

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

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

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

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



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

The American criminal justice system must shift its focus from punishment to rehabilitation, particularly for nonviolent drug offend-



Anti-Drug Abuse Act of 1986, which established the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses.<sup>42</sup> Under this framework, the mandatory minimums ranged from five years without parole to life imprisonment with the quanti1 0 0o63 720 486-







due to the fact that anger and a desire for vengeance are socially undesirable in Norway.<sup>70</sup> To them, deprivation of freedom is enough of a punishment, and thus there is a major focus on rehabilitation of inmates.<sup>71</sup> Further, instead of utilizing mandatory minimum sentencing laws, Norway has defined the maximum sentence for a particular offense as 21 years with possible extension.<sup>72</sup> Thus, not only is there no death penalty in Norway, it has abolished the life sentence and replaced it with a 21-year maximum term for most crimes, even mass murder.<sup>73</sup> Although it is rare, the 21-year imprisonment can be extended in five-year increments if prison authorities, while the of-

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

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

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

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

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

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

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

87. TURNERds38.55298der-

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

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

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

##### A. Retribution

###### 1. The United States

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

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90. Leslie Patrice Wallace,





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

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

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

## 2. Norway

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

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

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

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

119. *Id.*

120.



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

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

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

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

## 2. Norway

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

## D. Rehabilitation

### 1. The United States

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

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

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

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

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

151. *Id.*

152. *Id.* at 351.

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

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

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

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

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

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

158. See *id.* at 2. 30 S

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

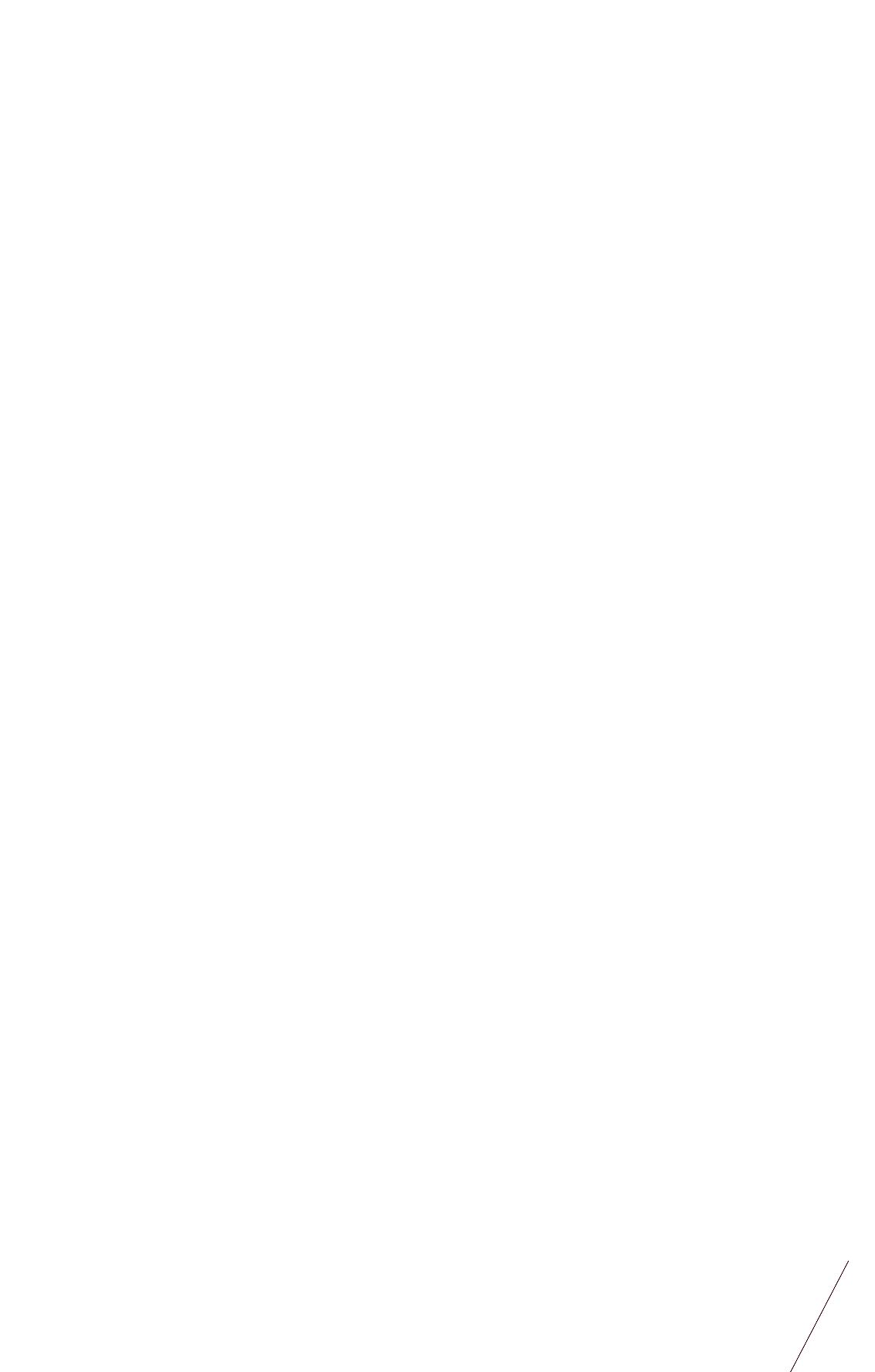
## 2. Norway

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

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

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

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