

LOUISIANA’S ADDICTION TO MASS INCARCERATION BY THE NUMBERS

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I. INTRODUCTION

The United States—the land of the free—has held the title for highest incarceration rate of any country in the world for fifteen consecutive years.¹ Though the United States makes up less than 5% of the world’s population, it accounts for 25% of the

1. See Tyjen Tsai & Paola Scommenga, *U.S. Has World’s Highest Incarceration Rate* (Aug. 2012), <http://www.prb.org/Publications/Articles/2012/us-incarceration.asp>
x.

total prison population.² Moreover, the state of Louisiana has the highest rate of incarceration of any country or U.S. state in the world, and it imprisons nonviolent³ offenders at much higher rates than other southern states.⁴ Louisiana's reliance on imprisonment to reduce crime has had a disproportionate impact on minority and indigent communities and cost taxpayers billions of dollars.

In the wake of a multimillion-dollar budget shortfall, the Louisiana Legislature took steps to reduce its prison population by passing new legislation during the 2017 Regular Legislative Session.⁵ Nevertheless, Louisiana must make additional reforms to its criminal justice system to further reduce the state's prison population and address the impact that its addiction to incarceration has had on nonviolent offenders for decades.

Part II of this Comment highlights the history of the War on Drugs and its impact on minorities and the country's incarceration rate. Part III examines mass incarceration in Louisiana, focusing on the factors contributing to its unmatched rate of imprisonment, disproportionate impact on African Americans and the poor, and economic impact on taxpayers. Finally, Part IV outlines legislative recommendations for further reducing the state's incarceration rate through sentencing reforms and expanded re-entry programs aimed at reducing the incarceration of nonviolent offenders. Part IV also addresses the

2. Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.e89ed6920e48.

3. "Crime of violence" in Louisiana "means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon." LA. STAT. ANN. § 14:2 (2016 & Supp. 2017).

4. John Simerman, *Report: Louisiana Could Lose Title of Highest-in-Nation Incarceration Rate, But Hurdles Exist*, NEW ORLEANS ADVOCATE (Sept. 5, 2016), http://www.theadvocate.com/new_orleans/news/crime_police/article_e423d3c2-7397-11e6-b8f3-b3aae3602455.html; see also Kevin Kane, *Louisiana Locks Up More Nonviolent Offenders Than Neighboring States Without Achieving Lower Crime Rates*, PELICAN POST (Aug. 25, 2016), <http://www.thepelicanpost.org/2016/08/25/louisiana-locks-up-more-nonviolent-offenders-than-neighboring-states-without-achieving-lower-crime-rates/>.

5. See generally Julia O'Donoghue, *Louisiana Criminal Justice Reform: What You Need to Know About the Changes*, NOLA.COM (June 29, 2017), http://www.nola.com/politics/index.ssf/2017/06/louisiana_criminal_justice_ref_1.html.

detrimental impact of incarceration on individuals with criminal backgrounds and proposes a revision to the law governing expungement.

II. THE HISTORY AND CURRENT STATE OF THE WAR ON DRUGS

Civil rights attorney and associate professor at Stanford Law School Michelle Alexander asserts that the War on Drugs⁶ played an integral role in the growth of America's prison population over the past four decades.⁷ Additionally, the War on Drugs has been linked to factors that drive incarceration rates, like the rise in violent crime.⁸ While it cannot be solely blamed for the rise in mass incarceration, it is undeniable that the federal crusade against drugs significantly contributed to this country's unrivaled rate of incarceration. The current state of imprisonment in the United States and its disparate impact on minorities cannot be accurately evaluated without considering the impact of the War on Drugs.

A. THE FABRICATION OF A DRUG AND RACIAL THREAT

The passage of the Harrison Narcotics Act of 1914, legislation that aimed to control the trafficking of narcotics, marked what many believe was the official beginning of the "oppressive, expensive, and devastating" drug war.⁹ The

6. *War on Drugs*, BRITANNICA.COM, <https://www.britannica.com/topic/war-on-drugs> (last visited Jan. 2, 2018) (defining the War on Drugs as "the effort in the United States since the 1970s to combat illegal drug use by greatly increasing penalties, enforcement, and incarceration for drug offenders").

7. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press ed., 1st ed. 2010).

8. See Josh Sanburn & David Johnson, *Violent Crime Is on the Rise in U.S. Cities*, TIME (Jan. 30, 2017), <http://time.com/4651122/homicides-increase-cities-2016/>. But see, Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT (Feb. 9, 2017), https://www.the-marshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong?utm_medium=email&utm_campaign=sharetools&utm_source=email&utm_content=post-top#.ijbfCuyXZ (quoting Fordham University School of Law Professor John Pfaff, who alleges that the War on Drugs is "important but unequivocally secondary to other factors" like the rise in crime and argues that sentencing reform and similar solutions will have no significant impact on reducing rates of incarceration). See also John Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173 (2015).

9. Jeremy Lesser, *Today Is the 100th Anniversary of the Harrison Narcotics Tax Act*, DRUG POLICY ALL. (Dec. 16, 2014), <http://www.drugpolicy.org/blog/today-100th-anniversary-harrison-narcotics-tax-act>; see also Walter E. Block & Violet Obioha, *War on Black Men: Arguments for the Legalization of Drugs*, 31:2 CRIM. JUST. ETHICS

Harrison Narcotics Act prohibited doctors from prescribing opiates to treat addiction because it was “not a disease,” and an underground market for opiates and cocaine formed in response.¹⁰ Concurrently, the U.S. government employed an “aggressively racist propaganda attack” aimed at African Americans who were associated with cocaine, as well as Chinese individuals who used opium.¹¹

In June 1971, nearly sixty years after the passage of the Harrison Narcotics Act, President Richard Nixon declared a national “War on Drugs.”¹² In addition to dramatically increasing the scope of federal drug control agencies and forming the Drug Enforcement Administration (DEA), Nixon imposed mandatory sentencing measures for federal drug offenses.¹³ Despite public opinion polls from the 1970s indicating that only about 2% of respondents viewed drug abuse as an important problem, Nixon dramatized the threat by referring to drug abuse as “America’s public enemy number one.”¹⁴ However, in a 1994 interview, John Ehrlichman, one of Nixon’s top advisers, suggested that the true motive behind the War on Drugs was going after “the antiwar left and black people.”¹⁵ Ehrlichman stated, “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we

106 (2012).

10. See Lesser, *supra* note 9.

11. *Id.*; see also Matthew J. Routh, *Re-Thinking Liberty: Cannabis Prohibition and Substantive Due Process*, 26 KAN. J.L. & PUB. POL’Y 143, 167 (2017) (noting that “cannabis prohibition was spawned from racial discrimination toward immigrant groups such as Mexicans, African Americans, Latinos, and other racial minorities”).

12. *A Brief History of the Drug War*, DRUG POLICY ALL., <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> (last visited Oct. 9, 2017); Cigdem V. Sirin, *From Nixon’s War on Drugs to Obama’s Drug Policies Today: Presidential Progress in Addressing Racial Injustices and Disparities*, 18 RACE, GENDER & CLASS 82, 84 (2011).

13. *A Brief History of the Drug War*, *supra* note 12.

14. Jarvis DeBerry, *The War on Drugs: Not Just Effectively Racist but Deliberately So*, NOLA.COM (Mar. 29, 2016), http://www.nola.com/crime/index.ssf/2016/03/war_on_drugs_nixon.html (“In ‘Making Crime Pay: Law and Order in Contemporary American Politics,’ Katherine Beckett writes that ‘the percentage of poll respondents identifying drug abuse as the nation’s most important problem had dropped from 20% in 1973 to 2% in 1974 and hovered between 0% and 2% until 1982.’”).

15. Tom LoBianco, *Report: Aide Says Nixon’s War on Drugs Targeted Blacks, Hippies*, CNN POLITICS (Mar. 24, 2016), <http://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/>.

could disrupt those communities.”¹⁶ Despite Nixon’s aggressive position on drugs, his administration was the last to designate a majority of funding to drug abuse treatment instead of law enforcement since the inception of the drug war.¹⁷

In the 1980 presidential election, Ronald Reagan promised to expand the role of the federal government in “fighting crime.”¹⁸ Although “less than two percent of the American public viewed drugs as the most important issue facing the nation” at that time, President Reagan officially announced his administration’s War on Drugs in October 1982.¹⁹ Subsequently, federal law enforcement agency budgets expanded exponentially.²⁰ DEA antidrug spending increased from \$86 million to \$1.026 billion between 1980 and 1984.²¹ Curiously, the Reagan administration also dramatically cut funding for agencies responsible for drug education, prevention, and treatment.²² For example, the budget for the National Institute on Drug Abuse decreased from \$274 million in 1981 to \$57 million in 1984.²³ If drugs posed such a significant problem that it was necessary to wage an official war, then why did the administration decrease funding for education, prevention, and treatment?

Legislation enacted under President Reagan reinforced the threat of a national drug epidemic requiring a federal response. Laws passed in 1986 allotted \$2 billion to the War on Drugs, allowed some illegally obtained evidence to be admitted in drug trials, and even permitted capital punishment as a penalty for some drug-related crimes.²⁴ In the same year, Reagan signed the Anti-Drug Abuse Act of 1986, which set federal mandatory

16. LoBianco, *supra* note 15; Dan Baum, *Legalize It All: How To Win the War on Drugs*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>.

17. *Thirty Years of American’s Drug War*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pagesfrontline/shows/drugs/cron/> (last visited Oct. 9, 2017).

18. See ALEXANDER, *supra* note 7, at 49.

19. See *id.*

20. See *id.*

21. *Id.* (“Practically overnight the budgets of federal law enforcement agencies soared. Between 1980 and 1984, FBI antidrug funding increased from \$8 million to \$95 million. Department of Defense antidrug allocations increased from \$33 million in 1981 to \$1,042 million in 1991. During that same period, DEA antidrug spending grew from \$86 to \$1,026 million, and FBI antidrug allocations grew from \$38 to \$181 million.”).

