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IMPLEMENTING A PRESUMPTION AGAINST IMPRISONMENT: HOW SCANDINAVIAN SENTENCING POLICIES COULD BE THE KEY TO ENDING MASS INCARCERATION IN THE UNITED STATES

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I. INTRODUCTION

The United States houses more prisoners than any other country in the world. As of June 2020, there are over 2 million people behind bars in the United States—2,121,600 people to be exact.² This is astronomically higher than the prison populations in Scandinavian countries. Sweden only has a prison population of 6,109,³ and Denmark has a prison

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² *United States of America*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/etats-unis-d-amerique-2020> (last visited July 26, 2021).

³ *Sweden*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/suede-2020> (last visited July 26, 2021).

population of 4,125.⁴ Norway's prison population is 3,207,⁵ and in Finland, the prison population is only 2,910.⁶ With the United States being significantly larger than these other countries, the incarceration rates for each of these countries may be more helpful when put into perspective by showing how many people each of these countries incarcerates out of every 100,000 inhabitants. In the United States, this number is 639 people,⁷ and in Sweden it is 68.⁸ The incarceration rate in Denmark is 71 people per 100,000.⁹ In Norway the incarceration rate is 60,¹⁰ and in Finland, it is only 53.¹¹ Regardless of which statistic you look at, there is only one conclusion to be drawn: the United States has a mass incarceration problem.

The realization that the United States has a problem with mass incarceration begs the question of why this is the case. It is more than a difference in population because the United States is only home to five percent of the world's total population, but it houses almost twenty-five percent of the world's prisoners.¹² Moreover, the United States' higher incarceration rates cannot be explained by higher crime rates, which are historically low.¹³ What else could cause the United States to lead the world in incarceration rates? Cultural norms? Policy differences? Ultimately, it comes down to one simple difference: the primary form of punishment in the United States is imprisonment, while

⁴ *Denmark*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/danemark-2020> (last visited July 26, 2021).

⁵ *Norway*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/norvege-2021> (last visited July 26, 2021).

⁶ *Finland*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/finlande-2020> (last visited July 26, 2021).

⁷ *United States of America*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-states-america> (last visited July 26, 2021).

⁸ *Sweden*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/sweden> (last visited July 26, 2021).

⁹ *Denmark*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/danemark-2020> (last visited July 26, 2021).

¹⁰ *Norway*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/norvege-2021> (last visited July 26, 2021).

¹¹ *Finland*, PRISON INSIDER, <https://www.prison-insider.com/en/countryprofile/finlande-2020> (last visited July 26, 2021).

¹² Molly J. Walker Wilson, *Retribution as Ancient Artifact and Modern Malady*, 24 LEWIS & CLARK L. REV. 1339, 1346 (2020).

¹³ *Id.*

Scandinavian countries impose punishments that rehabilitate offenders.¹⁴

This paper will look at how the different goals of punishment influence how criminal offenders are sentenced in the United States, Sweden, Denmark, Finland, and Norway. Furthermore, it will compare how these different sentencing practices impact the correction systems. First, this paper will start by examining the sentencing policies and practices in the United States, Sweden, Finland, Denmark, and Norway. Then, it will compare these sentencing policies and their impact on incarceration rates and suggest ways in which the Scandinavian sentencing practices could influence changes to the current Federal Sentencing Guidelines in order to combat mass incarceration in the United States.

II. SENTENCING IN THE UNITED STATES

A. THE FEDERAL SENTENCING GUIDELINES LAY OUT THE MEANS FOR DETERMINING PROPER SENTENCES IN THE UNITED STATES.

The Sentencing Reform Act of 1984 created the United States Sentencing Commission to establish sentencing policies and practices for the federal criminal justice system through the creation of sentencing guidelines.¹⁵ This Act was aimed at achieving certainty, uniformity, and proportionality in sentencing.¹⁶ When the Federal Sentencing Guidelines were initially created, they were intended to be mandatory, but, in 2005, the Supreme Court ruled in *United States v. Booker* that the Guidelines' subsections requiring judicial compliance were unconstitutional, rendering them advisory in nature.¹⁷

The Federal Sentencing Guidelines set out a series of steps for determining a particular punishment.¹⁸ The first

¹⁴ Liane Jackson, *Behind Bars in Scandinavia, and What We Can Learn*, ABA JOURNAL (Feb. 1, 2020, 1:25 AM), <https://www.abajournal.com/magazine/article/behind-bars-in-scandinavia-and-what-we-can-learn>.

¹⁵ U.S. SENT'G GUIDELINES MANUAL § 1A1.2 (U.S. SENT'G COMM'N 2018).

¹⁶ *Id.* § 1A1.3.

¹⁷ *United States v. Booker*, 543 U.S. 220, 245 (2005).

