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Can Islamic Law Principles Regarding Settlement of Criminal Disputes Solve the Problem of the US Mass Incarceration?

Amin R. Yacoub* & Becky Briggs**

Abstract

The mass incarceration crisis in the United States remains a vexing issue to this day. Although the U.S. incarcerated population has decreased by 25% amid the COVID-19 pandemic, the United States remains a leading country in the number of incarcerated people per capita.¹ Focusing on Islamic law principles governing settlement in criminal cases and the powerful role of prosecutors in serving justice, this research argues that integrating settlement and mediation into the U.S. criminal justice system would significantly reduce mass incarceration in the United States and reimagine an overly punitive approach to

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¹ Alexi Jones and Wendy Sawyer, *New data on jail populations: The good, the bad, and the ugly*, PRISON POL’Y INITIATIVE (Mar. 17, 2021), <https://www.prisonpolicy.org/blog/2021/03/17/jails/>.

criminal behavior. To demonstrate our argument, this article assesses the practical application of the relevant Islamic law principles in the Egyptian public prosecution system. We conclude that these principles are highly successful in both reducing incarceration rates and responding to crime. In the absence of similar principles in the U.S. prosecutorial system, we explore the alternative role of U.S. prosecutors in remedying injustices through issuing orders to vacate additional criminal counts that had led to an excessive prison time. Finally, we assess the recently issued U.S. First Step Act considering the successful Icelandic criminal justice rehabilitative system. This assessment makes us conclude that combining both ADR mechanisms applied by prosecutors and rehabilitative sentencing would fill the existing gap in the U.S. criminal justice system and solve the problem of mass incarceration.

I. Introduction

Human and civil rights advocates have been at the forefront of fighting the U.S. sentencing, prison, and social policies to reduce the national reliance on incarceration to rehabilitate.² The prison system is an extension of the criminal justice system, a large and complex system aimed at minimizing crime and ensuring public safety.³

In theory, the main aim of the prison system is to process and rehabilitate criminal inmates.⁴ In many states,

² See *Revoked How Probation and Parole Feed Mass Incarceration in the United States*, H.R. WATCH (July 31, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states#>.

³ RAM SUBRAMANIAN, LAUREN-BROOKE EISEN, TARYN A. MERKL, LEILY ARZY, HERNANDEZ D. STROUD, TAYLOR KING, JACKIE FIELDING, ALIA NAHRA & MICHAEL WALDMAN, *A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM* 6 (Brennan Ctr. for Just. 2020), https://www.brennancenter.org/sites/default/files/2021-01/FederalAgendaCriminalJustice_Final.pdf.

⁴ *Id.*

this system is even titled the “Department of Corrections.”⁵ These prison systems are ideally supposed to provide inmates with a controlled environment necessary to motivate their change and reduce recidivism.⁶ Yet, the prison system in the United States is regarded as one of the most oppressive systems in the world, despite America being a first-world country.⁷ Moreover, U.S. incarceration is marred by inequality where low-income persons and people of color are far more likely to be incarcerated and for more extended periods than similarly situated rich or white inmates.⁸ This results in growth of the phenomenon termed as “disproportionate hyper-incarceration.”⁹ Travis, Western, and Redburn show that as of 2007, the United States had more than four and one-half times of people incarcerated in 1972, and as of 2012, it had a total of 2.23 million people, which was by far the highest in the world.¹⁰

The consequences of hyper incarceration were equivalently devastating across the nation’s population. Early researchers have identified that as early as the 1990’s the juvenile corrections system and the general American

⁵ *E.g.*, New York, Washington D.C, Colorado, Wisconsin, and Wyoming. CORR. LEADERS ASS’N https://www.asca.net/index.php?option=com_mcsearchresults&view=search&uuid=eaf848d3-b3af-4b7d-b914-d0d2ae3f4fb0#/ (last visited Oct. 15, 2021) (naming the directors of correctional facilities of the U.S. and their departments’ names).

⁶ *E.g.*, *About the Department of Correction*, N.Y.C. DEP’T OF CORR. <https://www1.nyc.gov/site/doc/about/about-doc.page#:~:text=About%20the%20Department%20of%20Correction&text=The%20Department%20provides%20for%20the,are%20located%20on%20Rikers%20Island.>

⁷ See SUBRAMANIAN, EISEN, MERKL, LARZY, STROUD, KING, FIELDING, NAHRA & WALDMAN, *supra* note 3, at 5–6.

⁸ *Id.* at 6.

⁹ See Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper incarceration and Black Male Identity Performance*, 93 B.U.L.R. 1185, 1195 (2013).

¹⁰ NAT’L RSCH. CTR., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 13 (Jeremy Travis, Bruce Western, & Steve Redburn, eds., 2014).

rehabilitation process did not ensure a reduction in recidivism.¹¹ Recidivism implies relapsing into a similar criminal activity after incarceration.¹² Researchers contended that the system was unsuccessful in rehabilitating inmates and transforming them into good citizens to be reintegrated in society.¹³ Indeed, the prison system that intended to rehabilitate had yielded contrary results.¹⁴ Crane indicates that more than half of the prisoners and people in jails were diagnosed with mental illnesses and a gradual dependency on alcohol and drugs.¹⁵

Furthermore, there were higher rates of chronic diseases recorded among the incarcerated.¹⁶ Research indicated that at least 40% of people in jail had at least one chronic medical condition; 74% were overweight or obese.¹⁷ These worsened health conditions were directly linked to prison system practices, some of which were allowed by ineffective prison, sentencing, and social policies that predominate American criminal justice reform.¹⁸ Crane shows that most incarcerated people interviewed for the report identified that the prison system slowly eroded their physical and emotional health—promoting debilitating levels of Post-Traumatic Stress Disorder (“PTSD”), depression, and anxiety, and accelerating death rates.¹⁹ With overt failures recorded in this regard, there is a greater need to reevaluate the American criminal justice system.²⁰ In the

¹¹ Denise C. Gottfredson & William H. Barton, *Deinstitutionalization of Juvenile Offenders*, 31 *CRIMINOLOGY* 591, 591–92 (1993).