22. See *id.*

23. See ALEXANDER, *supra* note 7, at 50.

24. See *id.* at 53.

minimum sentences for cocaine distribution.²⁵ Notably, the penalty for distributing crack cocaine, a drug more often associated with African American users, was far more severe than the penalty for powder cocaine, a drug more often associated with Caucasian users.²⁶ Like the Act passed in 1986, the Anti-Drug Abuse Act of 1988 was “extraordinarily punitive.”²⁷ It permitted public housing authorities to evict tenants who “allow[ed] any form of drug-related criminal activity to occur on or near public housing premises.”²⁸ Additionally, the new Anti-Drug Abuse Act excluded those convicted of a drug offense from receiving many federal benefits, including student loans.²⁹ It also established new federal mandatory minimums for drug crimes, some of which even applied to first-time offenders.³⁰ In just four years, arrests for drug offenses increased from 56,013 in 1985 to 94,490 in 1989.³¹

B. PUBLIC BELIEF IN THE DRUG THREAT AND THE SUBSEQUENT MARGINALIZATION OF MINORITIES

Public perception about the severity of the national drug threat and its relationship to crime finally shifted. After President George H. W. Bush described drug abuse as “the most pressing problem facing the nation” in 1989, a poll indicated that 64% of participants viewed drugs as the country’s most important problem.³² However, “[t]he level of public concern about crime and drugs was weakly correlated with actual crime rates but highly correlated with political initiatives, campaigns, and partisan appeals.”³³ Arguably, the unprecedented number of individuals behind bars in the United States in 1991 was due to the War on Drugs.³⁴ That year, one quarter of all African American men in the country were in jail or prison.³⁵

In the wake of the public’s acceptance of the idea that drugs

25. See ALEXANDER, *supra* note 7, at 53; see also Sirin, *supra* note 12 at 90–91.

26. See ALEXANDER, *supra* note 7, at 53; see also Sirin, *supra* note 12 at 90–91.

27. See ALEXANDER, *supra* note 7.

28. See *id.*

29. See *id.*

30. See *id.*

31. Dan Check, *The Successes and Failures of George Bush’s War on Drugs*, DRUGSENSE.ORG, <http://tfy.drugsense.org/bushwar.htm> (last visited Feb. 5, 2017).

32. See ALEXANDER, *supra* note 7, at 55.

33. See *id.*

34. See *id.* at 56.

35. See *id.*

posed a significant threat to the nation, President Bill Clinton passed legislation that “escalated the drug war beyond what conservatives had imagined possible a decade earlier.”³⁶ Under his administration, the country experienced its “largest increases in federal and state prison inmates of any president in American history.”³⁷ In 1994, President Clinton signed a \$30.2 billion crime bill that mandated life sentences for some three-time federal offenders (commonly referred to as “three strikes”), allocated over \$16 billion for state prison grants, and expanded state and local police efforts to fight the War on Drugs.³⁸

Additionally, President Clinton’s “One Strike and You’re Out” initiative authorized federally-assisted public housing authorities to refuse access to anyone with a criminal background—effectively excluding entire families from public housing with few alternatives to homelessness.³⁹ “Ultimately, multiple generations of America’s most vulnerable populations, including drug users, African Americans, Latinos, and the very poor found themselves confined to long-term prison sentences and lifelong social and economic marginality.”⁴⁰ In May 2015, President Clinton conceded that policies pushed through by his administration some twenty years earlier played a role in the country’s current state of excessive incarceration.⁴¹ He noted that “[w]e wound up . . . putting so many people in prison that there wasn’t enough money left to educate them, train them for new jobs, and increase the chances when they came out so they could live productive lives.”⁴²

C. IMPACT OF SUCCESSIVE ADMINISTRATIONS’ WAR ON DRUGS

The high incarceration rate in the United States and its disproportionate impact on minorities is a product of the racially-motivated national drug threat. Federal prisons in the early

36. See ALEXANDER, *supra* note 7, at 56.

37. See *id.*

38. See *id.*; see also Donna Murch, *The Clintons’ War on Drugs: When Black Lives Didn’t Matter*, NEW REPUBLIC (Feb. 9, 2016), <https://newrepublic.com/article/129433/clintons-war-drugs-black-lives-didnt-matter>.

39. See ALEXANDER, *supra* note 7, at 57.

40. See Murch, *supra* note 38.

41. Jeremy Diamond, *Bill Clinton Concedes Role in Mass Incarceration*, CNN POLITICS (May 7, 2015), <http://www.cnn.com/2015/05/06/politics/bill-clinton-crime-prisons-hillary-clinton/>.

42. *Id.*

1980s housed 25,000 inmates and had a budget of approximately \$1 billion.⁴³ Today, the federal prison system has over 209,000 inmates and a budget of \$6.85 billion.⁴⁴

The War on Drugs also impacted state incarceration rates. While the number of federal and state prisoners was fairly stable throughout the early 1970s, it soared from 218,466 in 1974 to 1,508,636 in 2014.⁴⁵ As of 2016, 2.2 million individuals were incarcerated in federal and state prisons and local jails in the United States—a 500% increase over the past forty years.⁴⁶ Additionally, the number of individuals locked up for drug-related offenses increased from 41,000 in 1980 to 488,400 in 2014—an increase of 1000%.⁴⁷ Today, nearly half a million individuals are behind bars for a drug-related offense.⁴⁸

The United States currently has the highest incarceration rate in the world.⁴⁹ Its rate of imprisonment is five to ten times higher than the rates of other countries it views as peers.⁵⁰ Despite comparable crime rates, there is a chasm between rates of imprisonment in the United States and the rates in other “stable, internally secure, industrialized nations.”⁵¹ For example, while the United States imprisons 693 people for every 100,000 residents, the United Kingdom incarcerates only 145 and Canada only 114.⁵² Unlike the United States, most countries that have high incarceration rates also grapple with internal conflict, political instability, or repression.⁵³ For example, Turkmenistan,

43. Timothy Head & Grover Norquist, *The High Costs of Over-Incarceration*, NAT'L REV. (Aug. 13, 2015), <http://www.nationalreview.com/article/422476/over-incarceration-not-making-america-safer>.

44. *Id.*

45. Lauren Carroll, *How the War on Drugs Affected Incarceration Rates*, POLITIFACT (July 10, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/jul/10/cory-booker/how-war-drugs-affected-incarceration-rates/>.

46. *Id.*

47. *Id.*

48. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/reports/pie2016.html> (last visited Oct. 9, 2017).

49. Tsai & Scommenga, *supra* note 1.

50. Peter Wagner & Alison Walsh, *States of Incarceration: The Global Context 2016*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/global/2016.html> (last visited Oct. 9, 2017).

51. *Id.*

52. *Id.*

53. *Id.*

“one of the world’s most repressive countries,”⁵⁴ has the second-highest incarceration rate in the world.⁵⁵ Yet the United States as a whole, as well as thirty-two individual states within the country, have incarceration rates higher than those of a country described as having “a disastrous human rights record.”⁵⁶ Additionally, while New York and New Jersey have implemented measures to actively reduce their prison populations, their population rates are nearly identical to Rwanda, a country that boasts the seventh-highest incarceration rate in the world and is still recovering from the government-sponsored genocide that occurred in the mid-1990s.⁵⁷ Even the six U.S. states that have the lowest rates of incarceration in the country—Utah, Minnesota, Rhode Island, Maine, Vermont, and Massachusetts—have higher rates than those of South Africa and several former Soviet republics.⁵⁸

Ironically, America’s incarceration of individuals at “globally unprecedented rates” has had no significant impact on improving public safety.⁵⁹ Rather, it has “consistently and disproportionately stunted the social and economic well-being of poor communities and communities of color for generations.”⁶⁰ While African American men are incarcerated at “grossly disproportionate rates” throughout the country,⁶¹ racial disparities do not correlate to rates of illegal drug use.⁶² Although around 17 million Caucasians and only 4 million African Americans report having used an illicit drug within the last month, a 2015 survey found that African Americans are incarcerated for drug offenses at a rate ten times that of

54. *Turkmenistan*, HUMAN RIGHTS WATCH, <https://www.hrw.org/europe/central-asia/Turkmenistan> (last visited Oct. 9, 2017).

55. See Wagner & Walsh, *supra* note 50; see also John Pfaff, *A Better Approach to Violent Crime*, WALL STREET J. (Jan. 27, 2017), <https://www.wsj.com/articles/a-better-approach-to-violent-crime-1485536313>.

56. See Wagner & Walsh, *supra* note 50; see also *Turkmenistan*, *supra* note 54.

57. See Wagner & Walsh, *supra* note 50; see also *Rwanda Country Profile*, BBC NEWS, <http://www.bbc.com/news/world-africa-14093238> (last visited Oct. 1, 2017).

58. See Wagner & Walsh, *supra* note 50.

59. See *id.*; see also Daniel P. Mears, *Mass Incarceration Means Less Public Safety at Great Cost*, ORLANDO SENTINEL (Dec. 9, 2014), <http://www.orlandosentinel.com/opinions/os-ed-crowded-prisons-120914-20141209-story.html>.

60. See generally Wagner & Walsh, *supra* note 50; see also INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind, eds., 2002).

61. See generally ALEXANDER, *supra* note 7, at 99.

62. *Id.* at 100.

Caucasians.⁶³ Further, even though Caucasians may be more likely to sell drugs and just as likely to consume them, African Americans are 2.5 times more likely to be arrested for possession of drugs and 3.6 times more likely to be arrested for selling drugs.⁶⁴

III. MASS INCARCERATION IN LOUISIANA: THE WORLD'S PRISON CAPITAL

Public perception about the need for a “war” to fight the national threat of drugs eventually permeated to the state level. The impact of the federal War on Drugs is demonstrated most acutely in Louisiana. Referred to as “the world’s prison capital,” Louisiana imprisons a higher percentage of residents than any other state in the United States and any other country in the world.⁶⁵

However, Louisiana has not always had the world’s highest incarceration rate.⁶⁶ Prior to the commencement of the nationwide drug war, Louisiana had only the thirteenth highest incarceration rate in the country.⁶⁷ Its rates progressively rose to fifth highest in the nation by 1986, third highest by 1990, and second-highest by 2000.⁶⁸ Today, the state imprisons 816 people per 100,000, whereas Russia incarcerates only 492 and China only 119.⁶⁹ Louisiana’s current rate of imprisonment is 0.88%, with 39,710 of its 4.5 million residents behind bars.⁷⁰

63. See *Criminal Justice Fact Sheet*, NAACP.ORG, <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited Oct. 1, 2017); see also Christopher Ingraham, *White People Are More Likely to Deal Drugs, But Black People Are More Likely to Get Arrested For It*, WASH. POST (Sept. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it/?utm_term=.5346d2012fe4; see also Maia Szalavitz, *Study: Whites More Likely to Abuse Drugs Than Blacks*, TIME (Nov. 7, 2011), <http://healthland.time.com/2011/11/07/study-whites-more-likely-to-abuse-drugs-than-blacks/>.