¹⁸ U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2018).

step is to identify the base offense level.¹⁹ Chapter Two of the Guidelines lists various offenses by conduct and assigns levels to each offense.²⁰ The base offense level is then adjusted by applying the appropriate specific offense characteristics, cross-references, and special instructions.²¹ The next step is to apply further adjustments related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.²² If there are multiple counts of conviction, each of these steps is repeated for each count, and Part D of Chapter Three is applied to group the counts and further adjust the offense level.²³ Then, the appropriate adjustments under Part E of Chapter Three are applied if the defendant accepts responsibility.²⁴ The sixth step is to determine the defendant's criminal history category under Part A of Chapter Four, which uses a point system.²⁵ Points are assigned based on the length of prior sentences, the circumstances under which the prior offense was committed, and other characteristics of the prior offense.²⁶ Further adjustments are made to either the criminal history category or offense level under Part B of Chapter Four for defendants classified as career offenders or offenses committed as part of a criminal livelihood.²⁷

Once the offense level and criminal history category are determined, the sentencing table in Part A of Chapter Five is used to determine the recommended months of imprisonment.²⁸ The offense levels are listed vertically on the left of the chart, and the criminal history categories are listed horizontally across the top.²⁹ The box where the offense level and criminal history category intersect contains the recommended sentencing range in months of imprisonment.³⁰ Boxes that fall within Zone A recommend a

¹⁹ *Id.* § 1B1.1(a)(1).

²⁰ *Id.*

²¹ *Id.* § 1B1.1(a)(2).

²² *Id.* § 1B1.1(a)(3).

²³ U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(4) (U.S. SENT'G COMM'N 2018).

²⁴ *Id.* § 1B1.1(a)(5).

²⁵ *Id.* § 1B1.1(a)(6).

²⁶ *Id.* § 4A.

²⁷ *Id.* § 4B.

²⁸ *Id.* § 1B1.1(a)(7).

²⁹ U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2018).

³⁰ *Id.*

sentence of zero to six months.³¹ Boxes within Zone B recommend a sentencing range of one to fifteen months.³² Boxes in Zone C recommend a sentence of ten to eighteen months, and Zone D includes all recommended sentences of fifteen months or more.³³ Once the sentencing range is determined, Parts B through G of Chapter Five are used to determine the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.³⁴ Then, Parts H through K of Chapter Five incorporate specific offender characteristics, circumstances that might warrant departures, and any other policy statements or commentary that may warrant consideration.³⁵ The court's final step in determining the imposition of a particular sentence is to consider the factors listed in 18 U.S.C. § 3553(a), which advises courts to "impose a sentence sufficient, but not greater than necessary" to achieve the statutory sentencing goals.³⁶

B. THOUGH ALTERNATIVES TO IMPRISONMENT ARE AVAILABLE UNDER THE FEDERAL SENTENCING GUIDELINES, THEY ARE ONLY AVAILABLE UNDER CERTAIN CIRCUMSTANCES AND MANDATORY MINIMUMS MUST BE MET.

The primary alternative to imprisonment under the Sentencing Guidelines is probation. The Guidelines read:

Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to fully meet the statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by a defendant.³⁷

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* § 1B1.1(a)(8).

³⁵ U.S. SENT'G GUIDELINES MANUAL § 1B1.1(b) (U.S. SENT'G COMM'N 2018).

³⁶ *Id.* § 1B1.1(c).

³⁷ *Id.* at ch. 5, pt. B, introductory cmt.

The Guidelines go on to limit the circumstances in which imposing a term of probation is allowed.³⁸ Probation sentences are limited to Zone A of the sentencing table or Zone B if the court also imposes further conditions on the probation term.³⁹ However, probation is not an available sentence if the offender is convicted of a Class A or B felony, if the offense expressly precludes probation as a sentence, or if the defendant is simultaneously sentenced to imprisonment for the same or a different offense.⁴⁰ If the court decides to sentence the defendant to probation for a felony, the guidelines advise that the defendant should be required to make restitution, work in community service, or both unless the court imposes a fine or finds extraordinary circumstances that would make these conditions unreasonable.⁴¹ If the court decides that there are extraordinary circumstances that would make it unreasonable to require the defendant to make restitution or complete community service, the guidelines recommend that the court impose at least one discretionary condition.⁴² These discretionary conditions may include but are not limited to supporting dependents, maintaining employment or education, and undergoing medical or psychological treatment.⁴³ The court may also decide, on a case-by-case basis, if special conditions are appropriate.⁴⁴ These special conditions include community confinement, home detention, community service, occupational restrictions, curfews, and intermittent confinement.⁴⁵ Fines may also be imposed as the sole sanction where no prison term is required by the Guidelines; however, they may also be imposed as a condition of supervised release following imprisonment or as a condition of probation.⁴⁶

For offenses in Zone A, imprisonment is not required unless that specific offense requires imprisonment under

³⁸ *Id.* § 5B1.1.

³⁹ *Id.* § 5B1.1(a).

