carried a sentence, lengthened sentences for many crimes, and lifted the cap on sentences handed down to young adults under the age of twenty-eight.²⁶ The code also increased the discretionary powers of judges “to an extent unknown in other American jurisdictions.”²⁷

As a result, the number of people sent to jail and prison rose and judges imposed much longer sentences—two to three times longer for some crimes.²⁸ As of 2017, the number of Mainers in jail had increased 649% since 1970 and the number in prison had increased 151% since 1983.²⁹ While the number is currently stabilizing, prison admissions in Maine increased by 34% just in the short period between 2012 and 2018.³⁰

A significant portion of the rise in incarceration post-1976 was due to new drug laws and the proliferation of actions and behaviors newly criminalized in statutory law. Class A drug arrests doubled from 2008 to 2018,³¹ and in 2021 approximately 40% of all people entering prison were convicted of drug furnishing, possession, or illegal importing.³² The incarceration of women, in particular, grew fifteen-fold from 1978 to 2017.³³ As of 2019, the MDOC reported that 72% of women in Maine prisons were convicted of drug-related charges.³⁴

Incarceration in the U.S. 2 (Fla. State Univ. Inst. of Just. Rsch. & Dev., Working Paper No. IJRD-072016, 2016), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Economic_Burden_of_Incarceration_IJRD072016_0_0.pdf (“The \$80 billion spent annually on corrections is frequently cited as the cost of incarceration, but this figure considerably underestimates the true cost of incarceration by ignoring important social costs. These include costs to incarcerated persons, families, children, and communities. This study draws on a burgeoning area of scholarship to assign monetary values to twenty-three different costs, which yield an aggregate burden of one trillion dollars. This approaches 6% of gross domestic product and dwarfs the amount spent on corrections. For every dollar in corrections costs, incarceration generates an additional ten dollars in social costs. More than half of the costs are borne by families, children, and community members who have committed no crime. Even if one were to exclude the cost of jail, the aggregate burden of incarceration would still exceed \$500 billion annually.”).

25. DONALD F. ANSPACH ET AL., MAINE REJECTS INDETERMINACY: A CASE STUDY OF FLAT SENTENCING AND PAROLE ABOLITION 120–22 (1983).

26. *Id.* at 26–37.

27. JOHN H. KRAMER ET AL., ASSESSING THE IMPACT OF DETERMINATE SENTENCING AND PAROLE ABOLITION IN MAINE 14 (1978), <https://www.ojp.gov/pdffiles1/Digitization/61428NCJRS.pdf>.

28. ANSPACH ET AL., *supra* note 25, at 71–81.

29. VERA INST. OF JUST., INCARCERATION TRENDS IN MAINE 1 (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-maine.pdf>.

30. BEN SHELOR ET AL., JUSTICE REINVESTMENT IN MAINE 24 (2019), <https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Maine-second-presentation1.pdf>.

31. *Id.* at 15.

32. 2021 YEAR END MDOC ADULT DATA REPORT, *supra* note 4, at 15–16.

33. VERA INST. OF JUST., *supra* note 29, at 2.

34. Dan Neuman, *72% of Women in Maine's Prisons are There on Drug-Related Charges*, THE BEACON (July 18, 2019), <https://mainebeacon.com/72-of-women-in-maines-prisons-are-there-on-drug-related-charges>. This statistic includes those convicted of both drug and theft charges. *Id.*

Another contributor to the rising prison population was the eradication of parole. Whereas prior to 1976 people sentenced to life spent an average of eleven years in prison, now those who receive life sentences actually spend the entire remainder of their lives in a cage.³⁵ Post-reform release opportunities based on rehabilitation or geriatric care became effectively non-existent.³⁶

Among those most affected by the 1976 revision were young adults aged eighteen to twenty-seven, who became exposed to extreme sentences despite the fact that recent scientific studies suggesting that “emerging adults” aged eighteen to twenty-seven are still developing neurologically and thus show similar behavioral characteristics as those under age eighteen.³⁷ Scientists argue that eighteen is a relatively arbitrary age for determining “adulthood” in the criminal legal system.³⁸ The impact of neurological development on criminal behavior is reflected in the age-crime curve, which displays a peak of criminal activity in the late teens and early twenties, followed by a swift decline in later years.³⁹ In Maine currently, the number of arrests of those in their late teens to early twenties is far higher than their percentage of the population, and many individuals receive longer—and in some cases vastly longer—sentences than would have been the case before 1976.⁴⁰

While incarceration is usually considered necessary to keep communities safe from crime, it is worth pausing to consider who is being incarcerated for criminal behavior. The portrait of Maine’s carceral landscape shows the extent to which incarceration is used as a response to social problems. Drug use and substance use disorder (SUD) have been major drivers of incarceration rates, most spectacularly for women, but poverty, mental illness, and trauma are also critically important. As of December 2022, 985 out of 1,654 incarcerated residents were prescribed psychiatric medications for various disorders including depression, anxiety, hypertension, and bipolar disorder.⁴¹ At the end of 2021, 600 people in MDOC facilities—or one-third of the total population—were receiving medication for substance use disorder (MSUD), representing 75% of MDOC residents with opiate use disorder.⁴² In 2019, the *Maine Beacon* and McLean Hospital reported that about

35. ANSPACH ET AL., *supra* note 25, at 78.

36. KRAMER ET AL., *supra* note 27; ANSPACH ET AL., *supra* note 25, at 23; Craig McEwen & Evelyn Hanneman, *Criminal Justice Policy Strategies for Maine*, 5 ME. POL’Y REV. 53, 62 (1996); E-mail from Dr. Ryan Thornell, Deputy Comm’r Corr., Me. Dep’t Corr., to Dr. Catherine Besteman, Francis F. Bartlett & Ruth K. Bartlett Professor of Anthropology, Colby Coll. (Nov. 18, 2022) (on file with author) (reporting that there were 117 individuals serving life or virtual life sentences in Maine, although the October 2022 report prepared by MDOC put the number at 90).

37. Christopher Northrop et al., *What’s My Age Again?: Adolescent Development and the Case for Expanding Original Juvenile Court Jurisdiction and Investing in Alternatives for Emerging Adults Involved in Maine’s Justice System*, 74 ME. L. REV. 243, 259 (2022).

38. *Id.* at 260.

39. *Id.* at 259; *From Youth Justice Involvement to Young Adult Offending*, NAT’L INST. JUST. (Mar. 10, 2014), <https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending> [<https://perma.cc/MN5X-KWCL>]; KYLE C. BARRY ET AL., POLICIES AND POLLING ON REDUCING EXCESSIVE PRISON TERMS 4 (2020), <https://www.filesforprogress.org/memos/reducing-excessive-prison-sentences.pdf>.

40. Northrop et al., *supra* note 37, at 259; ANSPACH ET AL., *supra* note 25, at 71.

41. DECEMBER 2022 MDOC ADULT DATA REPORT, *supra* note 4, at 4.

42. 2021 YEAR END ADULT DATA REPORT, *supra* note 4, at 10.

90% of incarcerated women in Maine have experienced multiple traumas such as sexual, physical, or verbal abuse.⁴³ In recent years, 18% to 38% of adults in MDOC facilities have not completed high school, a statistic that is likely related to class status as well.⁴⁴ Maine's struggling and impoverished indigent legal defense system is widely criticized for its inability to provide quality legal counsel to poor people facing criminal charges.⁴⁵ Some evidence suggests racial inequities in sentencing might also be a factor, although there is a lack of sufficient data to substantiate this claim. Like the rest of the nation's, Maine's sentencing patterns are racially disproportionate, with Black people representing just 1.8% of Maine's population, but 11% of its prison population and 12% of those with life and virtual life sentences.⁴⁶ The rate of incarceration of Black people in Maine is nine times higher than the rate of incarceration of white people—twice the national average—making Maine the fifth-worst in the nation for racial disparities in prison.⁴⁷ Additionally, 20% of those serving life or virtual life sentences are Black, Indigenous, and People of Color (BIPOC), whereas less than 6% of Maine's population is BIPOC.⁴⁸ In short, the majority of individuals in Maine's prisons face challenges related to mental illness, SUD, trauma, poverty, inadequate legal representation, and racism.

Although our focus here is on prisons, it is worth noting that an estimated 40,000 people circulate through Maine jails every year, another indication of Maine's problematic and costly carceral churn.⁴⁹ Much of this is due to the growing number of behaviors that are criminalized. As of 2015, Maine had 1,100 statutes on the books that carried minimum sentences or fines.⁵⁰

In addition to those incarcerated in Maine's prisons and jails, there are 5,400 people under some form of MDOC supervision in their community: about 4,200 people are under what is called "active probation," which requires them to engage in

43. Neumann, *supra* note 34, at 6; *McLean Hospital and Maine Department of Corrections Collaboration*, MCLEAN HOSPITAL, <https://www.mcleanhospital.org/education/medoc> [https://perma.cc/9VB6-A6R4] (last visited Dec. 11, 2023).

44. E-mail from Dr. Ryan Thornell, Deputy Comm'r Corr., Me. Dep't Corr., to Dr. Catherine Besteman, Francis F. Bartlett & Ruth K. Bartlett Professor of Anthropology, Colby Coll. (Jan. 9, 2023) (on file with author).

45. See, e.g., *ACLU of Maine Files Lawsuit Challenging Maine's Inadequate Indigent Defense System*, ACLU ME. (Mar. 1, 2022), <https://www.aclumaine.org/en/press-releases/aclu-maine-files-lawsuit-challenging-maines-inadequate-indigent-defense-system> [https://perma.cc/L39A-6U8J].