64. Carroll, *supra* note 45.

65. See Wagner & Walsh, *supra* note 50; see also *Incarceration Rates by State*, WORLDATLAS.COM, <http://www.worldatlas.com/articles/highest-incarceration-rates-by-state.html> (last visited Oct. 1, 2017).

66. Bill Quigley, *Louisiana Number One in Incarceration*, HUFFINGTON POST (May 11, 2017), http://www.huffingtonpost.com/bill-quigley/louisiana-number-one-in-i_b_9888636.html.

67. *Id.*

68. *Id.*

69. *Id.* This is noteworthy given that Russia and China are two of the largest countries in the world.

70. Alex Silady, *Which States Put the Most People in Prison*, SMARTASSET (Feb. 3,

Similar to the national trend, it does not appear that Louisiana's dependence on imprisonment has reduced or deterred crime. Despite the state's unmatched rate of incarceration, it still has one of the highest crime rates in the country.⁷¹ In fact, Louisiana had the highest murder rate in the United States from 1989 until 2012 consecutively.⁷² In 2013, it had the fifth highest violent crime rate and the third highest poverty rate in the nation.⁷³ Nevertheless, 58% of those imprisoned in Louisiana have no past convictions for violent crime.⁷⁴ Rather, "drug possession is the most common crime for newly sentenced prisoners, and all of the [ten] most common prison admission categories are for nonviolent offenses."⁷⁵ The state's adoption of the federal War on Drugs was the catalyst behind Louisiana's exceedingly high incarceration rate and its destructive impact on the state's minority and indigent populations.

A. CONTRIBUTING FACTORS STEMMING FROM THE FEDERAL WAR ON DRUGS

Louisiana's use of mandatory minimum sentences and harsh penalties for drug offenses mirror the extraordinarily punitive measures taken at the federal level to combat the War on Drugs. These measures are also the primary drivers behind the state's high rate of incarceration. Imposed by Congress and state legislatures, mandatory minimum sentences essentially require judges to hand down a fixed sentence to anyone convicted of a specific crime, particularly for drug offenses.⁷⁶ Not only are

2017), <https://smartasset.com/insights/which-states-put-the-most-people-in-prison>.

71. Elizabeth Crisp, *Louisiana Comes in Dead Last in New 'Best States' Ranking*, THE ADVOCATE (Feb. 27, 2017), http://www.theadvocate.com/baton_rouge/news/politics/article_f7949258-fd16-11e6-af07-fbc707f72f0b.html.

72. Beau Evans, *Louisiana Tops Murder Rate Again, New FBI Data Shows*, NOLA.COM (Sept. 28, 2016), http://www.nola.com/crime/index.ssf/2016/09/louisiana_tops_murder_rate_aga.html.

73. Maurice Ward, *Poverty and Crime*, NAT'L DIALOGUE NETWORK (Feb. 1, 2015), <http://www.nationaldialoguenetwork.org/poverty-and-crime/> (noting that there is a very "intimate relationship" between poverty and crime); *Reentry Overview*, LA. DEPT. OF PUB. SAFETY & CORR., <http://doc.louisiana.gov/reentry-overview> (last visited Sept. 26, 2017).

74. *Our Views: Save Money on Prison Costs*, THE ADVOCATE (Sept. 9, 2016), http://www.theadvocate.com/baton_rouge/opinion/our_views/article_7ce25c62-7516-11e6-928b-b748546e374a.html.

75. Simerman, *supra* note 4.

76. *Mandatory Sentencing Was Once America's Law-and-Order Panacea. Here's Why It's Not Working*, FAMILIES AGAINST MANDATORY MINIMUMS 1, 1, <https://www.prisonpolicy.org/scans/famm/Primer.pdf>.

mandatory minimums unjust and often illogical,⁷⁷ they have failed to deter the sale and use of drugs.⁷⁸ In Louisiana, a sentence is treated as a mandatory minimum if it includes some or all of the phrase, “without benefit of probation, parole, or suspension of sentence.”⁷⁹ Mandatory minimums have a tremendous impact on the state’s incarceration rate because they *require* that offenders be sent to prison. Moreover, more than half of the mandatory minimum sentences handed down in Louisiana between 2009 and 2015 were for nonviolent crimes.⁸⁰

Louisiana Revised Statutes Titles 14 and 40 address criminal law and public health and safety, respectively. Of the 599 statutes in Titles 14 and 40, there are approximately 164 mandatory minimum sentences and more than half of those are for nonviolent crimes.⁸¹ While article 890.1 of the Louisiana Code of Criminal Procedure permits waiver of mandatory minimum sentences upon the agreement of the judge and district attorney, this rarely occurs in practice.⁸² Louisiana’s reliance on mandatory minimums for drug offenses has resulted in the imprisonment of an excessive number of low-level offenders, a disproportionate impact on African Americans, and an enormous strain on taxpayers.⁸³

Louisiana also imposes severe penalties for drug offenses of all levels,⁸⁴ and more than half of new prison sentences for drug

77. Imposition of mandatory minimum sentences is a one-size-fits-all approach to a problem that requires individualized attention. It requires a certain prison term without taking account of what makes sense under the circumstances.

78. *Mandatory Sentencing, supra* note 76; *see also* Lex Talamo, *Re-entry Program Allows Drug Offenders Chance at Fresh Start*, SHREVEPORT TIMES (Sept. 2, 2016), <http://www.shreveporttimes.com/story/news/2016/09/02/re-entry-program-allows-drug-offenders-chance-fresh-start/88583308/>.

79. *See* Daryl G. Purpera et al., *Evaluation of Strategies to Reduce Louisiana’s Incarceration Rate and Costs for Nonviolent Offenders*, LA. LEGISLATIVE AUDITOR 1, 7 (Aug. 31, 2016), [https://app.la.state.la.us/PublicReports.nsf/DB26F2309F9783F2862580200077A2CD/\\$FILE/00010B73.pdf](https://app.la.state.la.us/PublicReports.nsf/DB26F2309F9783F2862580200077A2CD/$FILE/00010B73.pdf).

80. *Id.* at 7.

81. *Id.* at 8.

82. *Id.* at 8; *see also* Julia O’Donoghue, *Here’s How Louisiana Sentencing Laws Are Changing Under Criminal Justice Reform*, NOLA.COM (last visited Oct. 19, 2017), http://www.nola.com/politics/index.ssf/2017/06/louisiana_crime_sentences_change.html (noting that new law, effective August 1, 2017, eliminated mandatory minimum prison terms for “possession of two grams or less of many illegal drugs”).

83. *See* Hayley H. Fritchie, *State v. Noble: Mandatory Minimum Madness in Louisiana*, 89 TUL. L. REV. 933, 937 (2015).

84. *Louisiana*, DRUG POSSESSION LAWS, <http://www.drugpossessionlaws.com/>

offenses are solely for possession.⁸⁵ A second offense conviction of marijuana possession—in any amount—is a misdemeanor with a penalty of six months in jail under state law.⁸⁶ A fourth or subsequent offense can carry up to twenty years in prison.⁸⁷ Exacerbating the problem is the fact that Louisiana has one of the most severe habitual-offender laws in the country.⁸⁸ It allows a district attorney to file a multiple bill to have a convicted felon's sentence enhanced based on his criminal history simply by proving the history is correct.⁸⁹ When the habitual-offender law is utilized, judges have little discretion in deciding whether to lengthen a sentence.⁹⁰ For example, the habitual-offender law allows prosecutors to increase sentences to twenty years to life for a fourth conviction of any felony, even for a nonviolent crime.⁹¹ A 2016 report indicated that 77.5% of cases where the habitual-offender law was used were for nonviolent crimes.⁹² Even more disturbing, habitual offender laws concentrate primarily in three of the state's majority-African American parishes,⁹³ and its impact, when exercised, is life-shattering. This is best illustrated by New Orleans native Bernard Noble's 2010 conviction for possession of two marijuana joints.⁹⁴ After the sentencing judge refused to imprison him for more than five years, the Orleans Parish District Attorney successfully appealed the sentence to account for Mr. Noble's three prior low-level, nonviolent offenses

louisiana/ (last visited Sept. 26, 2017).

85. Simerman, *supra* note 4.

86. Louisiana, *supra* note 84.

87. *Id.*

88. John Simerman, *Louisiana's Habitual Offender Law Used Sparingly Except in Orleans, Jefferson, St. Tammany*, NEW ORLEANS ADVOCATE (Oct. 1, 2016), http://www.theadvocate.com/new_orleans/news/courts/article_cb112404-8803-11e6-a553-eff6f3cbe5dd.html; *see also* LA. STAT. ANN. § 15:529.1 (2016).

89. *See* Simerman, *supra* note 88; *see also* Sarah Larimer, *This Man Is Accused of Candy Theft. Under La. Law, He Could Have Spent Life in Prison*, WASH. POST (Apr. 6, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/04/06/this-man-is-accused-of-stealing-31-worth-of-candy-under-louisiana-law-he-could-spend-life-in-prison/?utm_term=.dbb4a8430d7b.

90. *See* Simerman, *supra* note 88; *see also* Larimer, *supra* note 89.

91. *See* Simerman, *supra* note 88.

92. Purpera, *supra* note 79, at 8. Note that past convictions may have been for violent offenses. *Id.*

93. *See* Simerman, *supra* note 88.