⁴⁰ *Id.* § 5B1.1(b).

⁴¹ U.S. SENT'G GUIDELINES MANUAL § 5B1.3(a)(2) (U.S. SENT'G COMM'N 2018).

⁴² *Id.*

⁴³ 18 U.S.C. § 3563(b).

⁴⁴ U.S. SENT'G GUIDELINES MANUAL § 5B1.3(d) (U.S. SENT'G COMM'N 2018).

⁴⁵ *Id.*

⁴⁶ *Id.* § 5E1.2 cmt. n.1.

Chapter Two of the Sentencing Guidelines.⁴⁷ Zone B requires a prison sentence or a sentence of probation with conditions that substitute for imprisonment.⁴⁸ These conditions must be for the same amount of time recommended by the Sentencing Table for imprisonment and include intermittent confinement, community confinement, or home detention.⁴⁹ A prison sentence can also include a term of supervised release with a condition that requires either community confinement or home detention; however, at least one month must be actual imprisonment, and the total length of the sentence must fall within the range recommended by the sentencing table.⁵⁰ The minimum sentence term in Zone C can be satisfied by either a prison sentence or a prison sentence that includes a term of supervised released with a condition that requires either community confinement or home detention; however, at least half of the minimum term must be actual imprisonment.⁵¹ Only a prison sentence can satisfy the minimum term for offenses that fall within Zone D.⁵²

⁴⁷ *Id.* § 5C1.1(b).

⁴⁸ *Id.* § 5C1.1(c).

⁴⁹ *Id.*

⁵⁰ U.S. SENT'G GUIDELINES MANUAL § 5C1.1 cmt. n.3. (U.S. SENT'G COMM'N 2018).

⁵¹ *Id.* § 5C1.1(d).

⁵² *Id.* § 5C1.1(f).

III. SENTENCING IN SCANDINAVIAN COUNTRIES

A. SCANDINAVIAN COUNTRIES AIM TO IMPOSE LESS HARMFUL SENTENCES BY FOCUSING ON ALTERNATIVE SANCTIONS AND RESERVING IMPRISONMENT FOR OFFENDERS WHO COMMIT THE MOST EGREGIOUS CRIMES.

The Scandinavian system uses the humane neoclassicism sentencing theory, “which stresses the principles of proportionality, predictability, and equality.”⁵³ Under the principle of proportionality in the Scandinavian system, “it is more important to prevent overly harsh and unjustified penalties than to prevent overly lenient ones.”⁵⁴ The Finnish, Danish, and Swedish codes have similar language in the sentencing chapters of their penal codes that stress the importance of sentences being proportional “to the harmfulness and dangerousness of the offense, the motives for the [offense], and . . . the culpability of the offender.”⁵⁵ Additionally, the principle of endangerment requires not only actual harms, but potential harms be considered in the determination of the seriousness of the offense.⁵⁶ The principle of subjective coverage limits endangerment only to the harms that “the actor foresaw . . . or should have foreseen.”⁵⁷ “Culpability relates to the actor’s mental state at the time of the offense,” which includes consideration of “the degree of planning and premeditation, the firmness of the criminal decision, and the offender’s decisiveness.”⁵⁸ Culpability does not include “the offender’s personality or the moral merits of [the offender’s] way of life,” but culpability may be mitigated by “respectable and altruistic motives or

⁵³ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 355 (2011).

⁵⁴ *Id.* at 356.

⁵⁵ *Id.* at 356-7 (quoting from the semiofficial translation of the Finnish code provided by the Ministry of Justice (“Translations of Finnish acts and decrees,” <http://www.finlex.fi/en/laki/kaannokset/>).

⁵⁶ *Id.* at 358.

⁵⁷ *Id.*

⁵⁸ *Id.*

the [intent] to benefit other members of society,” justifying lesser sanctions.⁵⁹

Criminal codes in Scandinavian countries define offenses and indicate their severity.⁶⁰ Offenses are graded into subcategories by seriousness: petty, standard, and aggravated.⁶¹ Each subcategory is assigned a minimum and maximum penalty, except in Denmark where few minimum punishments are provided.⁶² While maximum penalties are binding and cannot be exceeded except for minor exceptions, minimum penalties are only presumptive and are not mandatory.⁶³ Minimums are low compared to the United States’ mandatory minimums, and “penalties tend to be . . . in the lower quarter or third of the authorized range.”⁶⁴ After the penalty range is determined, the court chooses the type of sanction and the amount of punishment.⁶⁵

Under the Scandinavian system, imprisonment is only to be considered as a last resort when other alternatives are unavailable.⁶⁶ Scandinavian countries all share similar sets of sanctions, which are arranged by severity in order to follow the principle of proportionality.⁶⁷ The first level of “sanctions consist[s] of warnings, usually in the form of non-prosecution.”⁶⁸ In Finland, cases that go to “court may . . . result in waiver of measures.”⁶⁹ The second level consists of fines, which may be imposed in connection with a conditional or unconditional prison sentence in Denmark.⁷⁰ Community sanctions make up the third level, which “consists of different combinations of conditional or suspended sentence[s], probation or supervision, community service, treatment orders, electronic monitoring, and fines.”⁷¹ The

⁵⁹ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 358 (2011).