46. E-mail from Dr. Ryan Thornell, Deputy Comm'r Corr., Me. Dep't Corr., to Dr. Catherine Besteman, Francis F. Bartlett & Ruth K. Bartlett Professor of Anthropology, Colby Coll. (Nov. 18, 2022) (reporting that fourteen of the 117 adults with life/virtual life sentences in Maine prisons are Black) (on file with author); *How Has the Population Changed in Maine?*, USA FACTS, <https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population/state/maine?endDate=2021-01-01&startDate=1975-01-01> [https://perma.cc/44RQ-5GF9] (last visited Dec. 5, 2023) (indicating that the proportion of Black individuals in Maine's population rose from 0.3% in 1975 to 1.8% in 2021).

47. ASHLEY NELLIS, *THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 10 (2021).

48. *Id.* at 10, 19.

49. *Maine's Pretrial Incarceration Crisis*, ACLU ME. (May 10, 2019), <https://www.aclumaine.org/en/news/maines-pretrial-incarceration-crisis> [https://perma.cc/4SSY-ZEWJ].

50. HON. ROBERT E. MULLEN, *REPORT OF THE INTERGOVERNMENTAL PRETRIAL JUSTICE REFORM TASK FORCE* 1, 33 (2015). This report analyzed how to reduce the human and financial costs of pretrial incarceration and restrictions. *Id.* at 3.

some type of treatment or education and regularly report to their probation officers.⁵¹ The other 1,200 people are on “passive probation,” which allows them to engage in everyday activities with only the occasional check-in with their probation officers, although their status can be changed at any time from “passive” to “active.”⁵² Until a few years ago, probation violations drove the rate of incarceration, with upwards of 60% of the incarcerated population in prison for violating the terms of their probation.⁵³ As the culture of probation supervision has shifted toward graduated sanctions and away from reincarceration, that number is decreasing.⁵⁴ Our concern is that another culture shift with a change in administration could reverse this trend.

The final problem with Maine’s use of incarceration to be discussed here is the cost. MDOC estimates that it costs \$78,000 per year to incarcerate one adult, and \$300,000 per year to incarcerate one child.⁵⁵ Incarcerating *one* 18-year-old with a LWOP sentence would ultimately cost the state almost \$4 million.⁵⁶ In all, Maine’s 2021 biennial budget for the Maine Departments of Corrections and Public Safety totaled nearly \$700 million.⁵⁷ The expenditure on criminalizing drug use alone is eye-popping: a 2022 report by the American Civil Liberties Union (ACLU) and the Maine Center for Economic Policy found that Maine spends \$111 million every single year to arrest, detain, and sentence people who use drugs.⁵⁸ According to the report, “Maine’s law enforcement spends \$8,427 alone for each drug-related arrest. This amount could cover seven months of rent in Cumberland County, two-thirds of the cost of educating a public school student for a whole year, or four months of intensive outpatient treatment for someone on MaineCare.”⁵⁹

The cost of incarceration is not borne just by taxpayers, of course, but rather creates ripples of adverse impacts throughout affected communities. Children with incarcerated parents are more likely to become incarcerated themselves, and between 2015 and 2020 there were 3,403 children in Maine with incarcerated parents.⁶⁰ The lost income for families with incarcerated adult members, alongside the costs of phone calls, necessary commissary items, and transportation for visits, is economically burdensome—even devastating—for families. In recognition of this

51. RANDALL LIBERTY & ANTHONY CANTILLO, DEP’T OF CORR., 2022 YEAR END MDOC ADULT DATA REPORT 19 (2023).

52. *Id.*

53. *Id.* at 13.

54. *Id.*

55. The annual budget for Long Creek is \$18 million, and it generally houses 18–30 children. Abby Gerwitz, *It’s Time to Close Long Creek Youth Development Center* (Jan. 25, 2022), <https://storymaps.arcgis.com/stories/883f695f549c4c3d90cdb9c9e0f6a498>.

56. See *DOC Responses to Other Information Requests*, <https://legislature.maine.gov/doc/9093> (last visited Dec. 11, 2023) (basing estimates on MDOC’s projected costs of \$78,000 per resident).

57. Susan Sharon, *Advocates Call for Reinvestment of \$700 Million Budgeted for Maine Corrections and Public Safety*, ME PUB. (Mar. 2, 2021), <https://www.mainepublic.org/politics/2021-03-02/advocates-call-for-reinvestment-of-700-million-budgeted-for-maine-corrections-and-public-safety>.

58. *A Better Path for Maine: The Case for Decriminalizing Drugs*, ACLU ME. (Mar. 21, 2022), <https://www.aclumaine.org/en/publications/better-path-maine-case-decriminalizing-drugs> [<https://perma.cc/E4MF-GJDH>].

59. *Id.*

60. Jillian Foley et al., *BREAKING THE CYCLE: INTERRUPTING GENERATIONAL INCARCERATION IN MAINE*, PLACE MATTERS 4 (2020).

fact, the Institute for Justice Research and Development published a working paper that argues that the \$80 billion frequently cited as the annual cost of corrections in the United States fails to take into account the true cost of incarceration, according to several different factors.⁶¹ These include lost income for those incarcerated; higher health care costs for those incarcerated and formerly incarcerated; costs associated with incarceration for families with incarcerated loved ones (such as visitation, moving, evictions, and indebtedness); the negative impact on children with incarcerated parents (such as lower high school graduation rates and higher rates of homelessness and incarceration); costs of reentry programs; divorce; post-release homelessness; and more.⁶² Aggregating these factors together, researchers estimate the actual cost to society of hyper-incarceration at the national level is closer to \$1 trillion.⁶³ We do not have a similar cost estimate for Maine alone, but it is surely much, much greater than the estimated \$400 million a year to run the state's prisons and jails.

This prompts several questions. Whose interests are being served by such high levels of criminalization, extreme sentences, and limited pathways toward early reentry? Is our current criminal legal structure really operating in the best interests of the public good, community safety, and the Maine taxpayer?

II. THE 1976 REFORM OF THE CRIMINAL JUSTICE CODE

In 1913, Maine enacted indeterminate sentencing as well as parole, which gave authorities wide latitude in sentencing and in evaluating rehabilitation as a reason for early release.⁶⁴ Sentences were limited to a specific maximum duration, with universal parole eligibility for prisoners after serving at least half of their sentence length.⁶⁵ Those under the age of twenty-seven received a maximum of thirty-six months, with no minimum, but could attain early release at the judgment of the Superintendent and their ability to find a job.⁶⁶ However, policymakers grew dissatisfied with the practice of criminal justice in Maine, which was based in common law and included ambiguities and contradictions.⁶⁷ By the early 1970s, calls for reform reflected concerns about sentencing, parole, prisoners' rights, and, more generally, the goals of incarceration.⁶⁸

Criminal legal reform in the 1970s initiated a turning point for Maine, when prisoner resistance, political rhetoric, and public perception combined to shift discourse and policy around sentencing and incarceration from one based on rehabilitation, to one more retributive in intent and punitive in outcome.⁶⁹ In the early 1970s in Maine, "the prevailing corrections industry ideology viewed prisoners

61. See McLaughlin et al., *supra* note 24, at 6–14.

62. *Id.* at 2.

63. *Id.*

64. ANSPACH ET AL., *supra* note 25, at 3, 18.

65. *Id.* at 18.

66. *Id.* at 19.

67. See *id.* at 110; KRAMER ET AL., *supra* note 27, at 3, 6.

68. ANSPACH ET AL., *supra* note 25, at 120–22; KRAMER ET AL., *supra* note 27, at 5–6.

69. KRAMER ET AL., *supra* note 27, at 5–6.

as ill patients in need of treatment instead of as sinners in need of penance.”⁷⁰ The rehabilitative approach in Maine included furloughs for 75% of those incarcerated at the MSP and regular family picnics in the MSP prison yard in recognition of the importance of maintaining family and community ties.⁷¹ News reports at the time were sympathetic to prisoners’ rights issues, and the Director of the Department of Mental Health and Corrections at the time, Ward Murphy, even expressed her interest in reducing the number of people in prison and easing the circumstances of their incarceration.⁷²

Contesting the view of prisons as rehabilitative, a group of prisoners and ex-prisoners in Maine created the Statewide Correctional Alliance on Reform (SCAR) in 1972 to fight for their rights, in concert with other prison uprisings happening across the country.⁷³ SCAR rejected the idea that incarcerated people were sick and in need of care, arguing instead that the system was unjust, unfair, and targeting poor people.⁷⁴ Their platform called for the elimination of the social “crimes” of poverty and injustice.⁷⁵ Through organizing inside Maine prisons and working with the ACLU and Pine Tree Legal, SCAR unsuccessfully pursued legislation (losing all eight of their bills) but successfully litigated for prisoners’ rights regarding prison regulations of books, the right to assemble, and the right to organize.⁷⁶ SCAR members on the outside built community support and engaged in outreach efforts.⁷⁷ The MSP warden, who opposed changing policy in response to prisoners’ strikes, demands, and resistance retaliated against their efforts to organize and lost his job as a result.⁷⁸

In opposition to the reforms sought by SCAR, guards and ex-guards formed an anonymous group to launch a strategic and effective campaign against furloughs and other reforms—despite the fact that out of the 1,454 furloughs in the preceding few years, only four crimes were recorded (a 99% success rate).⁷⁹ But when a prisoner on furlough escaped in late 1973, the guard’s anti-furlough group demanded, and achieved, restrictions.⁸⁰ At the same time, SCAR’s influence began to wane as the tide of public opinion turned against prisoners’ rights.⁸¹ In 1974, the Legal Affairs Committee of the Maine Legislature and the Maine Law Enforcement Planning and Assistance Agency held five public hearings on the future of criminal justice, but only considered testimony from law enforcement and judges, while interrupting and blocking testimony presented by SCAR members.⁸² Thus, the report was heavily

70. Daniel S. Chard, *SCAR’d Times: Maine’s Prisoners’ Rights Movement, 1971-1976* (2011) (M.A. thesis, University of Massachusetts Amherst) (ScholarWorks).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 68–69.