94. Drug Policy Alliance, *Louisiana Man Sentenced to 13 Years Hard Labor for Possession of 2 Marijuana Cigarettes*, DAILY CHRONIC (Apr. 17, 2014), <http://www.thedailychronic.net/2014/30685/louisiana-man-sentenced-to-13-years-hard-labor-for-possession-of-2-marijuana-cigarettes/>.

of drug possession years earlier.⁹⁵ Consequently, Mr. Noble was sentenced to thirteen and one-third years in prison without the possibility of parole.⁹⁶

B. CONTRIBUTING FACTORS UNIQUE TO LOUISIANA

Louisiana's unmatched rate of incarceration, stemming from state measures mirroring the federal War on Drugs, is exacerbated by recidivism, the public defender shortage, and incentives to keep the state's incarceration rate high. In the early 1990s, Louisiana had an opportunity to reduce its incarceration rate in response to a federal court order to address overcrowding in its prisons.⁹⁷ After all, the state lacked the funds to build any new facilities.⁹⁸ Instead, in 1992, the head of the Louisiana Department of Corrections paved the way for the state to become the world's prison capital by incentivizing sheriffs to build new local facilities to house prisoners.⁹⁹ This was accomplished by giving sheriffs an increased per diem payment for each inmate they held and promising 40% occupancy in the new facilities.¹⁰⁰ This blossomed into a billion-dollar industry that thrives when the state's incarceration rate remains high.¹⁰¹ The for-profit prisons bring in as much as \$200,000 annually for mid-sized operations and \$1 million annually in multi-prison parishes.¹⁰²

Not only are sheriffs still making payments on newly-constructed facilities,¹⁰³ but they also rely on the prisons to

95. Drug Policy Alliance, *supra* note 94; *see also* Krishna Andavolu, *Thirteen Years for Two Joints*, VICE (Mar. 16, 2016), https://www.vice.com/en_ca/article/bernard-noble-sentenced-to-13-years-in-prison-for-two-joints.

96. Drug Policy Alliance, *supra* note 94; *see also* Matt Ferner, *Man Who Was Serving More Than 13 Years Over Two Joints' Worth of Marijuana Gets Sentence Reduced*, HUFFINGTON POST (Dec. 5, 2016), http://www.huffingtonpost.com/entry/bernard-noble-resentenced_us_5845de4fe4b028b32338db6d. While marijuana was decriminalized in New Orleans in March 2016, police can still make arrests for simple marijuana possession under state law.

97. Cindy Chang, *Sheriffs and Politicians Have Financial Incentives to Keep People Locked Up*, TIMES-PICAYUNE, May 13, 2012, at A7.

98. *Id.*

99. Cindy Chang, *In Local Prisons, Soon-to-be-Released Inmates Languish Without Job Training. It's a System Designed to Make Profit off of Prisoners*, TIMES-PICAYUNE, May 14, 2012, at A5-6.

100. *Id.* at A4-6.

101. *Id.*

102. Cindy Chang, *North Louisiana Family is a Major Force in the State's Vast Prison Industry*, NOLA.COM (May 14, 2012), http://www.nola.com/crime/index.ssf/2012/05/jonesboro_family_is_a_major_fo.html.

103. Tom Aswell, *State Inmate Housing a Financial Boon to Local Sheriffs*, LA.

generate revenue to pay for equipment, squad cars, and new technology.¹⁰⁴ Many small rural communities in Louisiana rely on the prisons for jobs.¹⁰⁵ Accordingly, there is intense political pressure to keep the prisons full, and the powerful prison lobby typically fights against reform efforts that could reduce the state's incarceration rate.¹⁰⁶ There is no question that "[t]he hidden engine behind the state's well-oiled prison machine is cold, hard cash."¹⁰⁷

Louisiana is unique in that over half of its prisoners are housed in local prisons run by sheriffs or private entities instead of state facilities.¹⁰⁸ In the rest of the country, only about 5% of state inmates are housed in local facilities.¹⁰⁹ While state prisons in Louisiana receive an average of \$55 a day for each inmate and typically house the most violent offenders, local facilities receive only \$24.39 a day for inmates convicted of relatively minor crimes who are serving sentences shorter than ten years.¹¹⁰ Most local facilities spend as little of that \$24.39 as possible on the inmates themselves to ensure the facilities maximize profits.¹¹¹ What is sacrificed in the process—in addition to medical treatment and other basic necessities—is the vocational training and educational and treatment programs that give inmates opportunities to improve their employment prospects and stay out of prison upon release. Ironically, inmates who are serving life sentences in state prisons such as Angola State Penitentiary can get certified in air conditioning repair, welding, and similar

VOICE (Dec. 13, 2010), <https://louisianavoice.com/2010/12/13/state-inmate-housing-a-financial-boon-to-local-sheriffs/>; see also Julia O'Donoghue, *Why a Former Louisiana Sheriff Wants to Boost Prisoner Pay - at the Expense of Sheriffs*, NOLA.COM (April 17, 2017), http://www.nola.com/politics/index.ssf/2017/04/prisoner_pay.html.

104. Chang, *supra* note 97, at A9.

105. *Id.* at A9, A12. These positions are in high demand due to the full package of benefits and the opportunity to work close to home in areas with little economic opportunity. In a 2012 interview, the mayor of Mangham, Louisiana stated, "Everyone I know works at the prison." *Id.* at A12.

106. Chang, *supra* note 97, at A1.

107. *Id.*

108. Chang, *supra* note 99, at A4 ("Louisiana locks up more people per capita than any other state. One in 86 of its adult citizens is behind bars. Of those Louisiana inmates, 52 percent are housed in local prisons – by far the highest percentage in the country.").

109. Julia O'Donoghue, *Amid Budget Cuts, Louisiana Keeps Prison Costs Down in Ways Other States Don't*, NOLA.COM (Sept. 27, 2016), http://www.nola.com/politics/index.ssf/2016/09/louisiana_prison_costs.html.

110. Chang, *supra* note 99, at A4.

111. *Id.*; Chang, *supra* note 102.

trades, though they will likely never have the opportunity to put their skills to use outside of the prison walls.¹¹² Of the 15,000 inmates released from prison in Louisiana each year, 11,000 had the misfortune of being housed in a local facility.¹¹³ Thus, 73% of the inmates released annually likely spent their time behind bars receiving no education, treatment, or job training before being released into society with little more than the clothes on their back and a criminal record.

Louisiana's high incarceration rate is also escalated by its rate of recidivism, or an ex-offender's re-arrest, reconviction, or return to prison during a given time period, typically within three to five years of release.¹¹⁴ There are several potential causes for recidivism, including lack of job training, inability to secure a job, lack of education, and substance abuse problems.¹¹⁵ Recidivism should be expected given the numerous laws, rules, and regulations that "operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream society and economy."¹¹⁶ For example, Louisiana offenders may not be eligible for health and welfare benefits, public housing, food stamps, or student loans.¹¹⁷ Additionally, they may be disqualified from certain employment opportunities and professional licenses.¹¹⁸ They may even become disenfranchised.¹¹⁹ The high rate of reentry in Louisiana can also be attributed to technical violations of parole, not new criminal behavior.¹²⁰ Given the lack of funding dedicated to treatment, education, and reentry programs in local facilities run by sheriffs and private entities, as well as the prison lobby's economic

112. Chang, *supra* note 99, at A4.

113. *Id.*

114. Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, CONG. RESEARCH SERV. 1, 5 (Jan. 12, 2015), <https://fas.org/sgp/crs/misc/RL34287.pdf>.

115. James, *supra* note 114, at 11–12; see also *Recidivism: Definition, Causes & Prevention*, STUDY.COM, <http://study.com/academy/lesson/recidivism-definition-causes-prevention.html> (last visited Oct. 9, 2017).

116. ALEXANDER, *supra* note 7, at 142.

117. See INVISIBLE PUNISHMENT, *supra* note 60, at 5.

118. *Id.* at 5.

119. *Id.*

120. *Reducing Incarceration for Technical Violations in Louisiana*, PEW CHARITABLE TRUSTS (Oct. 2014), <http://www.pewtrusts.org/~media/assets/2014/11/psppreducingincarcerationfortechnicalviolationsinlouisiana.pdf> (citing Nancy LaVigne et al., *Justice Reinvestment Initiative State Assessment Report*, URBAN INST. (Jan. 2014), <http://www.urban.org/UploadedPDF/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf>).

interest in keeping incarceration rates high, it is not surprising that 43% of those released from prison in Louisiana will be back behind bars within five years.¹²¹

Finally, the public defender shortage has also exacerbated the incarceration rate in Louisiana. Both the United States and Louisiana constitutions *guarantee* those charged with a crime punishable by imprisonment “the right to meaningful and effective assistance of counsel.”¹²² However, thirty-three out of Louisiana’s forty-two public defender offices were forced to stop accepting or waitlist clients in 2016 due to lack of funding and unmanageable caseloads.¹²³ This is arguably due in large part to the state’s rate of prosecuting nonviolent offenders.¹²⁴ As a result of the public defender shortage, hundreds of individuals who cannot afford to hire an attorney are left waiting in jail for months or longer facing criminal charges that they cannot fight without legal representation—significantly increasing the state’s incarceration rate.¹²⁵ Michael Carter, who had been jailed since August 2015, had yet to meet with an attorney concerning his case a year and a half later.¹²⁶ Carter is quoted as saying, “I shouldn’t be kept in the dark just because I don’t have the money to pay for an attorney.”¹²⁷ Unfortunately, many offenders like Mr. Carter will be advised to accept a plea bargain in lieu of continuing to await their day in court—resulting in even more individuals behind bars in Louisiana.

C. IMPACT OF INCARCERATION ON MINORITY AND INDIGENT POPULATIONS

The marginalization of minorities as a result of the federal War on Drugs also occurs at the state level. Minority and indigent populations in Louisiana are bearing the brunt of the state’s reliance on mass incarceration. While the 2010 U.S. Census showed that Caucasians make up 60% of the state’s total

121. *Reentry Overview*, *supra* note 73.

122. *SPLC, Allies File Lawsuit over Louisiana’s Broken Public Defender System*, S. POVERTY LAW CTR. (Feb. 6, 2017), <https://www.splcenter.org/news/2017/02/06/splc-allies-file-lawsuit-over-louisianas-broken-public-defender-system>.