⁶⁰ *Id.* at 354.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 355 (2011).

⁶⁶ *Id.* at 367.

⁶⁷ *Id.* at 368.

⁶⁸ *Id.* at 368.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 368 (2011).

last and most severe sanction is imprisonment, which is sometimes “combined with other sanctions, usually a conditional sentence [in Denmark and Norway].”⁷²

In Finland, the court must decide between conditional and unconditional imprisonment when the offense is too serious for a fine.⁷³ Prison sentences up to two years may be imposed conditionally, and conditional prison sentences over a year may be combined with short community service orders.⁷⁴ In order to decide between a conditional and unconditional prison sentence, the court takes into consideration “the seriousness of the offense, the culpability of the offender, previous convictions, and the age of the offender.”⁷⁵ A sufficiently extensive criminal record and a middle-rank offense may lead to unconditional imprisonment.⁷⁶ Only serious offenses warrant unconditional imprisonment for first-time offenders, and only special reasons justify juvenile imprisonment.⁷⁷ Finland differs from other Scandinavian countries in that it places short prison sentences at the same severity level as community service.⁷⁸ The Finish Penal Code requires that “unconditional prison sentences up to eight months . . . be converted to community service” absent unconditional imprisonment sentences, “earlier community service orders or other weighty reasons,” which would “bar[] the imposition of a community service order.”⁷⁹ Thus, community service is considered only after the court concludes that the offense warrants an unconditional prison term.⁸⁰ As of 2010, “[o]ffenders deemed unsuitable for community service . . . may be placed under electronic monitoring” supervision if it is justified “in order to uphold and promote the offender’s social skills.”⁸¹ This sanction is usually imposed for offenders with substance abuse problems, and it includes an activity obligation, which may require the offender to go to work,

⁷² *Id.*

⁷³ *Id.* at 369.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 *CRIME & JUST.* 349, 369 (2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 370.

school, or a rehabilitation program.⁸² Therefore, Finland's sentencing ladder is as follows: non-prosecution, waiver of sentence, fines, conditional imprisonment, and unconditional imprisonment.⁸³

"Sweden has more community alternatives;" its sentencing ladder is as follows: non-prosecution, fines, suspended sentences, conditional sentences, probation, community service, and imprisonment.⁸⁴ Suspended sentences often function like warnings in Sweden and usually "do not . . . entail a prefixed prison term."⁸⁵ The most common community alternative is probation or "protective supervision," which may be combined with a treatment order, suspended sentence, or community service (which differs from Finland where community service is a free-standing criminal sanction).⁸⁶ In addition to proportionality considerations, "community alternatives [are] also tied to behavioral prognoses."⁸⁷ According to the Swedish Supreme Court, a suspended sentence is only excluded "if there are special reasons to assume that the offender will reoffend."⁸⁸ The Swedish Penal Code requires courts to consider whether a sanction of probation "can contribute to the accused refraining from continued criminality."⁸⁹ The Supreme Court's declaration that a "total absence of any reasons to assume that the sanction could contribute to the accused refraining from continued criminality" be a precondition to excluding probation has led to probation being imposed in higher risk cases than suspended sentences.⁹⁰ When these conditions are not met, or the penal value warrants a prison sentence, suspended sentences and probation can be combined with up to 240 hours of community service.⁹¹

⁸² *Id.*

⁸³ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 369 (2011).

⁸⁴ *Id.* at 370.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 371.

⁸⁸ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 371 (2011) (quoting MARTIN BORGEKE & GEORG STERZEL, *STUDIER RORANDER PAFOLJDSPRAXIS MED MERA* 27 (2009)).

⁸⁹ *Id.* (quoting the Swedish Penal Code, SPC 30:9.1).

⁹⁰ *Id.* (quoting MARTIN BORGEKE & GEORG STERZEL, *STUDIER RORANDER PAFOLJDSPRAXIS MED MERA* 142 (2009)).

⁹¹ *Id.*

Prison sentences of up to twelve months can be replaced with a combined sentence of probation and a treatment order if there is “a connection between substance abuse and the current offense and the ‘accused declares [a willingness] to undertake treatment in accordance with a personal plan.”⁹²

B. AGGRAVATING AND MITIGATING FACTORS IN SCANDINAVIAN COUNTRIES FOCUS ON THE CULPABILITY OF THE OFFENDER, SO UNRELATED PREVIOUS OFFENSES ARE LESS LIKELY TO INCREASE PUNISHMENT.