81. *Id.* at 69.

82. *Id.* at 70.

weighted towards the viewpoints of law enforcement.⁸³ The 1973 Governor's Task Force on Corrections was formed in response to SCAR's efforts and included many SCAR officials.⁸⁴ The task force made a number of progressive suggestions, including short sentences, but these were ignored (although the report's critique of the Department of Mental Health and Corrections' capacity to offer rehabilitative programming was noted by later reformers).⁸⁵

By 1974, in response to SCAR's successful organizing (and what historian Daniel Chard describes as the popular embrace of the sort of vigilantism promoted in Clint Eastwood films), law enforcement was openly harassing and subjecting SCAR members to constant arrests, beatings, and mailed death threats and swastikas.⁸⁶ This onslaught of violence and harassment unraveled SCAR over the next year.⁸⁷ Moreover, several SCAR members who had joined radical underground groups were eventually arrested for bombing attacks, which destroyed SCAR's reputation in Maine and lost the organization its public support.⁸⁸

As SCAR was fighting for prisoners' rights, an anonymous group founded by guards and ex-guards was countering its efforts.⁸⁹ Beginning in 1971, "[a] commission of influential citizens" set themselves to the task of reviewing statute and common law principles that had formed the basis for criminal law in Maine for almost two centuries.⁹⁰ Their work ultimately resulted in the adoption of the new Maine Criminal Code in 1975.⁹¹ The perspective of the commission radically shifted over the four years of their work (1971–1975). While the first model proposed by the group was rehabilitative in nature, with short sentences and parole eligibility at five years, the second, retributive model abolished parole and gave the judiciary complete control over sentencing decisions.⁹² Scholars at the time explained the shift as resulting from a public and judicial perception that the parole board was too lenient, that indeterminate sentencing left too much to judicial discretion, and that the MDOC lacked the capacity and discretion to offer and assess rehabilitation.⁹³ According to one report, the adoption of the new model showed a "lack of confidence in the treatment ethic and in corrections' ability to provide essential services to ensure rehabilitation" and reflected "a moral panic about crime and parolees."⁹⁴

The new code brought statutes relating to different offenses codified at different times into a single criminal code that graded offenses into five classes, each with a relatively high, fixed maximum penalty.⁹⁵ The new code abolished indeterminate sentencing as well as parole and expanded split sentences (dividing a sentence

83. *Id.*

84. *Id.* at 71.

85. See KRAMER ET AL., *supra* note 27, at 64 (noting that the report should be taken as a preliminary appraisal of decreased sentences by Maine judges).

86. Chard, *supra* note 70, at 92–93.

87. *Id.* at 93–94.

88. *Id.* at 107–09.

89. *Id.*

90. KRAMER ET AL., *supra* note 27, at 6.

91. *Id.*

92. *Id.*

93. *Id.* at 8–9, 15, 16; ANSPACH ET AL., *supra* note 25, at 24.

94. ANSPACH ET AL., *supra* note 25, at 24.

95. *Id.*

between time to be served and probation).⁹⁶ Importantly, it gave the judiciary complete control over sentencing decisions.⁹⁷

Thus, as noted above, the immediate effect of the new code was to grant “unrestrained discretion in the judiciary.”⁹⁸ As one report written in the immediate aftermath of the reform noted, “[i]ndeed, the centrality of the judiciary is perhaps the most unusual characteristic of the sentencing scheme established by Maine’s new code” because, while normally judges have a great deal of discretion, parole boards play an important role in setting the actual time served.⁹⁹ “Maine is unique in that its judges are empowered to impose fixed sentences limited only by statutory maxima without [the oversight] traditionally provided by parole boards [T]he discretionary powers of judges have been increased to an extent unknown in other American jurisdictions.”¹⁰⁰

Critics argued that the new code was neither rehabilitative (because of the abolition of parole) nor fully determinate (because of judicial discretion), but rather rife with ambiguity.¹⁰¹ The code abolished parole but retained other opportunities for reduced sentences, reflecting the view of some committee members that “the possibility of early release could and should be protected in the commission’s product.”¹⁰² The code also mandated flat sentences but granted judges wide discretion in actual sentencing.¹⁰³ The abolition of parole did not seem to have had a significant initial impact because many other ways to reduce sentences remained on the books.¹⁰⁴ As part of the code, sentences in excess of one year were considered tentative, and the MDOC could request a resentencing if it evaluated that a resident had made sufficient progress toward a “noncriminal way of life.”¹⁰⁵ Additionally, those sentenced to longer than twenty years could be released after serving four-fifths of their sentence, including those with life sentences.¹⁰⁶ The possibility of review by the appellate division of the Law Court remained, although it only very rarely reduced sentences.¹⁰⁷

The new code ushered in several effects that the commission did not seem to have anticipated. One was a great disparity in judicial sentencing: the year after the imposition of the new code, sentences got shorter for some crimes, but over the next few years sentences and incarceration rates shot up, and sentencing disparities widened dramatically.¹⁰⁸ Another potentially unanticipated effect was the closure of

96. *Id.*

97. *Id.* at 23.

98. *Id.* at 36.

99. KRAMER ET AL., *supra* note 27, at 9.

100. *Id.* at 9–10, 13–14.

101. ANSPACH ET AL., *supra* note 25; KRAMER ET AL., *supra* note 27.

102. KRAMER ET AL., *supra* note 27, at 15.

103. *Id.* at 15 n.45.

104. *Id.* at 18; see Darlene E. Gerry, *Criminal Law—Judicial Resentencing of Offenders After Service Has Commenced—State v. Hunter 447 A.2d 797 (Maine 1982)*, 66 W. NEW ENG. L. REV. 147, 147–48 (1983).

105. KRAMER ET AL., *supra* note 27, at 11.

106. P.L. 1975, ch. 499, § 1254(2) (codified as 17-A M.R.S. § 1254(2) (repealed)) (explaining that a prisoner sentenced to life is eligible for a review after twenty-five years).

107. ANSPACH ET AL., *supra* note 25, at 57.

108. *Id.*

avenues for early release (aside from parole).¹⁰⁹ As part of the reform committee's attempt at system integration, the new code integrated three provisions: split sentencing, resentencing, and transfer.¹¹⁰ The intent of the commission "was to provide a mechanism through which the trial judge could reconsider their original sentence, given the abolition of parole."¹¹¹ But in 1977, the *State v. Abbott* court questioned the constitutionality of this provision, concluding that "section 1154 did not intend to confer upon the court jurisdiction to modify a sentence after it had been imposed on the grounds of changes in the attitude or behavior of the offender."¹¹² The court in *State v. Abbott* further concluded that if the statute purports to confer that power, it contains an unconstitutional delegation of executive power to the judiciary.¹¹³ The Law Court upheld this lower court's decision in 1982 in *State v. Hunter*, confirming that only the Governor can amend sentences.¹¹⁴

This decision was made over the dissent of Justice Watham, whose sole dissenting opinion was reviewed in a 1983 study on the impact of the 1976 Criminal Code revision.¹¹⁵ The study reported that the opinion

focused on the unique character of incapacitative sentencing and argued that, in failing to specify the factual bases on which such sentences could be imposed, the legislature failed to deal effectively with the issue. As a result, a body of law dealing with incapacitative sentences, and principles of sentencing in general, do [sic] not exist. Consequently, he argues that incapacitative sentences (defined in excess of five years) form the basis for judicial authority in Section 1255. He argues that the authority exists because, when an incapacitative sentence is imposed, the "inmate's progress towards a non-criminal way of life," as assessed by the Department of Corrections, is the only mechanism that exists to correct an error of judgment by the court.¹¹⁶

Thus, in 1982, *State v. Hunter* repealed the law allowing the MDOC to petition a sentencing judge to reduce the term of incarceration for those evaluated as having made sufficient "progress toward a noncriminal way of life."¹¹⁷ In 1976, a one-year constraint on the ability of defendants to return to court to argue that their convictions and sentences are unlawful was imposed.¹¹⁸ Executive clemency became the only remaining avenue for sentence reduction. Although executive clemency was "fairly common prior to the enactment of the new code," it has rarely happened since.¹¹⁹

109. *Id.*; KRAMER ET AL., *supra* note 27; Gerry, *supra* note 104.

110. ANSPACH ET AL., *supra* note 25, at 129.

111. *Id.* at 32.

112. *Id.* at 33 (citation omitted).

113. *Id.* at 33.

114. *State v. Hunter*, 447 A.2d 797, 803 (Me. 1982); Gerry, *supra* note 104, at 149.

115. ANSPACH ET AL., *supra* note 25, at 33.

116. *Id.*

117. *Hunter*, 447 A.2d at 798.