123. *SPLC*, *supra* note 122.

124. *See* Simerman, *supra* note 4.

125. Simerman, *supra* note 4; *see also* Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES (March 19, 2016), https://www.nytimes.com/2016/03/20/us/in-louisiana-the-poor-lack-legal-defense.html?_r=0.

126. *See* Robertson, *supra* note 125.

127. *See id.*

population, they account for only 30% of its federal and state prison population.¹²⁸ In contrast, African Americans—representing only 32% of the state’s population—comprise 66% of the prison population.¹²⁹ A 2012 *Times-Picayune* series on Louisiana prisons reported that “one in 14 black men from New Orleans [are] behind bars, compared with one in 141 white men.”¹³⁰ Further, “[o]ne in seven black men from the city is either in prison, on probation or on parole.”¹³¹ This coincides with racial disparity in drug arrests, prosecutions, and convictions.¹³² For example, despite data indicating that the rate of marijuana use is about the same among different races, 94% of individuals arrested for marijuana possession in New Orleans are African American.¹³³ Additionally, 85% of those arrested for a crime in Louisiana are indigent.¹³⁴ While this Comment does not address the myriad of reasons for racial and economic disparity in Louisiana’s prisons, it is clear from statistics that the state’s criminal justice system does not punish all offenders equally.

The disparate treatment of African Americans and the indigent in Louisiana does not end upon release from prison. Conviction and incarceration have a detrimental impact on the ability to secure school loans for continuing education, to obtain public housing, and—especially in Louisiana—to secure employment.¹³⁵ Convicted felons in the state are subject to 389 employment restrictions, whereas the national average is only 123.¹³⁶ These restrictions include making ex-offenders ineligible

128. *Whites Are Underrepresented in Louisiana Prisons and Jails*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/graphs/2010percent/LA_Whites_2010.html (last visited Oct. 1, 2017); see also Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLICY INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html>.

129. *Whites Are Underrepresented*, *supra* note 128; Sakala, *supra* note 128.

130. John Simerman, *Incarceration Tears Apart Families and Entire Communities. And in Some Neighborhoods, Doing Time in Prison Has Become Commonplace*, *TIMES-PICAYUNE*, May 18, 2012, at A5.

131. *Id.*

132. See Block & Obioha, *supra* note 9; see generally Black Strikes, <https://blackstrikes.com/> (last visited Oct. 1, 2017).

133. Kari Dequine Harden, *Report: Racial Disparity in Drug Arrests Alarming*, *LA WEEKLY* (July 25, 2016), <http://www.louisianaweekly.com/report-racial-disparity-in-drug-arrests-alarming/>.

134. See David Carroll, *Louisiana’s Right to Counsel Problems Explained*, *SIXTH AMENDMENT CTR.* (April 4, 2016), <http://sixthamendment.org/louisianas-right-to-counsel-problems-explained/>.

135. See generally ALEXANDER, *supra* note 7.

136. Richard A. Webster, *Louisiana’s Felons Face the Most Employment Obstacles in U.S.*, *NOLA.COM* (Feb. 23, 2016), <http://www.nola.com/politics/index.ssf/2016/02/>

for specific business or property licenses and certain occupations, including those in law enforcement, education, and the health profession.¹³⁷ An online search of employment opportunities for felons in Louisiana yields limited results, mostly for businesses paying minimum wage like Applebee's, Dunkin' Donuts, Goodwill Stores, and McDonald's.¹³⁸ As a result of oppressive state restrictions—and despite the availability of state-run programs intended to help ex-offenders reenter the workforce upon release¹³⁹—it is nearly impossible for someone with a felony conviction to find a job that pays enough to provide for a family, especially considering that many ex-offenders are ordered to pay restitution, fines, court costs, and court-appointed attorney's fees upon release.¹⁴⁰ Given the significant limitations¹⁴¹ on ex-offenders' ability to secure meaningful employment, it should be expected that many will re-offend and end up back behind bars.¹⁴²

IV. PROPOSAL

Louisiana implemented measures in 2010 that successfully reduced its incarceration rate, including allowing mandatory minimum sentences to be waived for certain nonviolent crimes with the agreement of the judge, prosecutor, and defense counsel,¹⁴³ as well as amending certain criminal penalties for

louisiana_ex-felons_face_most.html. The state with the second-highest number of restrictions is Illinois with only 258 as compared with Louisiana's 389 employment restrictions. Webster, *supra* note 136.

137. Allyson Fredericksen & Desiree Omli, *Jobs After Jail: Ending the Prison to Poverty Pipeline*, JOB GAP ECON. PROSPERITY SERIES (Feb. 2016), <https://www.prisonlegalnews.org/media/publications/Jobs%20After%20Jail%20-%20Ending%20the%20prison%20to%20poverty%20pipeline%2C%20AJS%2C%202016.pdf>.

138. *Louisiana Employment*, XAMIRE FELON RES., <https://xamire.com/jobs-for-felons/louisiana?site=1> (last visited Oct. 1, 2017).

139. See *Capital Area ReEntry Coalition*, LA. RES., <http://caparc.org/louisiana-resources.html> (last visited Nov. 8, 2017).

140. See Louisiana Justice Coalition, *Now and Later: The Short and Long-Term Consequences of a Louisiana Conviction*, ORLEANS PUB. DEFS., http://www.opd.la.org/attachments/article/104/CollateralConsequencesClientGuide_English.10.pdf (last visited Oct. 1, 2017).

141. Significant limitations on ex-offenders' ability to obtain adequate employment still exist despite passage of "ban the box" legislation in 2016. See Times-Picayune Editorial Board, *Louisiana 'Bans the Box' on Criminal History, Opening State Jobs to Ex-inmates: Editorial*, NOLA.COM (June 10, 2016), http://www.nola.com/politics/index.ssf/2016/06/ban_the_box_louisiana_1.html.

142. Cedric Richmond, *Louisiana Gives Former Inmates Little Chance to Start Over*, NOLA.COM (Feb. 26, 2016), http://www.nola.com/politics/index.ssf/2016/02/louisiana_prison_reform.html.

143. This is an insufficient remedy because it rarely occurs in practice. See Fritchie, *supra* note 83, at 943–44 (noting that mandatory minimums are usually

marijuana possession.¹⁴⁴ In June 2017, Governor John Bel Edwards signed a historic criminal justice reform package comprised of ten bills that are expected to reduce Louisiana's incarceration rate by 10% and save taxpayers \$78 million over the next ten years.¹⁴⁵ Reforms specific to drug offenders include those making them eligible for food stamps and welfare immediately upon release;¹⁴⁶ tailoring drug sentences based on the weight of drugs; creating a task force to make recommendations for a felony class system in 2018;¹⁴⁷ and expanding eligibility for probation, substance abuse probation, and drug courts.¹⁴⁸ Several reforms also address offenders' ability to pay fines and fees.¹⁴⁹ Additionally, the reforms address sentencing and the impact of felony convictions.¹⁵⁰

While the new legislation represents a step toward reducing Louisiana's unconscionable incarceration rate, it is only the beginning. History shows that the state's current criminal justice system has failed to reduce crime and has unjustly impacted the state's minority and indigent populations for decades. Further, current incarceration costs Louisiana taxpayers hundreds of millions of dollars annually.¹⁵¹ This is largely due to the state's rate of prosecuting low-level drug offenders and other nonviolent offenders.¹⁵² While Louisiana's crime rate is only slightly higher than most other states in the region, Louisiana's prison admission rate is much higher because it admits nonviolent

only waived for life sentences).

144. See Purpera, *supra* note 79, at 9–10.

145. O'Donoghue, *supra* note 5.

146. Act 265, H.B. 681, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

147. Act 281, S.B. 220, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

148. Act 280, S.B. 139, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

149. See Act 264, H.B. 680, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017) (tailoring court fees and restitution payments to an offender's ability to pay upon release from prison and suspending child support payments for offenders who have been incarcerated for more than six months and lack the means to pay).

150. See Act 277, S.B. 16, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017) (prohibiting life without parole sentences for juveniles except in cases of first-degree murder, reducing the minimum sentence for second felony convictions and limiting sentences of life without parole for third and fourth convictions, and allowing offenders to procure occupational licenses).

151. Trent Hill, *Louisiana Smart on Crime's Justice Reinvestment Factsheet*, PELICAN POST (Jan. 23, 2017), <http://www.thepelicanpost.org/2017/01/23/louisiana-smart-on-crime-justice-reinvestment-factsheet/> (stating that incarceration cost Louisiana taxpayers nearly \$700 million in 2013).

152. Simerman, *supra* note 4; see also Craig E. Gibbs, *The War on Drugs Is Costing Louisiana*, CRAIG E. GIBBS ATTORNEY AT LAW - BLOG (Sept. 20, 2016), <http://www.craigigbbs.com/blog/2016/09/the-war-on-drugs-is-costing-louisiana.shtml>.

prisoners at a rate that is “50 percent higher than that of Texas and nearly three times that of Florida.”¹⁵³ For example, incarcerating Bernard Noble—the man who was arrested in New Orleans for possession of two marijuana joints—will cost Louisiana taxpayers almost a quarter of a million dollars if he serves his full sentence.¹⁵⁴ Louisiana has an obligation to take additional steps to remedy the racial and class inequities escalated by its drug war. Accordingly, this Comment proposes three recommendations for measures that will further reduce Louisiana’s incarceration rate by focusing on limiting the number of nonviolent offenders behind bars. It also recommends revising Louisiana’s current law governing expungement to improve employment prospects and reduce recidivism for nonviolent ex-offenders with felony or misdemeanor convictions.¹⁵⁵

A. REDUCE LOUISIANA’S RATE OF INCARCERATION

Since the late 1990s, fourteen states have launched initiatives to reduce their prison populations.¹⁵⁶ These states experienced declines not only in rates of incarceration, but also in crime.¹⁵⁷ For example, Texas reduced its prison population by 9% between 2007 and 2012, and its total crime rate dropped by 16%.¹⁵⁸ New York reduced its incarceration rate by 26% between 1999 and 2012, and its total crime rate dropped by 28%.¹⁵⁹ Additionally, all fourteen states saved their taxpayers billions of dollars.¹⁶⁰

Louisiana should adopt three key strategies addressed in a 2016 report by the Office of the State Legislative Auditor to reduce its incarceration rate.¹⁶¹ First, the Louisiana Legislature must address the shortcomings that afflict the alternatives to incarceration. These alternatives, such as pretrial diversion and specialty courts, are designed to help divert nonviolent offenders

153. Simerman, *supra* note 4.

154. Drug Policy Alliance, *supra* note 94.

155. This Comment does not address drug law reform; however, the incarceration rate in Louisiana could be reduced further by decriminalizing marijuana and reducing possession to a misdemeanor as opposed to a felony. *See generally* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1056 (2015).