¹² *See id.* at 600.

¹³ *Id.* at 592, 600.

¹⁴ *See* Johanna Crane, *Becoming Institutionalized: Incarceration and “Slow Death,”* SOC. SCI. RSCH. COUNCIL (July 16, 2019), <https://items.ssrc.org/insights/becoming-institutionalized-incarceration-and-slow-death/>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

wake of George Floyd's and Breonna Taylor's deaths at the hands of an inherently racist system, there have been immense calls for scrapping elements central to the current American criminal justice system.²¹

The main argument behind this research is that integrating alternative dispute resolution mechanisms in criminal cases into the prosecutorial process on one hand and adopting rehabilitative sentencing on the other may significantly reduce the incarceration rates in the U.S.²²

In Part I, we contend that the U.S. retributive criminal justice system coupled with the unwillingness of U.S. prosecutors to settle criminal cases are the reasons behind the growth of the mass incarceration problem in the United States. In 2018, Congress had passed the First Step Act (the “Act” or “FSA”) to solve the mass incarceration dilemma.²³ We provide a critical review of the Act in light of two recent court decisions: *United States v. Brown* and *United States v. Holloway*.²⁴ Furthermore, we argue that the problem of mass incarceration in the United States persists even after the issuance of the First Step Act because of the unwillingness of U.S. prosecutors to dismiss charges when the suspect is inculpable. Nonetheless, this article uncovers a temporary solution proposed by the judges in both the *Brown* and *Holloway* cases—that U.S. prosecutors intervene in court proceedings and use their power to issue vacatur to remedy injustice.²⁵

In Part II, we review the role of mediation in criminal cases by evaluating its application on juvenile criminal justice system and the Brooklyn Dispute Settlement Center.

²¹ SUBRAMANIAN, EISEN, MERKL, LARZY, STROUD, KING, FIELDING, NAHRA & WALDMAN, *supra* note 3, at 5.

²² *See id.* at 6–7.

²³ *Id.* at 5.

²⁴ *United States v. Brown*, 411 F. Supp. 3d 446 (S.D. Iowa 2019); *United States v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014).

²⁵ *See Brown*, 411 F. Supp. 3d 446; *Holloway*, 68 F. Supp. 3d 310.

In Part III, we assess the relevant Islamic law principles regarding the settlement of criminal cases. Moreover, this article examines the partial application of Islamic law principles by Egyptian prosecutors who possess a thoroughly regulated discretionary power in contrast to their U.S. counterparts, whose discretionary power remains vague and unregulated.²⁶ Finally, we unravel the reasons behind the success of the Icelandic criminal justice model. As a result of our assessment of Islamic law principles, the Egyptian prosecutorial system, and the Icelandic model of criminal justice, we conclude that the adoption of alternative dispute resolution mechanisms alongside a wider discretionary power of prosecutors may reduce the incarceration rates in the United States.

A. The Existing Retributive U.S. Criminal Justice System and the Unregulated Discretionary Power of Prosecutors Raise Incarceration Rates

Prison systems around the United States are increasingly failing to cope with the myriads of challenges stemming from poor policy implementation, privatization, and other social aspects such as overcrowding.²⁷ With an increase in related ideological terrorism in some parts of the world, there has been a greater need to establish measures for good counterterrorism that will prevent the spread of radicalized individuals and work to create adequate policies for a safer world.²⁸ Clifford identifies “prison radicalization” as an increasing threat across many countries in Europe and North America.²⁹ In the same breath, he defines prison

²⁶ See *infra* Parts I.B, III.A.2.

²⁷ NAT’L RSCH. COUNCIL, *supra* note 10, at 6.

²⁸ INST. FOR ECONS. & PEACE, GLOBAL TERRORISM INDEX 4 (2020), <https://www.economicsandpeace.org/wp-content/uploads/2020/11/GTI-2020-web-2.pdf>.

²⁹ Bennett Clifford, *Rethinking “Prison Radicalisation”-Lessons from the U.S. Federal Correctional System*, INT’L CTR. FOR COUNTER TERRORISM (Nov. 16, 2018), <https://icct.nl/publication/rethinking-prison-radicalisation-lessons-from-the-u-s-federal-correctional-system/>.

radicalization as a process in which detained and incarcerated persons increasingly adopt violent ideas and goals, and defines its impact as a major factor in how terrorism around the West will unfold over in the next few decades.³⁰

Indeed, there is a greater cause for concern. Statistics show that prison radicalization is more impactful for social and economic security around Europe and North America.³¹ Clifford identifies that the November 2015, March 2016, and December 2016 attacks in Paris, Brussels, and Berlin, respectively, were perpetrated by persons formally in prison who were radicalized.³² The process of prison radicalization is multilayered and increasingly complex.³³ It requires an elaborate system to evaluate its values and create an impactful approach critically.³⁴ The United Nations Development Program (“UNDP”) posits that radicalization considers an elaborate manipulation process affected by the socialization process.³⁵ It is also facilitated by personal, emotional, and psychological factors such as social exclusion and lack of social identity development among a group due to increased discrimination that the group faces.³⁶

Radicalization has been defined to happen in stages directly linked to the defendant’s interaction with the criminal justice system.³⁷ Some scholars have uncovered

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Preventing Violent Extremism*, U.N. DEV. PROGRAM’S OSLO GOVERNANCE CTR., <https://www1.undp.org/content/oslo-governance-centre/en/home/our-focus/preventing-violent-extremism.html> (last visited Oct. 15, 2021).