118. ANSPACH ET AL., *supra* note 25, at 32–33.

119. KRAMER ET AL., *supra* note 27, at 57–58. The case resulting in the 1982 repeal, *State v. Hunter*, was argued by then-District Attorney (DA) Janet Mills. See *Hunter*, 447 A.2d at 797. 17-A M.R.S. § 1154 was enacted in 1975, repealed in 1981, and recodified verbatim at 17-A M.R.S. § 1255. See P.L. 1975, ch. 499, § 1154; P.L. 1981, ch. 324, §§ 28, 33; P.L. 1983, ch. 714. DA Janet Mills led the charge against the statute in *State v. Hunter*, arguing that the law was unconstitutional because it was a judicial usurpation of the governor's pardon power. *Hunter*, 447 A.2d at 805. Now, as Governor, Janet Mills has

By the early 1980s, the negative impact of the 1976 criminal code—the rising rates of incarceration, prison overcrowding, and wide sentencing disparities—led legislators and governors to attempt additional reforms to address these problems. In 1981, a bill to bring back parole (L.D. 1429) was introduced by the Minority Leader and supported by Governor Joseph Brennan as well as Kevin Concannon, the Commissioner of the Department of Mental Health and Corrections at the time.¹²⁰ Concannon noted that the bill was the cornerstone of efforts to reform corrections following the MSP lockdown the previous year.¹²¹ Parole eligibility would occur at the halfway point of a sentence, minus good time, and this date would be clear within the first six months of incarceration.¹²² Concannon stated in his testimony:

A major absent tool for both rehabilitation and, more importantly, public safety, is currently absent by virtue of our current criminal code. That is, the ability of the state to supervise inmates' post incarceration for a period of time during which they can be reincarcerated should they commit violations of their parole status. Supervised release would add a missing protective element for the public, would as well increase the likelihood of inmates being able to successfully readjust to the community and would provide an additional opportunity for the state to reimpose the ultimate sanction of incarceration without going through all of the procedures and problems associated with full court hearings.¹²³

Concannon went on to note the incentives provided by a parole program for correctional staff and the humane aspect of allowing prisoners to “earn time on the street under supervision,” as well as “the need to add to the correctional alternatives within the [state] of Maine.”¹²⁴ The chairman of the Maine Parole Board concurred, stating in a newspaper interview that, “[w]ith the new system, prisoners are now literally almost pushed out the front door and turned loose on society without supervision when their sentence is up The citizens of Maine are not being totally protected.”¹²⁵ But the punitive philosophy of incarceration won the day as the senate voted 16 to 15 and the house voted 95 to 27 to indefinitely postpone the bill.¹²⁶

Another effort then launched with the 1985 “Corrections in Crisis” report of the Governor’s Blue Ribbon Commission on Corrections.¹²⁷ The commission, which included then-DA Janet Mills, was formed to respond to rising judicial discrepancies and prison overcrowding precipitated by the 1976 Criminal Code Reform. Their report opened with these lines:

thus far resisted the push for her to use her pardon powers robustly. See, e.g., Will Grunewald, *The State of Maine v. Parole*, DOWNEAST (June 2022), <https://downeast.com/issues-politics/the-state-of-maine-v-parole/>.

120. See generally *An Act to Establish a Board of Prison Terms and Supervised Release: Hearing on L.D. 1429 Before the Comm. on the Judiciary*, 110th Legis. (1981) (testimony of Kevin W. Concannon, Commissioner of the Maine Department of Mental Health and Corrections).

121. *Id.* at 1.

122. *Id.* at 3.

123. *Id.* at 3.

124. *Id.* at 4.

125. *Resumption of Parole Plan Favored*, PORTLAND PRESS HERALD, Apr. 23, 1981, at 152.

126. Legis. Rec. 1410 (1981); Legis. Rec. 1417 (1981).

127. See generally GOVERNOR’S BLUE RIBBON COMM’N ON CORR., CORRECTIONS IN CRISIS (1985).

The correctional system of Maine is in a state of deepening crisis. It faces conditions of overcrowding that threaten the maintenance of safety, discipline, control of its population and the provision of constitutionally protected conditions of confinement. Not only are the institutional populations far in excess of normal capacity, but higher probation caseloads and lack of sufficient program alternatives for released prisoners and less serious offenders pose an undesirable risk to public safety.¹²⁸

The report goes on to note that “[f]rom 1980 to 1983, the number of prison admissions per 100 serious crimes reported to the police [murder, non-negligent manslaughter, rape, robbery, aggravated assault and burglary] increased by 39%. This increase also occurred while the arrest rates for these crimes were actually decreasing.”¹²⁹ The report attributes this outcome to the imposition of longer sentences, the eradication of parole, and the increased number of people sentenced for sexual offenses.¹³⁰ Most notable among their twenty-five recommendations was the creation of an Intensive Supervision Program for those convicted of felonies.¹³¹ Eligibility would be determined by the courts or by a Board of Community Placements, the creation of which was another recommendation in the report.¹³² The purpose was to open an avenue for supported and supervised early release for those with longer sentences.¹³³ The recommendations were never implemented.¹³⁴

Another effort to amend the Maine Criminal Code to address disparities in judicial sentencing succeeded in 2019 with L.D. 1407, but the problem of prison overcrowding was addressed by the construction or expansion of prison facilities rather than by addressing the relationship between dropping crime rates and rising incarceration rates.¹³⁵

A. Recent Reform Efforts

Now, in 2023, efforts continue to pour forth, seeking to ameliorate the damages done almost fifty years ago. Among others, the 129th and 130th Legislatures had the opportunity to begin fixing these problems through nine key pieces of legislation designed to address different aspects of the harms perpetuated over the past four-plus decades.¹³⁶ The 131st session also saw a bill crafted to bring back parole to Maine as a means of reopening the rehabilitative pathway to reentry and reintegration that was abolished in 1976.¹³⁷ This Article will first provide an overview of the nine bills’ trajectory and efficacy, followed by a discussion of L.D. 178, “The Parole Bill.” This is to show that legislative remedies to the extant harms this Article has covered do exist and that Maine’s Legislature needs to revive and enact these bills if it wants to start repairing the decades-old damage.

128. *Id.* at 2.

129. *Id.* at 6.

130. *Id.* at 6–7.

131. *Id.* at 20–21.

132. *Id.* at 21.

133. *Id.*

134. See generally GOVERNOR’S BLUE RIBBON COMM’N ON CORR., *supra* note 127.

135. *Id.* at 2–3.

136. See discussion *infra* Sections II.A.1–10.

137. L.D. 178 (131st Legis. 2023).

1. L.D. 1572: An Act to Enact the Maine Fair Chance Housing Act

L.D. 1572 died in the Legislature in 2020.¹³⁸ Seeking to provide necessary protections for returning community members, proponents of the bill would have established the Maine Fair Chance Housing Act.¹³⁹ The purpose of the Act is to ensure that a person is not denied housing based solely on the existence of a history of criminal convictions.¹⁴⁰ This bill prohibits a housing provider from considering an applicant's criminal history until after the provider determines that the applicant meets all other qualifications for tenancy.¹⁴¹ A person who is aggrieved by a provider's violation of the Maine Fair Chance Housing Act may file a grievance with the Maine Human Rights Commission and, if it is a violation by a private housing provider, may bring a civil action in court.¹⁴² By reviving and enacting this bill, the Legislature could address significant barriers to housing that currently keep people with a criminal record trapped in housing insecurity.

2. L.D. 1273: An Act to Establish Conviction Integrity Units in Maine

Creating an avenue of meaningful sentencing review to fill the void in Maine, this bill and L.D. 1270 were both designed to address the execution of sentences under the Maine Revised Statutes.¹⁴³ L.D. 1273 would have required "the Attorney General and every district attorney to maintain a conviction integrity unit to review convictions in cases they prosecuted to determine whether there is plausible evidence of innocence, a constitutional violation or prosecutorial misconduct, or when the facts and circumstances require a review in the interests of fairness and justice."¹⁴⁴ L.D. 1273 died on adjournment, May 9, 2022.¹⁴⁵ Reasserting and enacting this bill would provide greater assurance of fairness, equity, and accuracy in the legal system, also providing relief for actual innocence.

3. L.D. 1270: An Act To Establish Resentencing Units in the Attorney General's Office and All Maine Prosecutorial Districts

Addressing the same area of statute as the above bill, L.D. 1270 would have required that "[t]he Attorney General and every district attorney . . . shall maintain . . . a resentencing unit that timely reviews the sentences of imprisonment of criminal cases prosecuted . . . to determine whether to reduce or terminate a sentence in the interests of fairness and justice."¹⁴⁶ L.D. 1270 died in the Legislature on June 17, 2021.¹⁴⁷ This bill should be brought forward and enacted to provide

138. STATE OF MAINE, HISTORY AND FINAL DISPOSITION OF LEGISLATIVE DOCUMENTS OF THE 129TH LEGISLATURE 81 (2d Reg. Sess. 2020), <https://legislature.maine.gov/doc/4862>.

139. L.D. 1572, §§ 2–3 (129th Legis. 2019).

140. *Id.* at § 3.

141. *Id.*

142. *Id.*

143. L.D. 1273 (130th Legis. 2021); L.D. 1270 (130th Legis. 2021).

144. L.D. 1273, § 9 (130th Legis. 2021).

145. STATE OF MAINE, HISTORY AND FINAL DISPOSITION OF LEGISLATIVE DOCUMENTS OF THE 130TH LEGISLATURE 67 (2d Reg. Sess. 2022), <https://legislature.maine.gov/doc/9150>.