156. Head & Norquist, *supra* note 43.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* Purpera, *supra* note 79, at 1.

away from prison by gathering data on efficacy and then revising program requirements to increase a participant's likelihood of completion.¹⁶² Second, Louisiana must reform its sentencing guidelines.¹⁶³ This includes eliminating mandatory minimum sentences for drug possession and prohibiting use of the habitual-offender law for nonviolent offenses.¹⁶⁴ Finally, Louisiana must expand both rehabilitation programs and reentry services available in local jails in order to decrease recidivism and help offenders successfully transition from prison to the community.¹⁶⁵ Ensuring the provision of adequate programming is a step toward rectifying the discriminatory impact on the minority and indigent populations who are disproportionately incarcerated in Louisiana.

1. EXPAND PRETRIAL DIVERSION AND SPECIALTY COURTS

The first recommendation focuses on the period *before* an individual is incarcerated by presenting alternatives to prison.¹⁶⁶ These alternatives include services that divert nonviolent offenders who are deemed a low risk.¹⁶⁷ Managed by the district attorney's office, pretrial diversion programs provide a method for handling criminal matters that can result in a dismissal of charges if the offender successfully completes the program.¹⁶⁸ Additionally, specialty or "problem-solving" courts provide specialized services to address social issues that lead to criminality—including mental health and substance abuse—instead of immediately turning to incarceration.¹⁶⁹ The most common type of specialty court is drug court, which is comprised of a "tailored, phased treatment system" funded and overseen by the Louisiana Supreme Court.¹⁷⁰ In addition to addressing the underlying causes of criminal behavior to help offenders recover, Louisiana drug courts could also save the state money it would have spent on incarceration. The Louisiana Supreme Court estimates that for *each* offender who is sent to drug court instead of prison, state facilities save \$29,390 and local facilities save

162. Purpera, *supra* note 79, at 4–7. Pretrial diversion programs are currently offered by thirty-seven of the state's forty-two judicial districts, and twenty-eight of the districts have a specialty court

163. *Id.* at 7–10.

164. *Id.*

165. *Id.* at 10–13.

166. *See id.* at 1.

167. *See Purpera, supra* note 79, at 3–4.

168. *See id.* at 4–7

169. *See id.*

170. *See id.* at 5.

\$7,913 over a period of two years.¹⁷¹ Thus, the state could save \$69.8 million in a two-year period by sending the 8,822 offenders who have been solely charged with drug possession to drug court instead of prison.¹⁷²

In 2017, Louisiana expanded eligibility for participation in drug courts and substance abuse probation.¹⁷³ Specifically, it amended Louisiana Revised Statute 13:5304(B)(10)(b) by making individuals with a first-time conviction for a violent crime and a maximum sentence of ten years or less eligible for a drug probation program, provided that the offense was not committed against a family member, household member, or a romantic partner.¹⁷⁴ The state also passed legislation to reinvest 30% of savings produced from criminal justice reform towards prison alternatives.¹⁷⁵

While these changes are a step in the right direction, Louisiana must address the shortcomings of drug court programs in order to ensure that its efforts impact the state's incarceration rate. First, there is a lack of conclusive data on drug court programs' overall success in helping participants overcome addiction and avoid prison.¹⁷⁶ This is demonstrated by the fact that the Louisiana Supreme Court reports only the number of participants in drug courts, the graduation rate, and the costs.¹⁷⁷ There is no data regarding the number of participants who successfully remain drug-free and stay out of prison. Therefore, this Comment recommends that the Louisiana Legislature appoint a committee to track a selection of drug courts across the state for a period of five years in order to gather data on their efficacy. This could be accomplished by requiring drug court case managers to contact a percentage of program graduates twice a

171. See Purpera, *supra* note 79, at 6.

172. *Id.* Sending more offenders to specialty court will require the availability of resources, including substance abuse treatment. *Id.*

173. Act 280, S.B. 139, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

174. *Id.*

175. Act 261, H.B. 489, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

176. See Lisa S. Nored et al., *Incentives and Obstacles to Drug Court Implementation: Observations of Drug Court Judges and Administrators*, 6 JUST. POL'Y J. 4 (2009), http://www.cjcb.org/uploads/cjcb/documents/incentives_and.pdf.

177. See Purpera, *supra* note 79, at 5 (stating that the Supreme Court disclosed that "Louisiana drug courts served 4,926 participants and had a graduation rate of 43% with a total cost of \$17,140,308, or an average of \$3,480 per participant," and further stating that 89.8% of the 2012 graduates of Louisiana drug courts had successfully avoided any new convictions three years after completion of the program).

year to inquire about new arrests and convictions.

Another drawback of drug court that must be addressed is that individuals can be dismissed from the program and imprisoned for technical violations like missing curfew, failing to attend required substance abuse treatment sessions, or testing positive for drugs.¹⁷⁸ Realistically, it is difficult to avoid violations given that in the first two phases of the four-part program, participants are required to attend substance abuse treatment three times a week, submit to random drug testing twice weekly, appear for weekly status reviews with the judge, attend 12-step meetings three times a week, pay necessary fees, *and* maintain full-time employment or student status.¹⁷⁹ Thus, this Comment proposes that the legislature amend the drug court program requirements to increase the likelihood that participants will successfully complete the program. The legislature should consult with members of the drug court team,¹⁸⁰ given their experience and proximity to the issues, in order to identify appropriate areas for reform.¹⁸¹

2. REFORM SENTENCING

This Comment's second recommendation focuses on the sentencing phase by proposing measures to ensure that sentences are "fair and proportionate to the crime committed."¹⁸² The laws that enumerate crimes in Louisiana provide for unique

178. See *Intensive Probation Drug Court*, TWENTY-FOURTH JUDICIAL DIST. COURT, <http://www.24jdc.us/intensive-probation-drug-court/> (last visited Sept. 24, 2017); *Drug Court*, TERREBONNE PAR. DIST. ATTORNEY, <http://www.tpda.org/drugCourt.html> (last visited Sept. 24, 2017); *What are the Drug Court Program Requirements*, 19TH JUDICIAL DIST. COURT PAR. OF EAST BATON ROUGE, <http://www.19thjdc.org/DrugCourt/WhataretheDrugCourtProgramRequirements.aspx> (last visited Sept. 24, 2017); see generally Mike Riggs, *Want to Go to Drug Court? Say Goodbye to Your Rights*, REASON.COM (Sept. 24, 2012), <http://reason.com/archives/2012/08/17/want-to-go-to-drug-court-say-goodbye-to>.

179. *What are the Drug Court Program Requirements*, 19TH JUDICIAL DIST. COURT PAR. OF EAST BATON ROUGE, <http://www.19thjdc.org/DrugCourt/WhataretheDrugCourtProgramRequirements.aspx> (last visited Sept. 24, 2017).

180. This includes the judge, coordinator, district attorney, public defender, probation officers, case managers, and treatment staff.

181. This Comment does not attempt to specify what changes should be made given the highly-specialized nature of drug court and recovery from drug addiction in general. Rather, it recognizes the shortcomings of the current approach and recommends that those who are closest to the issue advise on what changes will help participants to successfully graduate from drug court.

182. See Purpera, *supra* note 79, at 3.

sentences—incarceration, a fine, or both.¹⁸³ Additionally, state prosecutors can rely on the habitual-offender law, a sentencing enhancement, to increase the sentence for offenders with previous criminal convictions.¹⁸⁴ Louisiana must further reform its sentencing laws because these laws directly impact the state's incarceration rate.¹⁸⁵ In the context of reducing the number of nonviolent offenders behind bars, necessary reforms include prohibiting the use of mandatory minimum sentences and the habitual-offender law for nonviolent offenses, as well as using probation in lieu of imprisonment for certain nonviolent offenders.¹⁸⁶ While reform efforts in the past have not addressed sentencing “because of its complexity and the difficulty in building consensus among different entities,” dramatic sentencing reform in the context of nonviolent offenders is a crucial step towards reducing Louisiana's unmatched incarceration rate and making the state's justice system more just.¹⁸⁷

In 2017, Louisiana lawmakers passed legislation that gives judges the power to shorten or suspend sentences that are prescribed by law for individuals convicted of either possession or possession with intent to distribute heroin or fentanyl under Louisiana Revised Statute 40:966.¹⁸⁸ Additionally, the state eliminated mandatory minimum sentences for possession of two grams or less of many Schedule I and II drugs.¹⁸⁹ However, Louisiana also implemented a new mandatory minimum sentence of one year for illegal possession of prescription medications classified as Schedule III, IV, and V drugs, regardless of the weight of the drugs.¹⁹⁰ To reduce its prison population further and reverse the detrimental impact of the drug war, Louisiana must pass legislation to eliminate mandatory minimum sentences for possession of any illegal drug. This approach will reduce the rate and cost of incarceration, and it is a more equitable solution in that it gives judges the discretion to make decisions based on the facts before them.