³⁶ *Id.*

³⁷ Randy Borum, *Radicalization into Violent Extremism II: A Review of Conceptual Models and Empirical Research*, 4 J. STRATEGIC SEC. 37, 41–43 (2011) [hereinafter *Violent Extremism*] (“Radicalization often starts with individuals who are frustrated with their lives, society or the foreign policy of their governments. A typical pattern is that these individuals meet other like-

the radicalization process in the prison system using a model comprised of four critical steps:³⁸

1. Social and Economic Deprivation: Like the initial model, Dr. Randy Borum identifies that the potential target is usually persons in groups that are economically, socially, or politically undermined by the larger society.³⁹ They face higher impediments to achieve their goals and are continually subjected to many hurdles.⁴⁰ This critically starts to affect how they view society.⁴¹

2. Inequality and Resentment: The defendants view their social ills as a failure of both themselves and society.⁴² They begin harboring resentment and hostilities but rarely act on it.⁴³ They also begin appreciating the extremist ideals and alternative perspectives on life.⁴⁴

3. Blame and Attribution: The defendants have a sustained need to blame the other groups for all their woes.⁴⁵ They identify a specific outgroup as the primary reason for

mind ed people, and together they go through a series of events and phases that ultimately can result in terrorism.”) (quoting Tomas Precht, *Home grown terrorism and Islamist radicalization in Europe: From conversion to terrorism*, DANISH MINISTRY JUST. (Dec. 2007)), https://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningspuljen/2011/2007/Home_grown_terrorism_and_Islamist_radicalisation_in_Europe_-_an_assessment_of_influencing_factors_2_.pdf).

³⁸ Randy Borum, *Understanding the Terrorist Mindset*, 72 FBI L. ENF'T BULL. 7, 7 (2003) [hereinafter *Terrorist Mindset*]. For a brief summary of proposed frameworks explaining the process of radicalization into violent extremism see *Violent Extremism*, *supra* note 37.

³⁹ *Terrorist Mindset*, *supra* note 38, at 7.

⁴⁰ *See id.*

⁴¹ *See Violent Extremism*, *supra* note 37, at 41 (quoting Precht, *supra* note 37).

⁴² *Violent Extremism*, *supra* note 37, at 39 (noting the “injustice is blamed on a target policy, person, or nation.”); *Terrorist Mindset*, *supra* note 38, at 8.

⁴³ *Violent Extremism*, *supra* note 37, at 41.

⁴⁴ *See id.* at 44–45; *Terrorist Mindset*, *supra* note 38, at 8.

⁴⁵ *Violent Extremism*, *supra* note 37, at 45; Michael King & Donald M. Taylor, *The Radicalization of Homegrown Jihadists: A Review of Theoretical Models and Social Psychological Evidence*, 23 TERRORISM & POL. VIOLENCE 501, 604 (2011).

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their injustice, and they begin to dehumanize and vilify this outgroup.⁴⁶

4. Stereotyping and Demonizing the Enemy: Defendants start accepting and legitimizing stereotypes of an outgroup and its members. Once established, they justify using violence toward all members of the outgroup.⁴⁷

Having established all the above failures in the criminal justice system, policymakers face a compelling need to change their approach to crime-fighting and rehabilitation; the settlement process presents a very well-defined, fair, and increasingly necessary complimentary system for criminal justice.⁴⁸ Further, research suggests that restorative justice works as well or better than the traditional retributive system in lowering recidivism.⁴⁹

B. A Failed Attempt to Completely Solve the US Incarceration Dilemma: Congress Passes the Frist Step Act (2018)

In 2018, Congress passed the First Step Act, which aimed to amend numerous portions of the U.S. Code to promote prisoner rehabilitation and to lower mass incarceration rates.⁵⁰ The Act adopted reforms in multiple aspects: confinement sentence durations, recidivism, incentives to rehabilitation, and housing changes.⁵¹

Regarding sentencing reforms, the Act reduced the mandatory minimum of twenty-year prison sentencing for

⁴⁶ *Terrorist Mindset*, *supra* note 38, at 8; *see also* King & Taylor, *supra* note 45, at 604.

⁴⁷ King & Taylor, *supra* note 45, at 8; *see also* *Violent Extremism*, *supra* note 37, at 49.

⁴⁸ Clifford, *supra* note 29.

⁴⁹ Flora Go, Comment *Mediation as Practiced in Criminal Law: The Present, the Pitfalls, and the Potential*, JAMES B. BOSKEY L. STUDENT ESSAY CONTEST ON DISP. RESOL., 2010 Winner, at 15 [hereinafter Flora Go], https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/2010_boskeyessay_winner_florago.pdf.

⁵⁰ *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019) (citing NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019)).

⁵¹ JAMES, *supra* note 50.

drug traffickers to a fifteen-year mandatory minimum.⁵² Further, the Act reduced a life-in-prison mandatory minimum to a twenty-five-year mandatory minimum for offenders who have two or more prior qualifying convictions.⁵³ Moreover, the Act made the Fair Sentencing Act of 2010 retroactive so that currently-incarcerated offenders received more favorable sentences.⁵⁴ Finally, the Act expanded the safety valve provision by allowing courts to sentence “nonviolent drug offenders with minor criminal histories to less than the required mandatory minimum for the offense.”⁵⁵

To incentivize inmates to rehabilitate, the Act allowed “federal inmates to earn up to 54 days of good time credit for every year” imposed on their sentence rather than every year served.⁵⁶ In addition, eligible inmates may earn time credits that would qualify them for pre-release custody.⁵⁷ However, violent offenses and sexual offenses render inmates ineligible for time credits.⁵⁸ Nonetheless, the ineligible inmates may benefit as prescribed by the Federal Bureau of Prisons (“BOP”) for successfully completing recidivism reduction programming.⁵⁹

The Act provides guidance on recidivism reduction programming by collecting information on the effectiveness of current productive activities and programs available to inmates.⁶⁰ Moreover, it aims at grouping prisoners with

⁵² *An Overview of the First Step Act*, FED. BUREAU PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> (last visited Oct. 17, 2021).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (“For example, this change means that an offender sentenced to 10 years in prison and who earns the maximum good time credits each year will earn 540 days of credit.”).