146. L.D. 1270, § 1 (130th Legis. 2021).

147. Legis. Rec. H-924 (1st Spec. Sess. 2021).

assurance of fairness, equity, and justice in sentencing, which would protect against judicial bias or prejudice.

4. L.D. 842: An Act To Reestablish Parole

With the aim of beginning to redress the harms caused by the abolition of parole in 1976, L.D. 842 would have established “the option of parole for persons sentenced to the custody of the Department of Corrections” in Maine statutory law.¹⁴⁸ L.D. 842 was referred to the Judiciary Committee on March 8, 2021, after which, the Committee adopted an amendment to replace the original bill, also replacing the title, which became “Resolve, To Create the Commission To Examine Reestablishing Parole.”¹⁴⁹ L.D. 842 finally passed on March 8, 2022, unsigned by Governor Janet Mills.¹⁵⁰

The chaptered law became “Resolve, To Create the Commission To Examine Reestablishing Parole,” whereby a commission was created to determine the following:

[T]he commission shall “examine parole as it currently operates in this State and in other states, with a specific focus on the parole law in Colorado, the benefits and drawbacks of parole, different models of parole, how parole fits in with the overall framework of the Maine Criminal Code, the effect of parole on parolees, the costs and savings of instituting parole and the elements of a plan to implement parole.”¹⁵¹

The final report was published December 2022, including a recommendation to “Reestablish parole in Maine.”¹⁵² This recommendation led to the proposal of L.D. 178 in the 131st Legislative Session, to be addressed in the closing of this section.

5. L.D. 1593: An Act To Provide Pathways to Rehabilitation, Reentry and Reintegration

This bill was written to expand and clarify the statute governing the MDOC’s SCCP.¹⁵³ This bill would amend the SCCP, require the Commissioner of the Department to adopt rules for the program, and to establish criteria and a process for determining eligibility for the program.¹⁵⁴ The bill would also provide streamlined eligibility for a prisoner who has a terminal or severely incapacitating medical condition if care outside a correctional facility is medically appropriate, add to the SCCP requirements for providing program information to prisoners, expand eligibility from two years to thirty months, and add a requirement that the MDOC track data for all prisoners who apply for the program.¹⁵⁵ L.D. 1593 passed into law on June 27, 2021, unsigned by Governor Mills.¹⁵⁶ The chaptered law accomplished

148. L.D. 842 (130th Legis. 2021); L.D. 842, Summary (130th Legis. 2021).

149. Comm. Amend. A to L.D. 842, No. H-717 (130th Legis. 2021).

150. Leg. Rec. S-1156 (1st Special Sess. 2021); L.D. 842 (130th Legis. 2021); Resolves 2021, ch. 126.

151. Resolves 2021, ch. 126.

152. Commission to Examine Reestablishing Parole, Report to the 130th Legislature 24 (Dec. 2022).

153. L.D. 1593 (130th Legis. 2021); House Amend. to L.D. 1593, Concept Draft (130th Legis. 2021).

154. House Amend. to L.D. 1593, Concept Draft (130th Legis. 2021).

155. House Amend. to L.D. 1593, No. H-556 (130th Legis. 2021).

156. *Id.*

the intent of the original bill,¹⁵⁷ standing as a rare legislative success in criminal legal reform in Maine.

6. *L.D. 847: An Act to Divert Young Adults from the Adult Criminal Justice System*

This bill would have addressed some of the racial disparities in sentencing practices and diverted young adults in the same manner as juveniles, reflecting neuroscience developments regarding emerging adults and their similar brain development level to juveniles.¹⁵⁸ L.D. 847 would have created a new statute that defined “diversion” and “young adult,” and required law enforcement officers to consider diversion before a young adult is funneled into the criminal legal system.¹⁵⁹

Governor Mills vetoed L.D. 847 on June 23, 2021, and that vote was sustained on June 30, 2021.¹⁶⁰ The Legislature should revive and enact this bill to help Maine’s criminal legal system reflect advances in neuroscience regarding emerging adulthood as a developmental stage in life. This would interrupt the harsh punishments of criminalization in early life.

7. *L.D. 1668: Resolve, To Develop a Plan to Close the Long Creek Youth Development Center*

L.D. 1668 would have required the MDOC to create a two-year plan to close the Long Creek Youth Development Center by June 30, 2023, repurposing the Center into a community center with supportive housing.¹⁶¹ The bill would have directed the Criminal Justice and Public Safety Committee to “study the selection of an entity to manage and distribute correction[al] funds currently designated for youth incarceration” and may have allowed them to “report out legislation regarding its selection of an entity to the Second Regular Session of the 130th Legislature.”¹⁶² These reallocated corrections funds would have been used for community-based integration services for youth that are not administered by the MDOC.¹⁶³

Governor Mills vetoed the bill on June 21, 2021, and the veto was sustained on June 30, 2021.¹⁶⁴ The Legislature needs to revive and enact this bill to end youth incarceration by providing age-appropriate care that is not connected to the criminal legal system.

157. *Compare* P.L. 2021, ch. 376, with House Amend. to L.D. 1593, No. H-556 (130th Legis. 2021).

158. L.D. 847 (130th Legis. 2021); *An Act To Divert Older Youth from the Criminal Justice System: Hearing on L.D. 847 Before the J. Standing Comm. On Crim. Just. and Pub. Safety*, 130th Legis. (2021) (testimony of Erica King, Senior Justice Policy Associate at the Muskie School of Public Service at the University of Southern Maine and testimony of Rep. Victoria Morales of House District 33). See generally Ruben C. Gur, *Brain Maturation and Its Relevance to Understanding Criminal Culpability of Juveniles*, 7 CURRENT PSYCHIATRY REPS. 292 (2005).

159. Comm. Amend. A to L.D. 847, No. H-551 (130th Legis. 2021).

160. Legis. Rec. H-911 (1st Spec. Sess. 2021); Legis. Rec. S-1225 (1st Spec. Sess. 2021).

161. L.D. 1668 (130th Legis. 2021).

162. *Id.*

163. *Id.*

164. See Leg. Rec. H-913 to H-915 (1st Spec. Sess. 2021).

8. *L.D. 696: An Act to Define “Solitary Confinement”*

L.D. 696 started as “An Act to Prohibit Solitary Confinement in Maine’s Corrections System” and was ultimately turned into “An Act to Define ‘Solitary Confinement.’”¹⁶⁵ This bill was designed to abolish the use of solitary confinement in Maine’s jails and prisons.¹⁶⁶ It would have defined and prohibited the use of solitary confinement in all jails and prisons in Maine, but the Committee adopted an amendment to replace the original bill instead.¹⁶⁷ This amendment changed the title to “An Act To Define ‘Solitary Confinement, which would merely define the term and in no way prohibit or restrict the use of solitary confinement.’”¹⁶⁸ L.D. 696 died in the Legislature on April 19, 2022.¹⁶⁹ Currently, there is a trend among correctional administrators toward limiting the use of solitary confinement.¹⁷⁰ Rather than trusting that this trend will continue beyond these administrators’ tenures, the Legislature should pass a bill that prohibits the use of solitary confinement in perpetuity.

9. *L.D. 546: An Act to Implement the Recommendations of the Maine Juvenile Justice System Assessment and Reinvestment Task Force*

This bill was written to reduce the number of youths detained and committed for incarceration, according to recommendations put forth by the Maine Juvenile Justice System Assessment and Reinvestment Task Force in its February 2020 report.¹⁷¹ It aimed to do so by reestablishing the juvenile justice task force; setting benchmarks for reducing the population of incarcerated youths; requiring reporting by the MDOC on progress made and on potential sites and locations for secure, therapeutic residences for detained and committed youths; and by allocating \$2 million in funding (through the Departments of Corrections and Health and Human Services) for community-based services and diversion from detention and commitment.¹⁷² L.D. 546 died on adjournment on May 9, 2022.¹⁷³ Maine’s Legislature needs to revive and enact this bill to create community-based alternatives that support the closing of Long Creek Youth Development Center.

10. *L.D. 178: An Act to Support Reentry and Reintegration into the Community*

With the exception of L.D. 1572, which was introduced in the 129th Legislature, all of these bills have been from the 130th legislative session. In May 2023, the most significant criminal legal system reform proposal went before the 131st Legislature: L.D. 178.

165. L.D. 696 (130th Legis. 2021); Comm. Amend. A to L.D. 696, No. H-846 (130th Legis. 2021).

166. L.D. 696 (130th Legis. 2021).

167. Comm. Amend. A to L.D. 696, No. H-846 (130th Legis. 2021).

168. *Id.*

169. L.D. 696, Summary (130th Legis. 2022).

170. See Phil Hirschorn, *Maine State Prison Officials Say They’ve Reduced Solitary Confinement to a Memory*, WMTW 8 (June 1, 2022), <https://www.wmtw.com/article/maine-state-prison-officials-say-the-yve-reduced-solitary-confinement-to-a-memory/40171183#>.

171. L.D. 546 (130th Legis. 2022).

172. *Id.* §§ 1–8.