While leniency is common for first-time offenders, many Scandinavian countries have limited the influence of recidivism as an aggravating sentencing factor.⁹³ In Finland, previous offenses are only considered if they show an increased culpability.⁹⁴ Previous convictions are more likely to influence community sanctions and backup sanctions.⁹⁵ Aggravating factors such as degree of premeditation and planning, racist and xenophobic motives, remuneration, harm, seriousness, and organized crime can increase penalties.⁹⁶ Maximum penalties are doubled in Norway for offenses committed as a part of organized crime, which is also true for some violent offenses in Denmark.⁹⁷

Mitigating factors can be external forces such as a “threat . . . strong empathy or an exceptional and sudden temptation . . . contribution of the injured party,” or other circumstances that might reduce the offender’s culpability to conform to the law.⁹⁸ Mitigating factors can also be personality related such as diminished responsibility because of mental illness, inability to understand the factual nature or unlawfulness of their behavior, inability to control

⁹² *Id.* at 372 (quoting MARTIN BORGEKE & GEORG STERZEL, *STUDIEN RORANDER PAFOLJDSPRAXIS MED MERA* 219 (2009)).

⁹³ *Id.* at 359.

⁹⁴ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 *CRIME & JUST.* 349, 359 (2011).

⁹⁵ *Id.* at 360.

⁹⁶ *Id.* at 360-61.

⁹⁷ *Id.* at 361.

⁹⁸ *Id.* at 362.

their behavior, or age.⁹⁹ Other mitigating factors “are based on pragmatic considerations or . . . humaneness, equity, and mercy.”¹⁰⁰ These may include cooperation with the victim or the criminal justice system.¹⁰¹ Mitigation is only available for cooperation in one’s own offenses; “exposing crimes by others does not mitigate sentences.”¹⁰² Successful mediation with the victim automatically diverts the case from the criminal justice system in Norway.¹⁰³ “In Finland and Sweden, mediation and reconciliation may justify non-prosecution, waiver, or lesser punishment.”¹⁰⁴ Other factors that may mitigate a sentence include poor health, advanced age, unreasonable hardship, and time passed since the commission of the offense.¹⁰⁵

If more than one offense is being sentenced simultaneously and they have different minimums, the sentence may not be less than the highest minimum.¹⁰⁶ In Denmark, the maximum penalty is the most severe maximum of the offenses, but aggravating circumstances may increase the maximum penalty by half.¹⁰⁷ In Norway, the maximum for multiple offenses is twice the highest penalty.¹⁰⁸ Finland and Sweden increase the maximum penalty by a portion of the original offense.¹⁰⁹

⁹⁹ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 362 (2011).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 363.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 363 (2011).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 363-64.

¹⁰⁸ *Id.* at 364.

¹⁰⁹ *Id.*

IV. ANALYSIS

- A. The Federal Sentencing Guidelines favor imprisonment as the appropriate punishment, and this is reflected in the fact that prison sentences vastly outnumber any other sanction imposed in federal court.

While imprisonment is a last resort in Scandinavian countries, it is the predominate form of punishment under the Federal Sentencing Guidelines. In 2020, According to the U.S. Sentencing Commission, 91.8% of offenders received imprisonment sentences with 89.1% receiving prison only sentences and 2.7% a combination of prison and alternatives.¹¹⁰ Only 8.2% of offenders did not receive a prison sentence, 7.7% of which received probation and 0.5% only fined.¹¹¹ 1.7% of offenders were sentenced to a combination of probation and alternatives, and the other 6.0% were only sentenced to probation.¹¹²

Though these statistics show a clear reliance on incarceration, this was not always the case. This tendency to steer away from alternative sentencing dates back to the 1980s.¹¹³ In the 1970s, alternative sentences were imposed at roughly the same rate as prison sentences.¹¹⁴ This shift in sentencing practices is largely due to a philosophical shift.¹¹⁵ The rehabilitation model, which dated back to the establishment of the federal parole board in 1910, generally relied on parole officials to determine if and when prisoners would receive early release.¹¹⁶ By the 1970s, this model was criticized for yielding too lenient sentences, “disparities in sentences [for] similarly situated offenders, discrimination

¹¹⁰ U.S. SENT’G COMM’N, Q. DATA REP. 10 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2020_Quarterly_Report_Final.pdf.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Melissa Hamilton, *Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*, 51 HOUS. L. REV. 1271, 1275-76 (2014).

¹¹⁴ *Id.* at 1275.

¹¹⁵ *Id.* at 1276-77.