⁵⁷ *Id.*

⁵⁸ *Id.* See also *Disqualifying Offenses*, FED. BUREAU PRISONS, https://www.bop.gov/resources/fsa/time_credits_disqualifying_offenses.jsp (last visited October 17, 2021) for a detailed list of other disqualifying offenses.

⁵⁹ *An Overview of the First Step Act*, *supra* note 52.

⁶⁰ *Id.*

similar culpability in recidivism reduction programming and housing assignments.⁶¹ Furthermore, the Act expands the application of the Second Chance Act by encouraging prison wardens “to enter into recidivism-reducing partnerships with non-profit and other private organizations.”⁶²

Additionally, the Act requires the “BOP to house inmates in facilities as close to their primary residence as possible or within 500 driving miles.”⁶³ To achieve this, the BOP takes into account the pragmatic needs of the facility including: the bedspace availability, the inmate’s mental health needs, and medical health needs.⁶⁴ The BOP is obligated to seriously consider the inmate’s request to stay at the current facility or be transferred to a different one.⁶⁵ Finally, the Act provides for a program that enables the BOP to place “terminally ill prisoners on home confinement to serve the remainder of their sentences.”⁶⁶

Most notably, the Act encouraged courts to increase the use of “compassionate release.”⁶⁷ Compassionate release is a proceeding that allows the defendants, for the first time, to directly petition district courts for release under three categories.⁶⁸ First, when the defendant is terminally ill.⁶⁹ Second, when the defendant is older than sixty-five.⁷⁰

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *United States v. Brown*, 411 F. Supp. 3d 446, 448, 452 (S.D. Iowa 2019) (citing First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194), *order amended on reconsideration*, 457 F. Supp. 3d 691 (S.D. Iowa 2020).

⁶⁸ *Brown*, 411 F. Supp. 3d at 448–49.

⁶⁹ *Id.* at 449.

⁷⁰ *Id.* (“[t]he defendant (i) is at least [sixty-five] years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least [ten] years or [seventy-five] percent of his or her term of imprisonment, whichever is less.”) (quoting U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(B) (U.S. SENT’G COMM’N 2018), *recognized as repealed by implication*, *United States v. Wiley*, 487 F. Supp. 3d 782, 786 n.15 (D. Neb. 2020); *United States v. Jones*, 482 F. Supp. 3d 969, 976 (N.D. Cal.

Third, when absent the defendant, their minor child(ren) or their incapacitated spouse would have no caregiver.⁷¹

Under the old regime, defendants could only petition the Director of the BOP to file a motion in court.⁷² The old regime failed to reap any fruits due to the reluctance of the BOP to file a motion, which resulted in disconnecting defendants from courts.⁷³ This rendered compassionate release a moot mechanism.⁷⁴

Compassionate release provides a slim path for defendants in “extraordinary and compelling circumstances” to gain their freedom and be released from prison early.⁷⁵ Nonetheless, such reduction in the sentence term must comply with factors provided by the Sentencing Commission.⁷⁶ The Sentencing Commission's policy statement requires both “extraordinary and compelling reasons” and that “the defendant is not a danger to the safety of any other person or to the community.”⁷⁷ Yet Congress never took the time to define what is meant by “extraordinary and compelling.”⁷⁸ In fact, Congress clarified that “[r]ehabilitation of the defendant alone” is insufficient.⁷⁹ The vagueness of the Act's wording and Congress's reluctance to consider rehabilitation as sufficient by itself had rendered the Act inapplicable in many qualifying cases.⁸⁰ This left no chance for courts to release a truly rehabilitated prisoner, defeating the Act's very

2020); *United States v. Cano*, No. 95-00481-CR, 2020 WL 7415833 (S.D. Fla. Dec. 16, 2020)).

⁷¹ *Id.*

⁷² *Id.* at 448.

⁷³ *Id.* (citing *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sent'g Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice)).

⁷⁴ *See id.* at 448–49.

⁷⁵ *Id.* at 449; 18 U.S.C. § 3582(c)(1)(A) (2018).

⁷⁶ 18 U.S.C. § 3553(a).

⁷⁷ *Id.* § 3142(g). U.S. SENT'G GUIDELINES MANUAL § 1B1.13.

⁷⁸ *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019).

⁷⁹ 28 U.S.C. § 994(t).