173. *Id.*

Entitled “An Act to Support Reentry and Reintegration into the Community,” L.D. 178 was also known as “The Parole Bill.”¹⁷⁴ This bill was designed to begin ameliorating some of the systemic harms caused by the 1975 Criminal Code revision and the abolishment of parole in 1976 by recognizing rehabilitation and opening pathways to safe and supported reentry.¹⁷⁵ If enacted, L.D. 178 would have established

the option of parole for persons sentenced to the custody of the Department of Corrections . . . establishe[d] the Maine Parole Board and outline[d] its operations and duties . . . set[] criteria for the Maine Parole Board’s granting and revocation of parole, and establishe[d] an appeal process for the board’s decisions. The amendment outline[d] the rights of victims in the parole process . . . [and] direct[ed] the board to adopt rules creating guidelines for administrative release and revocation, as well as other rules to support its duties.¹⁷⁶

L.D. 178 died on June 27, 2023, when the Legislature voted Ought Not to Pass.¹⁷⁷ In an effort to increase community safety and decrease recidivism rates by providing an avenue of supportive release, the Legislature should revive and enact L.D. 178.

III. THE COMPARATIVE VIEW

This Part looks comparatively at other states and countries to gauge the landscape of reform in order to consider next steps for Maine. Data from national organizations like the Vera Institute of Justice have shown Maine’s sentencing practices to be exceptionally harsh.¹⁷⁸ This is because the 1976 Criminal Code and subsequent court rulings disallowed any post-conviction resentencing or early release, other than executive clemency, which is not being used in Maine.¹⁷⁹ Additionally, Maine is one of only four states in the country which provides “no path to release for those sentenced to life behind bars, in direct contravention of the human rights standards laid out by the ECtHR.”¹⁸⁰ The Robina Institute suggests that Maine’s prison sentencing system is the worst in the country when it comes to discretion after a sentence is imposed.¹⁸¹ This is because it does not permit parole and because the maximum discretionary reduction of a prison sentence is only 23%

174. L.D. 178 (131st Legis. 2023).

175. The Parole-4-Maine citizens collective co-authored the bill with Senator Piny Beebe-Center. PAROLE-4-MAINE, www.parole4me.com [<https://perma.cc/K6NC-XU88>] (last visited Dec. 1, 2023).

176. L.D. 178, Summary (131st Legis. 2023).

177. LEGIS. INFO. OFF., L.D. 178, STATUS IN COMM., https://www.mainelegislature.org/legis/bills/disp lay_ps.asp?PID=1456&snum=131&paper=&paperId=l&ld=178 [<https://perma.cc/B6WQ-H26U>] (last visited Dec. 14, 2023).

178. VERA INST. OF JUST., *supra* note 29 (providing data on Maine’s incarceration rates).

179. *Maine Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. (2023), <https://ccresourcecenter.org/state-restoration-profiles/maine-restoration-of-rights-pardon-expungement-sealing/> [<https://perma.cc/KV6N-EURT>] (“Governor Janet Mills, who took office in early 2019, has to date issued no pardons.”).

180. *See* Carter et al., *supra* note 22, at 321, 357 (identifying Nevada, Kansas, and Alabama as other such states).

181. KEVIN R. REITZ ET AL., ROBINA INST. OF CRIM. LAW AND CRIM. JUST., PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE, STATE REPORT: MAINE 12 (2021).

of the maximum term.¹⁸² The Collateral Consequences Resource Center gives Maine an “F” for its statutory record relief and pardons for adults, and the Prison Policy Institute gives Maine an “F-” for its parole policy.¹⁸³

Nationally, there are evidence-based movements for criminal legal reform to reduce the number of people who are incarcerated and stem the flow of people into the carceral system. The following section will briefly review some of the most recent research on sentencing efficacy and some of the legislative efforts elsewhere to create pathways of decarceration. It will also offer a brief review of the international context.

A focus on youth who were sentenced as adults is one area of major reform. In 2012, the Supreme Court ruled in *Miller v. Alabama* that LWOP for youth under eighteen was cruel and unusual punishment.¹⁸⁴ Evidence shows that most people who have committed a violent crime are usually themselves victims of violence, committed their offense when they were very young, have a lower recidivism rate, and do not reoffend with age.¹⁸⁵ According to experts, “[b]y the time people reach their thirties, their odds of committing future crimes drop precipitously, in part due to cognitive development that continues until around age 26.”¹⁸⁶ In recognition of this research, California, Delaware, Maryland, Massachusetts, New Hampshire, New York, and Utah have raised the minimum age for juvenile court eligibility for all or most offenses, mandating diversion for those in this category.¹⁸⁷

In response to efforts to reduce criminalization of drug use by targeting non-violent offenders for decarceration, researchers are now complicating the binary between “violent” and “non-violent” offender categories. Evidence shows that those released after serving sentences for violent crimes are less likely than others to be re-arrested for a violent crime.¹⁸⁸ Other research shows that long sentences—those usually handed down with convictions for violent offenses—do not have a deterrent effect; their effect on crime rates is unproven, and their social, economic, and psychological costs are enormous.¹⁸⁹

182. *Id.*

183. See MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE REINTEGRATION REPORT CARD: GRADING THE STATES ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION 24 (2020); Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL’Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [<https://perma.cc/DV3W-Y6PP>].

184. *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

185. *From Youth Justice Involvement to Young Adult Offending*, NAT’L INST. JUST. (Mar. 10, 2014), <https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending> [<https://perma.cc/7RYG-PB5J>]; *Violent Offenders, Often Victims Themselves, Need More Compassion and Less Punishment*, USA TODAY (Aug. 9, 2018), <https://www.usatoday.com/story/opinion/policing/2018/08/09/violence-crime-punishment-policing-usa/930249002/>.

186. BARRY ET AL., *supra* note 39.

187. RICHARD A. MENDEL, DIVERSION: A HIDDEN KEY TO COMBATING RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE 21 (2022).

188. JAMES F. AUSTIN ET AL., RECONSIDERING THE “VIOLENT OFFENDER,” THE SQUARE ONE PROJECT: REIMAGINE JUSTICE 25 (2019)

189. See Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIM. & PUB. POL’Y 503, 507 (2014) (noting few discernible effects of lengthy sentences); COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 16, at

Reformist prosecutors, city councils, state legislatures, the federal government, and citizens groups are taking notice. Prosecutors in Louisiana, California, Washington, Illinois, Oregon, Maryland, Massachusetts, Georgia, Minnesota, and New York have recently created or are working to create sentencing review processes to reduce sentences for those who can be safely released.¹⁹⁰ These processes include victim and restorative support and reentry services.¹⁹¹ The federal government, Washington, D.C., and states are all considering or have passed Second Look legislation based on empirical evidence that shows long criminal sentences are counterproductive, do not contribute to public safety, do not act as a deterrent, and cost taxpayers billions of dollars.¹⁹² In March 2022, President Biden signed a proclamation to make April “Second Chance Month,” in recognition of the importance of recognizing the right to redemption.¹⁹³

In November 2022, Washington, D.C., City Council unanimously passed and then overrode a mayoral veto of a Revised Criminal Code that caps sentences at forty-five years and mandates sentence reviews at fifteen years for those sentenced when under the age of twenty-five, or at twenty years for those sentenced when older.¹⁹⁴ (This reform was voted down by Congress in March 2023.)¹⁹⁵

Efforts to decarcerate have also been underway in numerous locations around the country. Since 2000, New Jersey, Alaska, New York, Vermont, Connecticut, California, and Michigan have reduced their prison populations by over 20% with no adverse effect on public safety.¹⁹⁶ In fact, several of these states have seen a continued decline in crime.¹⁹⁷ Massachusetts has reduced its incarcerated population from more than 17,000 in 2017 to 11,200 in 2022.¹⁹⁸ Through Proposition 47, California had released 4,700 people from prison by 2017 through sentencing law

200–01, 174–75, 230–32, 258–59, 278–80, 301–02 (discussing the social, economic, and psychological effects of incarceration).

190. See Matt Nadel & Charlie Lee, *Prosecutors in These States Can Review Sentences They Deem Extreme. Few Do.*, THE MARSHALL PROJECT (Oct. 31, 2023), <https://www.themarshallproject.org/2022/11/11/prosecutors-in-these-states-can-review-sentences-they-deem-extreme-few-do-it>.

191. See George Gascón & Marilyn Mosby, *Resentencing Units Can Rectify, Rehabilitate, and Restore*, THE APPEAL (Dec. 8, 2020), <https://theappeal.org/resentencing-units-can-rectify-rehabilitate-and-restore/>.

192. JaneAnne Murray et al., *Second Look = Second Chance: Turning the Tide Through NACDL’s Model Second Look Legislation*, 33 U. MINN. L. SCH. 341, 341 (2021); *Second Look Sentencing*, NAT’L ASS’N CRIM. DEF. L. (Dec. 7, 2022), <https://www.nacdl.org/Content/Second-Look> [<https://perma.cc/9TJC-UUQB>].

193. Joseph R. Biden, *A Proclamation on Second Chance Month, 2023*, THE WHITE HOUSE (March 31, 2023), Proclamation No. 10362, 87 Fed. Reg. 19,593 (Mar. 31, 2022).

194. Revised Criminal Code Act of 2021, Council Bill 24-416 (D.C. 2022), 67, 102, 104, 282, <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Revised-Criminal-Code-Act-of-2021.pdf>.

195. See Susan Davis, *Congress Overturns D.C. Crime Bill with President Biden’s Help*, NPR (Mar. 8, 2023), <https://www.npr.org/2023/03/08/1161902691/d-c-crime-bill-biden-overturn>.

196. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 116 (2018).