¹¹⁶ *Id.* at 1277.

against minority offenders, and uncertainty in release decisions.”¹¹⁷ This led to the tough-on-crime agenda of the 1980s, which emphasized deterrence and retribution.¹¹⁸ As a result, incarceration has moved from the option of last resort to the predominate punishment, and the prison population has expanded exponentially.¹¹⁹

Though state courts are the largest contributors to mass incarceration, federal courts play a significant part.¹²⁰ In 2020, state prisons and local jails housed 1,922,000 people, while federal prisons and jails only held 226,000 people.¹²¹ This is because most crimes are prosecuted under state jurisdiction. Federal courts, however, sentence defendants to imprisonment at a much higher rate than state courts.¹²² In Louisiana, the state with the highest incarceration rate, defendants are sentenced to prison rather than probation 33% of the time,¹²³ but in federal court, defendants are sentenced to prison 91.8% of the time.¹²⁴ Though states may not reserve imprisonment as a last resort like Scandinavian countries, they are more likely to sentence offenders to alternative sentences, which are the norm in Scandinavian countries. While this is a great start, there is much more reform that needs to be done in the United States to reduce mass incarceration, and the federal system needs to join in the effort. Many states are continuing to get inspiration from Scandinavian countries to reform their prisons and reduce recidivism and incarceration including

¹¹⁷ *Id.* at 1277-78.

¹¹⁸ *Id.* at 1278.

¹¹⁹ Melissa Hamilton, *Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*, 51 HOUS. L. REV. 1271, 1278 (2014).

¹²⁰ *Id.*

¹²¹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

¹²² Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>.

¹²³ LA. JUST. REINVESTMENT TASK FORCE, REP. AND RECOMMENDATIONS 18 (2017), https://www.lasc.org/documents/LA_Task_Force_Report_2017_FINAL.pdf.

¹²⁴ U.S. SENT'G COMM'N, *supra* note 110, at 10.

California, Pennsylvania, North Dakota, and Oregon.¹²⁵ These states have been learning from Scandinavian countries how to reform prison conditions and implement rehabilitation efforts to assist former inmates as they reenter society,¹²⁶ but it is time for the United States to revisit how it sentences offenders.

B. THE UNITED STATES SHOULD REDUCE MASS INCARCERATION BY LOOKING TO SCANDINAVIAN SENTENCING PRACTICES FOR INSPIRATION ON HOW TO IMPOSE SENTENCES THAT ARE SUFFICIENT BUT NOT GREATER THAN NECESSARY.

The Scandinavian countries that many states have been looking to for inspiration on prison reform have made great strides in sentencing reform as well. These Scandinavian sentencing policies just might hold the key to reducing mass incarceration in the United States. One highly influential policy in Scandinavian sentencing is the policy disfavoring imprisonment to other possible sanctions. In fact, the Swedish Prison and Probation Service's website states in bold letters, "[I]mprisonment should not be seen as an effective crime prevention measure in Swedish criminal policy."¹²⁷ Swedish courts must look at all other possible sanctions before deciding that prison is the necessary sanction.¹²⁸ This policy is completely different from that of the United States, where prison is the primary sanction despite the fact that the Federal Sentencing Guidelines

¹²⁵ Ike Dodson, *California Leaders Learn from Norwegian Prison System*, CAL. DEP'T. OF CORR. AND REHAB. (Dec. 16, 2019), <https://www.cdcr.ca.gov/insidedcdr/2019/12/16/california-leaders-learn-from-norwegian-prison-system/>; *Scandinavian Prison Project*, PA. DEP'T OF CORR., <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Scandinavia-Prison-Project.aspx> (last visited Aug. 2, 2021); Karen Bouffard, *States Put Norway-Style Prison Reforms to Work in U.S.*, DETROIT NEWS (Oct. 11, 2019, 11:15 AM), <https://www.detroitnews.com/story/news/special-reports/2019/10/11/states-put-norway-style-prison-reforms-to-work/1682876001/>.

¹²⁶ *Id.*

¹²⁷ *Sanctions*, SWED. PRISON AND PROB. SERV., <https://www.kriminalvarden.se/swedish-prison-and-probation-service/sanctions/> (last visited Aug. 3, 2020).

¹²⁸ *Id.*

advise courts to impose a sentence that is “sufficient, but not greater than necessary” to achieve the statutory sentencing goals.¹²⁹ In fact, despite this recommendation, the structure and wording of the Federal Sentencing Guidelines imply a presumption in favor of imprisonment as the primary sanction.¹³⁰ Whereas the sentencing guideline ranges in Scandinavian countries begin with fines,¹³¹ the minimum sanction suggested by the Sentencing Table in the Federal Sentencing Guidelines is still in terms of months of imprisonment.¹³² Whereas Finnish law requires that prison sentences up to eight months are converted to community service unless the court finds reasons otherwise,¹³³ the Federal Sentencing Guidelines suggest that probation may be an alternative to incarceration if certain criteria are met.¹³⁴ The purpose of the Federal Sentencing Guidelines is to advise courts on the proper sentence, and as written, the Guidelines are currently advising courts that imprisonment is the proper sentence.¹³⁵ This implied preference for imprisonment in the Federal Sentencing Guidelines is reflected in the prevalence of imprisonment sentences imposed compared to other sentences.¹³⁶ If the United States is to fix its mass incarceration crisis, it should follow the example set by Scandinavian countries and start looking at alternative sentences as the preferred sanction rather than imprisonment. This new approach to sentencing would also be more in line with the objective stated in the Guidelines by imposing a sufficient but not greater than necessary sentence.