⁸⁰ *Brown*, 411 F. Supp. at 452.

purpose.⁸¹ Although the Act was not beneficial to courts to release a rehabilitated prisoner, it gave prisoners a new hope by allowing them to directly file a motion to the court to reconsider their early release.⁸² In both *Brown* and *Holloway*, the courts were unable to release two rehabilitated prisoners, which did not fulfill the purpose behind the Act in putting an end to the mass incarceration problem in the U.S.⁸³

For instance, in *Brown*, the court found itself unable to grant a truly rehabilitated defendant with an early release.⁸⁴ The court opined:

To say Defendant has been a model inmate is an understatement. He has not had a single disciplinary incident since entering federal custody in 2007. According to the BOP, '[h]e has exhibited an exemplary rehabilitative record as a testament to his positive character and efforts.' He has taken 6000 hours of programming, including 4150 hours in a Management Apprenticeship Program. 'He should be employable upon release.' He teaches and mentors other inmates. The BOP thinks he is quite good at it, too.'⁸⁵

The court described Brown's rehabilitation as extraordinary and compelling, yet it could not release Brown because his rehabilitation alone was insufficient.⁸⁶ Although it seems that the U.S. Legislature had noticed the problem of mass incarceration and attempted to solve it, the solution was restrictive rather than expansive.⁸⁷ Instead of crediting prison inmates for winning a tough fight with their inner selves to become good citizens, the Act might indirectly discourage prison inmates from joining

⁸¹ See *id.* at 450–51.

⁸² See *id.* at 448.

⁸³ See *e.g., id.* United States v. Holloway, 68 F. Supp. 3d 310 (E.D.N.Y. 2014).

⁸⁴ *Brown*, 411 F. Supp. 3d at 454.

⁸⁵ *Id.* (citations omitted).

⁸⁶ See *id.*

⁸⁷ *Id.* at 452.

rehabilitative programs since it will prove unfruitful in the end.⁸⁸

C. The Unwillingness of U.S. Prosecutors to Settle or Dismiss Criminal Charges and their Excessive Retributive Approach Lead to Injustices

Attorney General Robert Jackson once stated that: “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”⁸⁹ Most criminal law academics agree that “prosecutors are the criminal justice system.”⁹⁰ Stuntz—a renowned criminal law scholar—notably suggested that it is not legislators and judges, but “prosecutors, who are the criminal justice system’s real lawmakers.”⁹¹ Mainly, prosecutors have discretionary power to decide whether to press charges against a suspect and determine which charges to file.⁹²

Yet other scholars, such as Jeffrey Bellin, criticize the current scholarship regarding the extreme significance of prosecutors in the criminal justice system, arguing that this “obscures the complex interplay that actually determines criminal justice outcomes.”⁹³ Indeed, there is a complex interplay among Congress, police, prosecutors, and judges that determine the outcomes in the criminal justice system.⁹⁴

⁸⁸ See *An Overview of the First Step Act*, *supra* note 52.

⁸⁹ Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

⁹⁰ Erik Luna & Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010).

⁹¹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (discussing the restricted function of legislators and judges, as compared to prosecutors, by arguing that “[t]he definition of crimes and defenses plays a . . . much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors . . .”). See *Id.*

⁹² See Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUDS. 43, 43 (1988) (“Prosecutors have unlimited discretion not to charge, and when they do proceed, they have largely unlimited power to determine which charges to file.”).

⁹³ Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 171 (2019).

⁹⁴ *Id.*

Nonetheless, we argue—alongside most scholarship—that the role of prosecutors is the fulcrum of any criminal justice system.

The important question to answer here is what U.S. prosecutors do with their discretionary power. Many prosecutors believe their role is only to punish wrongdoings and bring to justice those in society who are culpable.⁹⁵ While this role is necessary, leaning more towards punishment on the justice scale significantly undermines the role of prosecutors in serving justice.⁹⁶ It is often difficult to assess the prosecutor's role in dismissing a criminal charge during the pre-charge stage due to the privacy and unavailability of such orders.⁹⁷ Nevertheless, there is an observable high tendency among U.S. prosecutors to charge suspects with the most excessive criminal charges that lead to over-incarceration.⁹⁸ The general leaning of U.S. prosecution towards retribution has prevented many prosecutors from serving justice by dismissing a criminal charge against a non-culpable suspect.⁹⁹ It even has led many criminal law scholars to forget about this inviable role of prosecution, making them spend most of their scholarship on the magnificent role of prosecutors to punish wrongdoings in society while disregarding their role in not pressing charges.¹⁰⁰

In *Brown*, the Southern District of Iowa emphasized that the “nation's current discussion of criminal justice reform focuses much on prosecutors' awesome power to punish wrongdoing” while “[l]ess ink is spent on their equal

⁹⁵ Angela J. Davis, *The American Prosecutor—Power, Discretion, and Misconduct*, 23 CRIM. JUST. (SPRING) 24, 25 (2008).

⁹⁶ *Id.* at 28.

⁹⁷ Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 DROIT ET CULTURES 55, 56 (2005).

⁹⁸ See *United States v. Brown*, 411 F. Supp. 3d at 454, 446, 454 (S.D. Iowa 2019); *United States v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014).

⁹⁹ Davis, *supra* note 97.

¹⁰⁰ *Id.* at 56.

ability to ‘remedy injustices.’”¹⁰¹ We cannot agree more with the wisdom of Judge Robert W. Pratt that prosecutors undermine their power to achieve justice by only seeking to indict defendants and charging them with the highest possible punishments.¹⁰² The court calling prosecutors to intervene to remedy injustice that has failed to be served is itself proof that prosecutors have failed to serve justice when the case was in their jurisdiction.¹⁰³

This is not the only case where a judge prays for hope by calling for an urgent intervention by prosecutors to remedy injustice. In *Holloway*, decided by the Eastern District of New York, the judge also called the prosecution to intervene and remedy injustice.¹⁰⁴ The court’s decision emphasised how the unwillingness of most prosecutors to consider settling or dismissing a criminal charge against a suspect often leads to severe injustice.¹⁰⁵ In the wise words of Judge John Gleeson, the court states:

It is easy to be a tough prosecutor. Prosecutors are almost never criticized for being aggressive, or for fighting hard to obtain the maximum sentence, or for saying ‘there’s nothing we can do’ about an excessive sentence after all avenues of judicial relief have been exhausted. Doing justice can be much harder. It takes time and involves work, including careful consideration of the circumstances of crimes, defendants, and victims—and often the relevant events occurred in the distant past. It requires a willingness to make hard decisions, including some that will be criticized.”¹⁰⁶

Another important aspect to discuss here is the arbitrariness of the U.S. prosecutorial charges that differ

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *United States v. Holloway*, 68 F. Supp. 3d 310, 311 (E.D.N.Y. 2014).