183. See Purpera, *supra* note 79, at 7.

184. See *id.*

185. See *id.*

186. See *id.*

187. See *id.*

188. Act 281, S.B. 220, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

189. *Id.*

190. *Id.*

Sentencing reforms must also address the habitual-offender law that enhances the minimum sentence for offenders who have two or more past convictions for violent *or nonviolent* crimes.¹⁹¹ Louisiana passed legislation revising the law pertaining to habitual offenders in 2017.¹⁹² Specifically, it amended Louisiana Revised Statute 15:529.1, shortening the length of time that a sentence may be enhanced for a second or third felony offense, regardless of whether the offense at issue or the past convictions were for violent or nonviolent crimes.¹⁹³ The new law also prohibits utilizing a past nonviolent offense for the purposes of sentence enhancement when more than five years have passed since the expiration of the offender's sentence, parole, or probation for the earlier nonviolent offense.¹⁹⁴ Finally, the state enacted a new provision that enables judges to avoid imposing a constitutionally excessive sentence:

If the court finds that a sentence imposed under the provisions of this Section would be constitutionally excessive pursuant to the criteria set forth in *State v. Dorthey*, 623 So.2d 1276 (La. 1993), then the court shall state for the record the reasons for such finding and shall impose the most severe sentence that is not constitutionally excessive.¹⁹⁵

Louisiana must make additional modifications to its habitual-offender law to reduce the state's rate of incarceration, cut costs, and ensure that the punishment fits the crime. Specifically, this Comment proposes that the legislature prohibit the use of the habitual-offender law for all nonviolent crimes.¹⁹⁶ For example, an offender like Bernard Noble¹⁹⁷ who has two previous convictions for low-level, nonviolent drug offenses should not have his conviction for a third offense—violent or nonviolent—enhanced on the basis of any prior nonviolent convictions. Enhancing an offender's sentence due to prior convictions for nonviolent offenses is an improper method for addressing low-level criminal behavior. Instead of minimizing

191. LA. STAT. ANN. § 15:529.1 (2012 & Supp. 2017).

192. Act 282, S.B. 221, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

193. *Id.*

194. LA. REV. STAT. ANN. 15:529.1, *amended by* Act 282, S.B. 221, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017). Prior law permitted use of such offenses within ten years of completion of the individual's sentence, parole, or probation.

195. Act 282, S.B. 221, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

196. This refers to crimes that are not enumerated as "crimes of violence" in Louisiana Revised Statute 14:2. *See* LA. STAT. ANN. § 14:2(B) (2016).

197. *See* Andavolu, *supra* note 95.

the likelihood that the offender will re-offend, this approach puts him in direct proximity of higher-level offenders who can teach him how to be a “better criminal.”¹⁹⁸ Prohibiting use of the habitual-offender law for past convictions of nonviolent offenses will reduce the state’s incarceration rate and permit judges to impose an appropriate punishment for a given offense after considering all the facts.

3. EXPAND REHABILITATION PROGRAMS AND REENTRY SERVICES IN LOCAL FACILITIES

The final recommendation focuses on the period *during* incarceration by expanding rehabilitation and reentry programs in local facilities to reduce recidivism.¹⁹⁹ The Department of Corrections (DOC) offers a range of certified treatment and rehabilitation programs (CTRP), including courses in education, faith-based programs, treatment programs, and job skills like welding.²⁰⁰ However, some local facilities in Louisiana that house state prisoners do not offer *any* programs because it is not mandated by the DOC.²⁰¹ For example, 43.8% of local facilities do not offer any treatment programs, such as those for substance abuse,²⁰² despite the fact that five of the top ten offenses for newly-sentenced prisoners in Louisiana are drug-related.²⁰³ This failure to provide adequate CTRP programming in local facilities affects more than half of the offenders incarcerated in Louisiana.²⁰⁴ Further, the DOC’s spending for rehabilitation programs in Louisiana’s state and local facilities is the lowest of all southern states.²⁰⁵ Although Louisiana’s per diem of \$24.39 a day for each offender is only slightly below the average for all southern states, the DOC reports that lack of funding is the key

198. See Shankar Vedantam, *When Crime Pays: Prison Can Teach Some to Be Better Criminals*, NPR.ORG, <http://www.npr.org/2013/02/01/169732840/when-crime-pays-prison-can-teach-some-to-be-better-criminals> (last visited Oct. 19, 2017). See also Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME.COM, <http://time.com/4596081/incarceration-report/> (last visited Oct. 19, 2017) (“[A]lmost all non-violent, lower-level offenders, would be better served by alternatives to incarceration such as treatment, community service, or probation.”).

199. See Purpera, *supra* note 79, at 3.

200. See *id.* at 11.

201. See *id.*

202. See *id.*

203. James LeBlanc et al., *Louisiana Justice Reinvestment Task Force Report and Recommendations* 1, 19 (Mar. 16, 2017), https://www.lasc.org/documents/LA-Task_Force_Report_2017_FINAL.pdf.

204. See Purpera, *supra* note 79, at 10.

205. See *id.* at 11.

reason programs are not offered in local facilities.²⁰⁶ The DOC sought to address these issues by expanding “good time approved rehabilitation programs” at local jails using both state and local funding.²⁰⁷ As a result, “enrollment in CTRP courses in local facilities has increased by 944%, from 1,555 in fiscal year 2010 to 16,234 in fiscal year 2015.”²⁰⁸

In 2017, Louisiana enacted legislation mandating that the Department of Public Safety and Corrections “collect, track, analyze, forecast, and distribute data relative to prison admissions, sentencing, habitual offender sentencing, parole, community supervision, medical furlough, certified treatment and rehabilitation programs, workforce development work release programs, and cost savings and reinvestment.”²⁰⁹ Further, the law provides for the allocation of 70% of savings realized by criminal justice reform efforts—approximately \$184 million²¹⁰—to public safety programs.²¹¹ Grants for prison alternatives will receive 30% of the savings, victims’ services will receive 20%, and the remaining 50% will be allocated to the DOC to offer programming to inmates.²¹² Given the increase in funding afforded to the DOC, it must increase rehabilitation and reentry programs for inmates. This Comment proposes that the DOC increase per diem payments to local facilities that provide rehabilitation and reentry programs to inmates and decrease the payments to those facilities that do not provide programming. For example, a local facility that offers substance abuse treatment, vocational skills, and an educational program could receive \$35 a day for each inmate instead of \$24.39. Facilities that do not provide programs could receive \$18 a day per inmate. This approach will incentivize profit-driven local facilities to provide the necessary programs to aid offenders and help reduce recidivism among the state’s offenders.

In connection with expanding rehabilitation and reentry programs in local facilities, the state must address the current

206. See Purpera, *supra* note 79, at 11.

207. See *id.*

208. See *id.* at 11–12.

209. Act 261, H.B. 489, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

210. Hamida Labi, *Louisiana Locks Up More of Its Citizens Than Any Other State in the Nation, But Reform Is Coming*, ACLU: SPEAK FREELY (June 23, 2017), <https://www.aclu.org/blog/speak-freely/louisiana-locks-more-its-citizens-any-other-state-nation-reform-coming>.

211. Act 261, H.B. 489, 2017 La. Sess. Law Serv., Reg. Sess. (La. 2017).

212. *Id.*

practice of arbitrarily transferring offenders to fill empty beds.²¹³ This process sacrifices offenders' consistent participation in programs aimed at reducing recidivism by prioritizing the bottom line of local facilities over the rehabilitation needs of offenders.²¹⁴ For example, one offender who was incarcerated for four years never spent more than one month in any single facility and was transferred a total of twenty-two times.²¹⁵ While the DOC currently requires local facilities to disclose transfers, this Comment proposes that the DOC prohibit local facilities from transferring an inmate unless there is some compelling reason beyond the monetary value the inmate represents. Prohibiting arbitrary transfers will enable offenders to participate consistently in programs aimed at reducing recidivism, and, in turn, will reduce the state's rate of incarceration. This approach has the added benefit of minimizing the risk that prisoners will lose contact with family members who are unable to ascertain their whereabouts due to multiple frivolous transfers.²¹⁶

B. REVISE LAW GOVERNING EXPUNGEMENT OF CRIMINAL RECORDS

To fully address the problems that mass incarceration has generated for African Americans and the indigent population in Louisiana, the state must also rectify the impact of felony and misdemeanor convictions. As previously discussed in this Comment, a criminal record can significantly limit access to adequate employment. Thus, it is necessary to provide a method for nonviolent ex-offenders who meet certain criteria to expunge their records in a timely, effective, and cost-efficient manner. If this is not done, the minority and indigent populations who are most affected by the state's reliance on mass incarceration will continue to be marginalized by restrictions on employment for those with criminal backgrounds.

In 2014, Louisiana enacted Chapter 34 of the Code of

213. See Purpera, *supra* note 79, at 13; see also Chang, *supra* note 97, at A7–8.

214. See Purpera, *supra* note 79, at 13.

215. See *id.*

216. See Paul Murphy, *Inmate Moves Frustrates Families, Sheriff*, WWLTV.COM, <http://www.wwltv.com/news/local/orleans/inmate-moves-frustrates-families-sheriff/170810931> (last visited Oct. 19, 2017) (“[H]aving inmates more than four hours away will be a tremendous obstacle for defense attorneys and the inmates families.”).

Criminal Procedure “to consolidate and extend the law governing record expungement to many felonies.”²¹⁷ The legislature’s stated purpose was “to break the cycle of criminal recidivism, increase public safety, and assist the growing population of criminal offenders reentering the community to establish a self-sustaining life through opportunities in employment.”²¹⁸ “Expungement” merely means the record is not considered to be a public record;²¹⁹ it does not mean the record has been destroyed. Although expunged records are confidential, they can be used by criminal justice and law enforcement agencies, as well as other state agencies.²²⁰ Under current law, the only felonies that are not eligible for expungement are those for sex offenses, violent offenses, crimes against minors, and drug trafficking offenses.²²¹ However, convictions of possession with intent to distribute may be expunged.²²² If an ex-offender meets the necessary requirements, expungement is mandatory, and a hearing need only be held if the expungement request is opposed by the prosecutor or law enforcement on the basis of ineligibility.²²³ Nevertheless, expungement is unavailable if an offender has been convicted of a crime or has charges pending during the required waiting period.²²⁴ Only one felony can be expunged in a fifteen-year period, but there is no limitation on the number of felonies that can be expunged during an offender’s lifetime.²²⁵ While the new law moved in the right direction by making many nonviolent felons eligible for expungement relief, its efficacy is impeded by excessive waiting periods and minimal effectiveness in alleviating “collateral consequences related to employment and licensure.”²²⁶ Additionally, it is expensive to have a felony or misdemeanor

217. Joshua Gaines, *Louisiana’s New Expungement Law: How Does it Stack Up?*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 16, 2015), <http://ccresourcecenter.org/2015/01/16/louisianas-new-expungement-law-stack/>.