Not only would a policy favoring sentencing alternatives over imprisonment help the United States to reduce mass incarceration, but it would also save money and allow the criminal justice system to focus on imposing sanctions and improving programs that help offenders reintegrate into society and reduce recidivism. In 2016, the

¹²⁹ U.S. SENT’G GUIDELINES MANUAL § 1B1.1(c) (U.S. SENT’G COMM’N 2018).

¹³⁰ Hamilton, *supra* note 113, at 1275.

¹³¹ Hinkkanen & Lappi-Seppälä, *supra* note 77, at 355.

¹³² U.S. SENT’G GUIDELINES MANUAL § 5A (U.S. SENT’G COMM’N 2018).

¹³³ Hinkkanen & Lappi-Seppälä, *supra* note 77, at 369.

¹³⁴ U.S. SENT’G GUIDELINES MANUAL § 5B1.1 (U.S. SENT’G COMM’N 2018).

¹³⁵ *Id.* § 1B1.2.

¹³⁶ Hamilton, *supra* note 113, at 1274; see also U.S. SENT’G COMM’N, *supra* note 134, at 10 (91.8% of federal defendants are sentenced to prison).

average annual cost of maintaining a prisoner was \$34,770.¹³⁷ The average annual cost of placing a person in a residential reentry center was \$29,280, and the average annual cost of supervising a person in the community was \$4,392.¹³⁸ These costs are likely higher today than they were in 2016,¹³⁹ but these figures reflect the same conclusion as those published in 2012: sentencing alternatives are less expensive than imprisonment.¹⁴⁰

On top of being the more expensive option, prison is the more harmful option. Inadequate prison conditions take their toll on inmates' physical and mental health, and limited opportunities for education and job training leaves inmates unable to better themselves and prepare for a career after release.¹⁴¹ Though these issues surrounding prison conditions and the availability of rehabilitation programs in prisons are beyond the scope of this paper, many states are currently learning from Scandinavian prisons how to improve prison conditions and implement rehabilitation programs, so inmates are more prepared for life after release.¹⁴² Once a new policy favoring sentencing alternatives is implemented in the United States, more funds will be available to dedicate to programs that can further reduce recidivism.

¹³⁷ *Incarceration Costs Significantly More than Supervision*, U.S. COURTS (Aug. 17, 2017), <https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>.

¹³⁸ *Id.*

¹³⁹ Afterall, the average annual cost of incarceration in 2018 had already increased to \$37,449 per prisoner. Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63891 (Nov. 19, 2019).

¹⁴⁰ *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. COURTS (July 18, 2013), <https://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system>.

¹⁴¹ See Daniel C. Semenza & Jessica M. Grosholz, *Mental and physical health in prison: how co-occurring conditions influence inmate misconduct*, HEALTH JUST. 7, 1 (2019); Kayla James & Elena Vanko, *The Impacts of Solitary Confinement*, VERA (April 2021), <https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf>; Kerri Miller & Marcheta Fornoff, *Life after prison: The 'sentence never ends'*, MPR (Mar. 8, 2017, 8:41 PM), <https://www.mprnews.org/story/2017/03/08/issues-facing-former-inmates>.

¹⁴² Dodson, *supra* note 125.

C. A FEW MINOR TWEAKS TO THE SENTENCING TABLE AND LANGUAGE OF THE SENTENCING GUIDELINES ARE ALL IT WOULD TAKE TO BEGIN REDUCING MASS INCARCERATION IN THE UNITED STATES.

Though the Scandinavian approach of favoring sentencing alternatives seems to require a complete shift in how US courts would sentence offenders, only a few minor tweaks to the Sentencing Guidelines are needed to begin the process of rectifying the mass incarceration problem. The Sentencing Guidelines as written leave very little opportunity to impose alternative sentences in practice. The solution is to change the Sentencing Guidelines' language so that it suggests a preference for alternative sentences and makes alternative sentences available in more situations.

The first tweak is directly inspired by Finnish law. Where the Sentencing Guidelines read, “[p]robation *may* be used as an alternative to incarceration,”¹⁴³ changing “may” to “should” would instill a preference for probation over incarceration. This language would advise courts against incarceration where it is not necessary while still allowing judges’ discretion to impose further conditions to achieve sentencing objectives and help rehabilitate offenders. Since the Sentencing Guidelines are only advisory, it would still allow judges to impose prison in cases where they absolutely felt it was necessary, but they would have to explain their reasoning for deviating from the Guidelines.¹⁴⁴

Another minor change that would imbue a preference for alternative sentencing over imprisonment would be to revise the Sentencing Table to reflect the length of the sentence in months instead of months *of imprisonment*. Though Section 5C1.1 of the Sentencing Guidelines explains how a minimum prison term may be served or substituted,¹⁴⁵ changing the Table to a more neutral term would not suggest prison as the default sanction and could be changed without having to make any changes to Section 5C1.1.