¹⁰⁵ *Id.* at 316.

¹⁰⁶ *Id.* at 316.

relative to the race, color, class, or gender of the suspect.¹⁰⁷ As Angela Davis has argued: “the deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application. Even in prosecution offices that promulgate general policies for the prosecution of criminal cases, there is no effective mechanism for enforcement or public accountability.”¹⁰⁸

One might argue that U.S. prosecutors often settle criminal cases by offering what is known as a “plea bargain.”¹⁰⁹ Yet the settlement mechanism we suggest below is inherently different from a plea bargain. While the latter’s purpose is to induce the defendant to incriminate themselves to receive a more favorable sentence, the settlement mechanism does not concern incriminating the defendant.¹¹⁰ Rather, the settlement mechanism, in its very purpose, aims at weeding out disposable criminal cases that could be adequately solved away from the traditional justice system.¹¹¹

Accordingly, the lack of regulated legal grounds for the dismissal of criminal charges renders the discretionary power of U.S. prosecutors vague and arbitrary.¹¹² Further, their unwillingness to dismiss cases and their heightened appreciation for the American retributive criminal justice system led to overcharging and over-incarceration.¹¹³

D. A Temporary Solution: Unraveling the Hidden Power of U.S. Prosecutors to Remedy Injustice

¹⁰⁷ Davis, *supra* note 97, at 56–57.

¹⁰⁸ *Id.* at 55.

¹⁰⁹ See *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/.

¹¹⁰ *Id.*

¹¹¹ *Cf. id.*

¹¹² See Davis, *supra* note 95, at 26.

¹¹³ Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 Yale L.J. 1648, 1686–87 (2019) (reviewing ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (Princeton Univ. Press, 2018)).

Nonetheless, prosecutors in the United States still enjoy enough power to remedy injustice that was incorrectly administered.¹¹⁴ There are two notable cases that shed light on the hidden powers of prosecutors in serving or remedying injustice: *Brown* and *Holloway*.¹¹⁵ The first case reveals the failure of the prosecution in utilizing their power to remedy injustice,¹¹⁶ whereas the second case applauds a prosecutor for interfering to achieve justice.¹¹⁷ We will start with the negative case where the prosecution was reluctant to remedy injustice.

The Southern District of Iowa had its hands tied in releasing a truly rehabilitated defendant from the prison system.¹¹⁸ In *Brown*, the “[d]efendant pleaded guilty to one count of conspiracy to distribute methamphetamine, . . . one count of methamphetamine possession with intent to distribute, . . . and two counts of possessing a firearm in furtherance of a drug-trafficking crime”¹¹⁹ The court “sentenced [Brown] to 150 months for the two drug counts and 60 months for the first firearms count to run consecutive[ly].”¹²⁰ The court further “stacked” an additional 300 months for the second firearms count.¹²¹ Brown “served 167 months of that sentence, including good-

¹¹⁴ Davis, *supra* note 95, 25–26.

¹¹⁵ See United States v. Brown, 411 F. Supp. 3d 446 (S.D. Iowa 2019); United States v. Holloway 68 F. Supp. 3d 310 (E.D.N.Y. 2014).

¹¹⁶ See *Brown*, 411 F. Supp. 3d 446.

¹¹⁷ See *Holloway*, 68 F. Supp. 3d 310.

¹¹⁸ *Brown*, 411 F. Supp. 3d at 452.

¹¹⁹ *Id.* at 448.

¹²⁰ *Id.*

¹²¹ *Id.* Defendants “sentenced under the § 924(c) stacking provisions and seeking relief under the compassionate release provision (as amended by the First Step Act) must establish extraordinary and compelling reasons *individually* in order to be eligible for relief. . . . And, as a textual matter, nothing . . . prevents a judge from resentencing under the Compassionate Release Statute on the basis of extraordinary and compelling reasons.” Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 109–10 (2019) (citations omitted).

conduct-time credits.”¹²² During his imprisonment time, he tried numerous methods to reduce his incarceration time with no avail.¹²³ The Court sought to acquit Brown based on the First Step Act passed in 2018.¹²⁴ The purpose behind the statute was to promote rehabilitation of prisoners and unwind decades of mass incarceration.¹²⁵ Yet, the Court could not acquit Brown based on the FSA since rehabilitation alone did not suffice as a ground for a compassionate release under the statute.¹²⁶ To release a defendant under a compassionate release, a defendant must be in an “extraordinary and compelling circumstance[.]” to leave prison early and rehabilitation alone does not count as such.¹²⁷

The Court had no other means but to request from the prosecutor to carefully consider exercising their discretion to produce an order vacating one of defendant's § 924(c) convictions, again with no avail.¹²⁸ Brown could still be served justice by the simple uncomplicated act of a prosecutorial order to vacate one of his convictions, yet the prosecution has been reluctant to take this step until this day¹²⁹—as if a human's freedom is not worth it.

In contrast, in the *Holloway* case, the prosecution took a heroic stand in remedying injustice.¹³⁰ Holloway, along with an accomplice, stole three cars at gunpoint in a two-day span in October 1994.¹³¹ The prosecution indicted Holloway on separate counts for each carjacking and the

¹²² *Brown*, 411 F. Supp. 3d at 448.

¹²³ *Id.*

¹²⁴ *Id.*; See First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194.