197. *Id.*

198. Shira Schoenberg, *New Public Data Sheds Light on Prison Population Decline*, COMMONWEALTH BEACON (Aug. 12, 2022), <https://commonwealthmagazine.org/criminal-justice/new-public-data-sheds-light-on-prison-population-decline/>.

revisions with no impact on overall crime rates or violent crime.¹⁹⁹ In Oregon, Governor Kate Brown granted clemency to 1,147 people during her recent term, including 144 people convicted of violent crimes.²⁰⁰ Brown sees clemency as “a tool for criminal justice reform and as an act of grace,” as opposed to keeping people in prison who have demonstrated their rehabilitation and shown accountability.²⁰¹ The Clemency Project in Seattle, Washington has worked to free eighty-three people, including dozens sentenced to life imprisonment under Washington’s three-strikes law, since 2016.²⁰²

Recognizing that lengthy sentences do not reduce crime rates, are not a deterrent to crime, and are counterproductive to rehabilitation, the American Bar Association adopted a resolution in 2020 that calls for a second look at long sentences at the ten-year mark.²⁰³ The American Law Institute recommends a review of all prison sentences at fifteen years.²⁰⁴ Additionally, a chorus of legal experts calls for abolishing LWOP sentences and setting a cap of twenty years on *all* sentences.²⁰⁵

Perhaps most surprising is the growing chorus demanding reforms from those who have experienced violent harm.²⁰⁶ The first two national surveys of crime survivors show that victims want rehabilitation rather than punishment for those who harmed them by a two-to-one margin.²⁰⁷ Two-thirds of voters support having elected prosecutors review sentences for those who have been incarcerated for more than ten years to give those who can be safely returned to the community an opportunity for release.²⁰⁸ There is extremely high bipartisan support for reexamining long sentences to release those who pose no safety risk.²⁰⁹ According to a recent poll of respondents across the political spectrum, 91% believe the criminal justice system is broken and needs reform; 71% believe that the United States needs to reduce its

199. Mauer, *supra* note 196, at 125–26.

200. Amanda Waldroupe, *The Story of One US Governor’s Historic Use of Clemency: ‘We are a Nation of Second Chances’*, THE GUARDIAN (Sept. 28, 2022), <https://www.theguardian.com/us-news/2022/sep/28/oregon-governor-kate-brown-clemency>.

201. *Id.*

202. Jim Brunner, *Seattle Clemency Group is Helping Free Lifers from WA Prisons — and Thrive on the Outside*, SEATTLE TIMES (Mar. 25, 2023), <https://www.seattletimes.com/seattle-news/law-justice/seattle-clemency-group-is-helping-free-lifers-from-wa-prisons-and-thrive-on-the-outside/>.

203. Amanda Robert, *ABA Provides 10 Principles for Ending Mass Incarceration and Lengthy Prison Sentences*, ABA J. (August 8, 2022), <https://www.abajournal.com/web/article/resolutions-604-and-502-aba-provides-guidance-on-ending-mass-incarceration-and-lengthy-prison-sentences>.

204. MODEL PENAL CODE: SENTENCING § 305.6 (AM. L. INST., Proposed Final Draft 2017).

205. See, e.g., MODEL PENAL CODE: SENTENCING § 305.6 (AM. L. INST., Proposed Final Draft 2019); Murray et al., *supra* note 192, at 341; Nazgol Ghandnoosh & Ashley Nellis, *How Many People Are Spending Over a Decade in Prison?*, THE SENTENCING PROJECT (Sept. 8, 2022), <https://www.sentencingproject.org/policy-brief/how-many-people-are-spending-over-a-decade-in-prison/>

[<https://perma.cc/6UYZ-39FQ>]; Liz Komar et al., *Counting Down: Paths to a 20-Year Maximum Prison Sentence*, THE SENTENCING PROJECT (Feb. 15, 2023), <https://www.sentencingproject.org/reports/counting-down-paths-to-a-20-year-maximum-prison-sentence/> [<https://perma.cc/6SGG-L2ET>].

206. See ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 5, 15 (2019), <https://allianceforsafetyandjustice.org/crimesurvivorsspeak/> [<https://perma.cc/56SQ-LNCQ>].

207. *Id.*

208. BARRY ET AL., *supra* note 39, at 2.

209. *Id.*

prison population; and over two-thirds would be more likely to vote for an elected official who would vote to shift funds saved by reducing the prison population to drug treatment and mental health programs.²¹⁰

Looking at international practice, the case for sentencing reform is even more apparent. The United States accounts for more than 80% of the people worldwide serving life sentences.²¹¹ As the country with the highest rate of incarceration in the world, as of 2009 the United States confined five times more people per capita than the United Kingdom (which has Western Europe's highest incarceration rate), six-and-a-half times more than Canada, nine times more than Germany, ten times more than Norway and Sweden, and twelve times more than Japan, Denmark, and Finland.²¹² On average, United States prison sentences are *much* longer than those handed down elsewhere. For example, in Germany, only 0.01% of prison sentences are longer than fifteen years.²¹³ Germany states that life sentences contradict the right to human dignity as enshrined in the German constitution and, in particular, the right to redemption through rehabilitation.²¹⁴

In May 2022, the Canadian Supreme Court ruled that LWOP is cruel and unusual, and unconstitutional.²¹⁵ LWOP, according to the court, "shakes the very foundations of Canadian criminal law. It thereby negates the objective of rehabilitation from the time of sentencing, which has the effect of denying offenders any autonomy and imposing on them a degrading punishment that is incompatible with human dignity."²¹⁶ Most Latin American countries consider life sentences cruel and unusual punishment, and the few that have life imprisonment offer a pathway to review and release, emphasizing rehabilitation.²¹⁷ Only Cuba, and three states in Mexico, allow LWOP.²¹⁸ Similarly, many African countries do not allow LWOP and consider life sentences cruel and unusual punishment.²¹⁹

In 2012, only thirty-eight of the world's 193 countries allowed LWOP.²²⁰ There is a strong international consensus that LWOP sentences that lack any possibility of review and release are cruel and unusual.²²¹ Most countries that allow the imposition of life sentences guarantee the right to review, usually after twenty-five years.²²² For

210. *91% of Americans Support Criminal Justice Reform*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/7SXS-PJMW>].

211. Edwin Rios, *US Civil Rights Groups File Complaint Against 'Death by Incarceration' to UN*, GUARDIAN (Sept. 15, 2022), <https://www.theguardian.com/us-news/2022/sep/15/civil-rights-us-death-incarceration-united-nations-solitary>.

212. ROY WALMSLEY, WORLD POPULATION PRISON LIST (International Centre for Prison Studies, 9th ed. 2011), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_9.pdf.

213. *See Lessons Learned from Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences*, FAIR & JUST PROSECUTION (Apr. 2020), https://fairandjustprosecution.org/wp-content/uploads/2020/04/FJP_Brief_GermanIncarceration.pdf.

214. *Id.*

215. *R. v. Bissonette*, (2022) S.C.C. 23 (Can.).

216. *Id.*

217. Carter et al., *supra* note 22, at 376.

218. *Id.* at 377.

219. *See id.* at 378.

220. Carter et al., *supra* note 22, at 322.

221. *Id.*

222. *Id.* at 374.

example, life sentences in Denmark and Sweden can be reconsidered after twelve years and eighteen years, respectively.²²³

Furthermore, the Council of Europe, which created the European Court of Human Rights to enforce the human rights obligations arising from the European Convention on Human Rights, condemned LWOP over forty years ago.²²⁴ The Committee of Ministers of the Council of Europe passed a resolution against long sentences and mandated reviews of all sentences, including life sentences, at eight to fourteen years from the time of incarceration.²²⁵ Each person would be viewed as an individual and evaluated based on the particulars of their case.²²⁶ The European Court of Human Rights states that life sentences amount to inhuman or degrading treatment or punishment.²²⁷ The court has decided that all sentences must be reviewable and reducible.²²⁸ The court argues that the reason for a sentence must change over time as people and context change.²²⁹ The reason to keep someone incarcerated must be regularly reviewed in order to gauge rehabilitation, atonement, and the state's need to keep someone incarcerated.²³⁰

The U.N. Human Rights Committee has recently called for a moratorium on LWOP sentences,²³¹ having stated that human rights law requires “more than just a theoretical possibility of review and release for those serving life sentences.”²³² Such reviews “must allow for a thorough evaluation of the detained person's progress towards rehabilitation and the state's justification for his continued detention.”²³³ The International Criminal Court, which prosecutes those accused of crimes against humanity, including genocide, does not hand down LWOP sentences.²³⁴

The United States is a signatory to treaties that “protect individuals' rights to dignity and prohibit torture, and cruel, inhuman, and degrading punishment including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).”²³⁵ In September 2022, a coalition of forty-four human rights and civil groups filed a complaint against the United States at the U.N. for the extreme sentencing practice of handing down life sentences, especially life without parole. The signatories argue:

223. Mauer, *supra* note 196, at 128.

224. Carter et al., *supra* note 22, at 341.

225. *Id.* at 341–42.

226. *See id.* at 340, 343.

227. *Id.* at 341.

228. *Id.* at 339–40.

229. *See id.* at 339.

230. *See id.*

231. *UN Human Rights Committee Calls for Moratorium on Life Without Parole in U.S.*, CTR. CONST. RTS. (Nov. 3, 2023), <https://ccrjustice.org/home/press-center/press-releases/un-human-rights-committee-calls-moratorium-life-without-parole-us> [<https://perma.cc/UKQ2-296Z>].