The last and largest change to the Sentencing Guidelines that would increase the use of alternative

¹⁴³ U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. B, introductory cmt. (U.S. SENT’G COMM’N 2018).

¹⁴⁴ 18 U.S.C. § 3553(b)

¹⁴⁵ U.S. SENT’G GUIDELINES MANUAL § 5C1.1 (U.S. SENT’G COMM’N 2018).

sentencing and reduce mass incarceration would be enlarging the sizes of Zones A, B, and C. Currently, Zone D is significantly larger than the other three zones and requires imprisonment,¹⁴⁶ and very few offenses fall within Zone A, where imprisonment is not required. Shifting Zone A down by just a couple boxes would increase the availability of sentencing alternatives to more offenders, and/or possibly require alternative sentencing in more situations. This minor shift to include offenses that have a maximum of eight months, would be very similar to the Finnish system where prison sentences under eight months must be converted to community service.¹⁴⁷ Shifting the zones could also be done without making any further changes to other sections if the range values are read as sanction lengths rather than imprisonment lengths. The ranges in Zone A that have a minimum term of zero could be satisfied by a fine or probation sentence of up to six months. The ranges that would be moved into Zone A would require at least one month of probation.

Increasing the size of Zone B would have a significantly larger impact on the reduction of imprisonment. Though Zone B requires that an offender sentenced to prison serve at least one month of the prison sentence before he or she can be released early, it does not require imprisonment where the court finds it sufficient to impose a sentence of probation with conditions.¹⁴⁸ Here, the court should first try to find a satisfactory punishment through alternatives like intermittent confinement, community confinement, or home detention before imposing a prison sentence. Increasing this zone and setting a preference for these alternatives could significantly reduce imprisonment by imposing sentences that are more likely to contribute to the offenders' rehabilitation, while still punishing the offender for their crime. Ideally, Zone B would end where the cut off for Zone C currently is because Level 14 is often used in Chapter Two of the Sentencing Guidelines to increase punishment where there are aggravating factors.¹⁴⁹ Zone B's new cut off would

¹⁴⁶ *Id.* § 5A.

¹⁴⁷ Hinkkanen & Lappi-Seppälä, *supra* note 77, at 369.

¹⁴⁸ U.S. SENT'G GUIDELINES MANUAL § 5C1.1(c) (U.S. SENT'G COMM'N 2018).

¹⁴⁹ *See id.* §§ 2A2.2, 2A3.3, 2A3.5(a)(2), 2B1.1(b)(14)-(16), 2B1.4(b)(2), 2B1.5(b)(6), 2B5.3(b)(6)-(7), 2B6.1(b)(3), 2C1.1(a)(1).

still achieve this aim of increasing punishment for those offenses with aggravating factors, while allowing the increased use of alternative sentences for the ranges that fall below this cut off and have a maximum sentence of eighteen months.

The new Zone C would then necessarily start where it currently ends, reducing the size of Zone D, which dominates most of the Sentencing Table. Though Zone C still requires imprisonment, it does permit supervised release with a condition of either community confinement or home detention to satisfy the second half of the minimum terms for those ranges.¹⁵⁰ Moving Zone C into what is currently the top of Zone D would simply increase the availability of supervised release to the offenders whose crimes fall within this zone (i.e., all the ranges that have a maximum sentence below two years). Even after increasing and relocating Zones A through C, Zone D would still encompass the most egregious crimes. This solution might not go as far as the sentencing policies imposed in Scandinavian countries, but these new zones would allow courts to rely more on alternative sentencing. This will reduce incarceration for lesser offenses, while still reserving prison for Zones C, D, and sometimes B, where the offenders' actions warrant such a sentence.

V. CONCLUSION

Mass incarceration in the United States is a complex problem, which will require a complex solution, but the first step to reducing incarceration must be to revisit how offenders are sentenced in the United States. Favoring alternative sentences over incarceration, like Scandinavian countries, has the potential to impact incarceration rate in the United States tenfold. A policy favoring alternative sentencing will reduce the number of offenders sentenced to prison in the first place. This policy will reduce the amount of money spent per person on corrections, reducing the amount of money spent overall on maintaining prisons each year. This will allow for money to be allocated towards improving prison conditions and implementing rehabilitation programs, which will further reduce

¹⁵⁰ *Id.* § 5C1.1(d).

recidivism by setting inmates up to live successful lives on the outside. By reducing both the number of offenders sentenced to prison and the number of offenders who recommit, the United States can finally end its mass incarceration crisis.