¹²⁵ NATHAN JAMES, CONG. RESEARCH SERV., THE FIRST STEP ACT OF 2018: AN OVERVIEW R45558 1 (2019), <https://sgp.fas.org/crs/misc/R45558.pdf>.

¹²⁶ *Brown*, 411 F. Supp. 3d at 452–454.

¹²⁷ *Id.* at 452.

¹²⁸ *Id.* at 453

¹²⁹ *Id.*

¹³⁰ *United States v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014).

¹³¹ *Id.*

penalty was aggravated.¹³² Right before trial in 1995, the prosecution offered Holloway a plea bargain that would drop two of the three counts in exchange for Holloway's plea of guilty to the car-jackings.¹³³ Accepting the plea bargain would have resulted in a sentencing range of 130–147 months with a bottom of nine years in prison.¹³⁴ Holloway rejected the plea bargain and received a total prison term of 57 years and 7 months under all statutory sections.¹³⁵ In contrast, his accomplice who pled guilty was sentenced to 27 months in prison and was released in 1997.¹³⁶

In 2012, Holloway filed a motion to reopen his § 2255 proceeding under Fed. R Civ. P. 60 (b) based on the fact that his sentence was excessive.¹³⁷ The judge recognized that there were good reasons to visit Holloway's excessive sentence even though there were no grounds for vacating it.¹³⁸ Consequently, the judge issued an order requesting the U.S. Attorney to consider exercising their discretion to issue an order vacating two or more of Holloway's 18 U.S.C. § 924(c) convictions.¹³⁹ At first, the U.S. Attorney declined the request to vacate the convictions based on two wrong beliefs.¹⁴⁰ First, that Holloway might be eligible for relief by a presidential clemency.¹⁴¹ Second, Holloway may benefit from the newly passed clemency initiative issued by the Department of Justice.¹⁴² After the judge renewed his request to the U.S. Attorney, noting that Holloway would not qualify under either argument, the U.S.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 313.

¹³⁶ *Holloway*, 68 F. Supp. 3d at 313.

¹³⁷ *Id.* at 314.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Holloway*, 68 F. Supp. 3d at 314.

¹⁴² *Id.*

Attorney adopted a different position.¹⁴³ At a court appearance in 2014, the Assistant U.S. Attorney, Sam Nitze, stated as follows:

Let me say formally, the U.S. Attorney has given long and careful consideration to your Honor's . . . earlier request. . . . She did carefully consider it and that was the office's recommendation—that Mr. Holloway seek clemency or commutation of sentence. And she further reconsidered, in light of your Honor's recent order, and has agreed to proceed along the lines similar to those that you proposed. I would say that's based on several considerations, and in part based on the office's view and her view that this is both a unique case and a unique defendant in many ways. And I say unique for a number of reasons, but I will state two of them.

First, this defendant's record while he's been in the custody of the Bureau of Prisons for the last two decades is extraordinary. He has the mildest of disciplinary records. There are a few infractions, but none of them are violent or involve drugs. They were minor, I believe five total in two decades. And it's also clear—we pulled the reports, and I know your Honor summarized some of this in your most recent order—but it's clear that he took advantage to better himself and to take advantage of the educational and other opportunities that the BOP provides. So, the way he has handled himself during this period of incarceration is extraordinary.

Second, as your Honor mentioned, we have made an effort to be in touch with the victims in this case [W]e were able to reach three victims, and every one of them said first that they were terrified by the experience—one in fact still wrestles with the fallout from that—but also that in their view, 20 years is an awfully long time, and people deserve another chance, and to a person they all supported—well, I think one would have framed it unopposed to an

¹⁴³ *Id.*

earlier release, and others were more affirmatively supportive of it. That is significant to us as well. Those are two among other aspects of this case that make it, I think, more than unusual, probably unique.

In terms of how to proceed, we would propose to withdraw our opposition to the pending Rule 60(b) motion, and also to state on the record that we wouldn't oppose the granting of the underlying 2255 motion for the purpose of vesting the court with authority to vacate two of the 924(c) convictions, and to proceed to resentence, all of that without taking a position on the merits of either the Rule 60 motion or the habeas petition.¹⁴⁴

Accordingly, and based on the U.S. Attorney position, Holloway's lawyer moved to vacate his convictions on two of the three § 924(c) convictions.¹⁴⁵ The Court vacated them without opposition from the government.¹⁴⁶ The Judge applauded the U.S. Attorney's role in this case, stating that: "the significance of the government's agreement is already clear: it has authorized me to give Holloway back more than 30 years of his life."¹⁴⁷

In conclusion, the Holloway case emphasizes the extremely important role of judges in proposing ways to remedy injustices. Moreover, the phenomenon of over and excessive charging at the prosecutorial early stage leads to prolonged prison sentences. This often leaves U.S. prosecutors with only one option, which is issuing an order to vacate a criminal count from an unjust or excessive sentence—remedying injustice after it is too late.

II. Introducing Mediation to Criminal Cases: Evaluating Two Practical Applications of Mediation in Criminal Cases

¹⁴⁴ *Id.* at 315.

¹⁴⁵ *Id.*

¹⁴⁶ *Holloway*, 68 F. Supp. 3d at 315.

¹⁴⁷ *Id.* at 315–316.

Alternative Dispute Resolution Mechanisms (“ADR”) are means to resolve disputes away from the traditional litigation system.¹⁴⁸ ADR often comprises settlement, mediation, and arbitration. Settlement is “an agreement that ends a dispute and results in the voluntary dismissal of any related litigation.”¹⁴⁹ Further, mediation is defined as a “private process where a neutral third person called a mediator helps the parties discuss and try to resolve the dispute.”¹⁵⁰ In this section, we will evaluate the use of mediation as an amicable dispute resolution mechanism in the resolution of criminal cases.