218. LA. CODE CRIM. PROC. ANN. art. 971 (2008 & Supp. 2017).

219. LA. CODE CRIM. PROC. ANN. art. 973 (2008 & Supp. 2017).

220. *Id.*; see also *Expungements: What You Might Want to Know*, JUSTICE & ACCOUNTABILITY CTR. OF LA., <https://www.jaclouisiana.org/expungements> (last visited Oct. 19, 2017).

221. See Gaines, *supra* note 217.

222. See *id.*; see also *How Act 145 Changed Expungement Law in 2014*, JUSTICE & ACCOUNTABILITY CTR. OF LA., http://media.wix.com/ugd/c51f9_51f07fa3ac1540af8750cf502443c2cd.pdf (last visited Sept. 30, 2017).

223. See Gaines, *supra* note 217.

224. See *id.*

225. See *id.*

226. See *id.*

expunged, and there is no waiver for indigency.²²⁷

Louisiana must address three deficiencies in the current law governing expungement. First, the legislature should shorten the length of time that ex-offenders must wait before they are eligible to apply for expungement relief. The eligibility waiting period under current law is ten years after completion of sentence for expungement of a felony, and five years for misdemeanors.²²⁸ This means that offenders are often limited to a small pool of minimum-wage jobs for a period of five to ten years after being released from prison, depending on the extent of their criminal backgrounds. However, the DOC reports that 43% of people released from prison in Louisiana will be incarcerated again within five years.²²⁹ Given the lengthy waiting periods for eligibility under the current law, it is unlikely that the law is serving the legislature's stated purpose of breaking the cycle of recidivism and addressing issues associated with reentry into society.²³⁰

Accordingly, the Louisiana Legislature should reduce the waiting period for expungement of misdemeanors to two years and nonviolent felonies to four years. This approach ensures that eligible felons and misdemeanants can expunge their records in a time frame that is compatible with the Bureau of Justice Statistics' approach to measuring recidivism within three years of a prisoner's release.²³¹ By allowing offenders who satisfy all eligibility requirements to obtain expungement relief fewer than five years after release from prison, Louisiana can curb recidivism and help offenders improve their employment prospects in a reasonable time without sacrificing public safety.

Next, Louisiana must revise the law governing expungement to ensure that it has a sufficient "legal and practical effect" on expanding employment and licensing opportunities for ex-offenders.²³² Currently, when a felony conviction is expunged, the state is barred from disclosing the record to the general public,

227. *Louisiana Expungement*, LA. STATE BAR ASS'N LEGAL EDUC. & ASSISTANCE PROGRAM, <http://lasc.libguides.com/c.php?g=464003&p=3171921> (last visited Sept. 30, 2017).

228. See Gaines, *supra* note 217.

229. *Reentry Overview*, *supra* note 73.

230. See Gaines, *supra* note 217.

231. *Reentry Trends in the U.S.*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/reentry/recidivism.cfm> (last visited Sept. 30, 2017).

232. See Gaines, *supra* note 217.

and the ex-offender is no longer required to disclose it to employers or others.²³³ However, this offers little benefit because Louisiana's law specifically allows disclosure of expunged records to certain licensing boards (health care, insurance, social work, and attorney's bar admissions), as well as to those screening candidates for licenses and employment that involve childcare.²³⁴ Additionally, the law forbids private, third-party providers of criminal records from distributing expunged records *only if* the subject of the record has put the provider on notice by sending a certified copy of the expungement order by certified mail.²³⁵ Nevertheless, providers are required to comply upon receiving notice only if they are *not* subject to the federal Fair Credit Reporting Act (FCRA).²³⁶ This means that an ex-offender who has had a conviction expunged must provide notice to every third-party provider to prevent an expunged record from being disseminated to potential employers.²³⁷ Even if this were possible, it would likely have a limited impact because the majority of third-party providers are governed by FCRA and are, therefore, not bound by Louisiana law.²³⁸

For these reasons, Louisiana must pass legislation limiting both distribution and use of expunged records to achieve the law's stated purpose of increasing employment opportunities for those with felony and misdemeanor convictions for nonviolent offenses. Louisiana should implement legislation to prohibit discrimination on the basis of an expunged record, as well as to forbid employers, licensing boards, and others from asking about an expunged record.²³⁹ Additionally, the legislature should ban consideration of expunged records in negligent hiring actions to encourage employers to hire ex-offenders who have obtained expungement relief.²⁴⁰ Louisiana must also include provisions in its law that prohibit *all* "criminal history providers" from dispersing expunged records regardless of whether the provider has received notice.²⁴¹ These measures will ensure that expungement has a practical effect on improving ex-offenders' employment prospects.

233. See Gaines, *supra* note 217.

234. See *id.*

235. See *id.*

236. See *id.*

237. See *id.*

238. See Gaines, *supra* note 217.

239. See *id.*

240. See *id.*

241. See *id.*

Finally, Louisiana must address the monetary cost of obtaining an expungement. Under the old law, expungement costs ranged from \$360 to \$775, depending on the parish.²⁴² It is now a flat fee of \$550 that must be paid in full when an expungement request is filed.²⁴³ The Louisiana State Police receives half of the total fee, the Clerk of Criminal District Court receives \$200, and the parish district attorney and sheriff each receive \$50.²⁴⁴ There is no waiver or reduction in price for those who are indigent.²⁴⁵ This is problematic because individuals who lack the resources to pay for an expungement likely also have limited options for employment. However, the very mechanism that will expand their employment opportunities—expungement of a criminal record—is unavailable unless they can afford to pay the required \$550 plus the cost of any supplemental documents.²⁴⁶ For an ex-offender working a minimum-wage job in Louisiana at a rate of forty hours a week, the cost of expungement is nearly half of his or her monthly income before taxes.²⁴⁷ In contrast, the cost for expungement in many states is \$150 or less, and some offer a waiver for indigent people.²⁴⁸ The executive director of the Justice & Accountability Center of Louisiana asserts that Louisiana's fee is so high due to “inefficiencies that make processing an application arduous.”²⁴⁹ Additionally, the entities that receive a portion of the fee lack sufficient funding and rely on such fines to operate.²⁵⁰

Nevertheless, Louisiana must reduce its fee to make expungement available to the indigent population that have been inordinately affected by the state's reliance on punishment and mass incarceration. The legislature should reduce the

242. *How Act 145 Changed Expungement Law in 2014*, JUSTICE & ACCOUNTABILITY CTR. OF LA., http://media.wix.com/ugd/c581f9_51f07fa3ac1540af873c2cd.pdf (last visited Sept. 30, 2017).

243. *Expungements*, *supra* note 220.

244. *Id.*

245. *Id.*; *see also* Gaines, *supra* note 217.

246. Alexandria Burris, *Getting a Second Chance After a Criminal Record*, SHREVEPORT TIMES (Sept. 27, 2014), <http://www.shreveporttimes.com/story/news/2014/09/27/expungement-law-gives-second-chance/16371367/>.

247. Louisiana adheres to the federal minimum wage, which is \$7.25 per hour. *See State Minimum Wages*, NCSL (Jan. 2, 2018), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx>.

248. Maura Ewing, *Want to Clear Your Record? It'll Cost You \$450*, MARSHALL PROJECT (May 31, 2016), <https://www.themarshallproject.org/2016/05/31/want-to-clear-your-record-it-ll-cost-you-450#.dhAKieob5>.

249. *Id.*

250. Ewing, *supra* note 248.

expungement fee to \$200 for all offenders seeking relief. Additionally, individuals who qualify as indigent should have the option of paying the fee in installments.²⁵¹ While this may place an additional burden on state officials, it is necessary to ensure expungement relief is not cost prohibitive. A lower fee will reduce the amounts that the aforementioned entities collect, but the proposed expungement fee is still double that imposed by many states and is more than one-quarter of the minimum-wage worker's monthly income. Further, given variations in the funding received by parish district attorney offices, it is recommended that the legislature allow each parish to determine how to divide the fee based on their needs. For example, it may not be necessary for the district attorney in a smaller parish like Lafourche—which reported a \$500,000 budget surplus in 2014²⁵²—to receive 9% of all expungement fees. A lower fee is vital to ensuring that expungement is practically available to qualifying former offenders to improve their employment prospects.

V. CONCLUSION

Louisiana is at a crossroads. The state can continue to incarcerate its nonviolent minority and indigent populations at unprecedented rates while its taxpayers foot the bill, or it can pass legislation to reduce its prison population and divest itself of the shameful title of highest incarceration rate in the world. In 2016, Governor John Bel Edwards announced his goal to reduce the number of state prisoners by 5,000 inmates during his term.²⁵³ Louisiana's budget crisis demands changes be made to the state's criminal justice system. To achieve this necessary change, however, lawmakers must pass legislation to address the shortcomings of pretrial diversion and specialty courts, make further reforms to sentencing, and expand rehabilitation programs and reentry services in local facilities. They must also revise the law governing expungement of criminal records to ensure that it fulfills its purpose of increasing employment opportunities and reducing recidivism. As former President Barack Obama stated, "Justice is not only the absence of oppression—it is the presence of opportunity [. . .] Justice and

251. LA. STAT. ANN. § 15:175 (2017).

252. *SPLC*, *supra* note 122.

253. Julia O'Donoghue, *Louisiana's Most Influential Lobbyists Coalesce Around Criminal Justice Overhaul*, NOLA.COM (Nov. 22, 2016), http://www.nola.com/politics/index.ssf/2016/11/louisiana_criminal_justice_ref.html.

redemption go hand in hand.”²⁵⁴ Now is the time for Louisiana to make changes to ensure that justice and redemption play a prominent role in the criminal justice system.²⁵⁵

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254. President Barack Obama, Address at the NAACP Conference (July 14, 2015), *in* OBAMA WHITE HOUSE ARCHIVES, <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

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