232. Carter et al., *supra* note 22, at 344–45.

233. *Id.* at 345; *see also* Comm. on Hum. Rts., *Comm'n on the Work of Its 112th Session*, U.N. Doc. C/112/D/1968/2010, at 16–17 (2014).

234. Mauer, *supra* note 196.

235. Memorandum from Signatory Organizations to United Nations Special Procedures, *supra* note 22, at 19.

[T]hat the United States' extreme prison sentencing policies and practices of life without parole (LWOP), life with parole (LWP), "virtual life" [50 years and over], and other term-of-years sentences that exceed life expectancy and thus effectively condemn individuals to death by incarceration (DBI), violate the prohibition against racial discrimination; violate individuals' right to life; violate the prohibition against torture, and cruel, inhuman, and degrading treatment; and are an arbitrary deprivation of liberty."²³⁶

IV. A RESTORATIVE PATHWAY FORWARD

This Article concludes with several suggestions for a restorative pathway toward ameliorating the harms of Maine's criminal legal system, rectifying some of the damage done by the 1976 Criminal Code revision, and reestablishing meaningful opportunities for review that foster rehabilitation, redemption, healing, and community safety.

A. Parole

We argue that the abolishment of parole in 1976 must be reversed. Within Maine's prisons, there remains a lack of hope and incentive to work towards a future beyond release.²³⁷ The reestablishment of parole, as modeled in L.D. 178, can serve as a major first step towards creating a clear pathway that supports and encourages active engagement in personal rehabilitation, accountability, and preparation for life after prison.²³⁸ A parole system like this can also serve to create an avenue through which victims and survivors of harm can have a voice in determining a more healing outcome than what the courts and criminal legal system currently provide. Rather than being confined to the victim impact statement they delivered at sentencing, or their testimony delivered at trial, victims and survivors will have the opportunity to have their voice and healing honored if they choose to participate in the parole process.

B. Second Look Legislation

Maine is currently one of a very few states that does not have any meaningful review mechanism to account for rehabilitative progress during incarceration.²³⁹ Second Look resentencing legislation is a growing movement across the United States.²⁴⁰ As the lawyers and the public alike are recognizing the structural harm and systemic racism that is embedded in the criminal legal system, many national and local organizations are now devoted to redressing these generations-old harms.²⁴¹

236. *Id.* at 1 (footnote omitted); see also Rios, *supra* note 211.

237. See discussion *supra* pp. 70–74.

238. See *supra* notes 174–177 and accompanying text.

239. See *supra* pp. 85–86.

240. See generally *Second Look Sentencing*, FAMS. AGAINST MANDATORY MINIMUMS, <https://fam.m.org/secondlook/> [<https://perma.cc/ZY4G-6L9W>] (last visited Dec. 11, 2023).

241. See *id.*; Nazgol Ghandnoosh, *One in Five: Ending Racial Inequality in Incarceration*, THE SENTENCING PROJECT (Oct. 11, 2023), <https://www.sentencingproject.org/reports/one-in-five-ending-racial-inequity-in-incarceration/> [<https://perma.cc/B3W5-UKHL>]; *Evidence-Based Reforms Safely Reduce Incarceration*, FWD, <https://www.fwd.us/> [<https://perma.cc/B73A-BSLE>] (last visited Nov. 25,

From prisoners' rights advocates, to legal firms, to social justice organizations, to victims' rights advocates—there is a widespread call for meaningful change within the criminal legal system. This Article argues that Maine needs to heed the call and begin to allow for second looks at lengthy prison sentences for those who are currently incarcerated.

C. Supervised Community Confinement Program

The MDOC's SCCP is lauded as a successful mechanism of early release.²⁴² However, few residents actually are released for the full thirty months of supervised community confinement that the statute and policy support.²⁴³ A simple yet effective change to this policy that would afford greater discretion to the Commissioner of Corrections and to heads of facilities to recognize rehabilitation would be to remove the thirty-month cap, and to allow the two-thirds structure to stand for those serving more than five and a half years (e.g., after serving two-thirds or one-half of their sentence, the person would be eligible to apply if they met all the other criteria). If people have met all of the requirements to be transferred to SCCP, but still have many years left on their sentence, keeping them incarcerated within a secure facility is a massive waste of Maine's taxpayer dollars. Lawmakers should remove the cap and allow those who know the incarcerated people best to determine when they are ready for release, rather than trusting in the future-telling capabilities of judges.

D. Security Custody Levels

One of the requirements of the SCCP is to have achieved "community custody" security level.²⁴⁴ If someone has proven themselves to be of no threat to themselves or others for an extended period of time, has continued to serve their inside community over time, and has developed a robust release plan, then the amount of time they have left to serve should not prevent them from moving through the Department's security custody levels. There are many people currently incarcerated who, by their behavior and rehabilitative status, should be classified as minimum or community custody level, but the time left on their sentence prevents them from moving to a lower custody level. For example, the men living in MSP's self-

2023); *Cutting Jail & Prison Populations*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/end-mass-incarceration/cutting-jail-prison-populations> [https://perma.cc/HM6U-LMRA] (last visited Dec. 11, 2023); VERA INST. OF JUST., *supra* note 29; ABOLITIONIST L. CTR., <https://abolitionistlawcenter.org/> [https://perma.cc/JS6V-ARME] (last visited Dec. 11, 2023); ILL. PRISON PROJECT, <https://www.illinoisprisonproject.org/> [https://perma.cc/TW7J-4QHA] (last visited Dec. 11, 2023).

242. See STATE OF ME. DEP'T OF CORR., POL'Y NO. 27.2, SUPERVISED COMMUNITY CONFINEMENT (July 8, 1998); *An Act to Support Reentry and Reintegration into the Community: Hearing on L.D. 178 Before the Crim. Just. Pub. Safety Comm.*, 131st Legis. 1 (2023) (testimony of Randall A. Liberty, Commissioner of the Department of Corrections, in opposition to L.D. 178).

243. 34-A M.R.S. § 3036-A(2); see also Chloe Teboe, *Program Allows Some Maine Prison Residents to Serve End of Sentence in Community*, NEWSCENTERMAINE, (Nov. 22, 2021), <https://www.newscentermaine.com/article/news/local/as-seen-on-tv/maine-updated-supervised-community-confinement-program-helps-prison-residents-to-reenter-society-successfully/97-96865291-c081-4e2c-af6a-b2152758f795>.

244. State of Me. Dep't of Corr., Pol'y No. 27.2, Supervised Community Confinement § VII(B)(6) (July 8, 1998).

governing Earned Living Unit have to be free of disciplinary write-ups for five years, be involved in community work, hold a job in the prison, and participate in the community meetings. Within this Unit, they can cook for themselves, hold jobs with outside employers, and manage their unit themselves. Despite this, because many of these men have extreme sentences, they cannot be moved to a lower security facility or apply for the Secure Community Confinement Program. Maine needs to take measures to allow incarcerated people serving life sentences to transfer to minimum security facilities as part of its shift towards the Maine Model of Corrections.²⁴⁵ A thorough reevaluation of each security custody level should be undertaken with an eye towards rehabilitation, restoration, empowerment, and healing. Such a reevaluation would in no way jeopardize the safety, security, or orderly running of any facility.

E. Executive Clemency

Due to the separation of powers clause in Maine's constitution, only the executive branch can change a prison sentence once rendered by a judge.²⁴⁶ This discretion needs to be given to the judiciary branch. The MDOC, or a judicial review board, should be able to determine when someone no longer poses a threat to their outside community. If the state is not ready for a constitutional amendment to repeal the separation of powers clause, then the Governor and the Clemency Board need to utilize their mechanism of review powers. People who have attained educational advancement, proven themselves rehabilitated, established a meaningful support network, and are clearly ready for release should be granted clemency without hesitation. This is currently not the case in Maine.

CONCLUSION: RESTORATIVE REVISION OF THE CRIMINAL CODE

The Commission to Examine Reestablishing Parole and the Permanent Commission on the Status of Racial, Indigenous, and Tribal Populations have called for the creation of a commission to review and revise the Maine Criminal Code.²⁴⁷ If the criminal legal system is to earn the name "criminal justice system," there must be a shift away from punishment and towards accountability and repair. Punishment and retribution have continually failed to increase community safety, lower recidivism rates, or deter crime. The current system punishes people without ever holding them accountable to the people they harmed. Maine's criminal code must be reviewed and revised with the purpose of shifting from punishment to accountability and repair.

Implementing these changes in policy and practice will enable Maine to build a restorative pathway to decarceration that would address some of the most egregious

245. See *Maine Model of Corrections*, STATE OF ME. DEP'T OF CORR., <https://www.maine.gov/corrections/mmc> [<https://perma.cc/5H8N-F2JQ>] (last visited Dec. 11, 2023).

246. ME. CONST. art. III, § 2; *id.* art. V, § 11.

247. *Commission to Examine Reestablishing Parole*, ME. STATE LEGIS., <https://legislature.maine.gov/reinstatement-of-parole-commission> [<https://perma.cc/28D6-A22T>] (last visited Dec. 11, 2023); Resolves 2021, ch. 101 (Maine state law directing the Permanent Commission on the Status of Racial, Indigenous and Maine Tribal Populations to examine restorative justice)

injustices in our current system, save Maine millions annually in taxpayer dollars, and contribute in productive ways to reducing harm and enhancing public safety.