A. Mediation of Criminal Cases in the Juvenile Criminal Justice System

Mediation is a “private process where a neutral third person called a mediator helps the parties discuss and try to resolve the dispute.”¹⁵¹ Mediation has been excessively examined in the field of the Juvenile Criminal Justice System.¹⁵² An analysis of 19 studies with 9,307 juvenile offenders found that mediation conducted between the victim and suspect reduced recidivism by 33% within 6 months.¹⁵³ The same study also found that juvenile reoffenders who participated in mediation committed less serious crimes afterwards than those who passed through the court system.¹⁵⁴ The satisfaction rate of participants in the

¹⁴⁸ *Alternative Dispute Resolution*, LEGAL INFORMATION INSTITUTE: CORNELL LAW SCHOOL (last updated June 8, 2017), https://www.law.cornell.edu/wex/alternative_dispute_resolution.

¹⁴⁹ *Settlement*, LEGAL INFORMATION INSTITUTE: CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/settlement#:~:text=1.,and%20closing%20of%20an%20account> (last visited Oct. 20, 2021).

¹⁵⁰ *Mediation*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/dispute_resolution/resources/disputeresolutionprocesses/mediation/ (last visited Oct. 20, 2021).

¹⁵¹ *Id.*

¹⁵² Flora Go, *supra* note 49.

¹⁵³ William R. Nugent, Mona Williams, & Mark S. Umbreit, *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137 (2004).

¹⁵⁴ *Id.* at 160–61.

Juvenile mediation system was from 80% to 90% with both the process and the outcome.¹⁵⁵

The mediation tactics may benefit prosecutors whereby the mediator can assist the prosecutor in reevaluating the strength of their case to reach a balanced judgment on the likelihood of trial success.¹⁵⁶ Furthermore, a mediator may positively impact the plea-bargaining process between the prosecution and the defendant.¹⁵⁷ Since there is a power imbalance between the prosecution and the defendant, the presence of a third-party neutral mediator may re-balance the power scale between them by alleviating some of the one-sidedness.¹⁵⁸

Nonetheless, mediation has been subject to three main criticisms: confidentiality, unenforceability, and sacrificing constitutional safeguards. First, although mediators may be confidential about the information they receive from the offender, the mediator's role in revealing the offender's point of view and underlying circumstances sacrifices the confidentiality privilege the attorney has with their client.¹⁵⁹ Second, the mediator's opinion is not binding, but rather advisory.¹⁶⁰ In *Lindsay v. Lewandowski*, the court nullified a mediated contract as the term "binding mediation" was not agreed-upon and it constituted a material term.¹⁶¹ Furthermore, sometimes mediation's lack of history with courts renders it unenforceable. For instance, in *Haghighi v. Russian-American Broadcasting Co.*, the court held that a

¹⁵⁵ Mark S. Umbreit, Robert Coates, Betty Vos., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. QUARTERLY 287 (2004).

¹⁵⁶ See Flora Go, *supra* note 49, at 20–21.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 22.

¹⁵⁹ See *Id.* at 14.

¹⁶⁰ *Id.*

¹⁶¹ *Lindsay v. Lewandowski*, 139 Cal. Ct. App. 4th 1618, 1620–25 (2006).

mediation agreement that is lacking a provision stating that it is binding renders it unenforceable.¹⁶²

This uncertainty surrounding the enforceability of mediated agreements sometimes forces parties to resort to litigation even after the criminal case has been mediated and dismissed.¹⁶³

Finally, for mediation to be effective, the offender must speak up about the crime they committed, why they committed it, and carry an apologetic and remorseful attitude into the mediation. In other words, the first step towards a successful mediation is not popular among suspects but involves sacrificing the constitutional Fifth Amendment right against self-incrimination.¹⁶⁴ We argue, however, that this could be easily solved by considering any statements made during mediation as inadmissible evidence. This way, a defendant will not fear admitting to committing the crime before a mediator. At the same time, the defendant will not be sacrificing their Fifth Amendment right against self-incrimination by participating in mediation. In fact, the Fifth Amendment right is a safeguard that is specifically designed for formal legal proceedings and is not expected to be waived in a mediation setting.¹⁶⁵

B. Assessing the Usefulness of Mediation Practiced at the Brooklyn Dispute Resolution Center proves that Settlement is a Better Amicable Mechanism

The Brooklyn Dispute Resolution System (“the Center”) has successfully mediated numerous criminal

¹⁶² Haghghi v. Russian-American Broad. Co., 577 N.W.2d 927, 927–300 (Minn. 1998).

¹⁶³ Flora Go, *supra* note 49.

¹⁶⁴ *Id.* at 11.

¹⁶⁵ See *Fifth Amendment*, JRANK (2021), <https://law.jrank.org/pages/6880/Fifth-Amendment-Self-Incrimination-Clause.html> (“[T]he purpose of this right is to inhibit the government from compelling a confession through force, coercion, or deception. The Self-Incrimination Clause applies to any state or federal legal proceeding, whether it is civil, criminal, administrative, or judicial in nature.”).

cases.¹⁶⁶ The criminal cases mediated before the Center included many felonies such as burglary.¹⁶⁷ Eligibility for mediation is conducted through a screening of all parties to the case and requires approval by the defendant and a judge.¹⁶⁸ Statistically, the first year of the Center's work succeeded in garnering 10% of felony arrests involving civilian complainants and 30% of felony cases involving a known prior relationship between the complainant and defendant.¹⁶⁹ Mediation before the Center differs radically from the adversarial system before criminal courts. While the criminal court system focuses on the culpability and the appropriate penalty imposed on the defendant, the mediation system has a different outlook.

The mediation system at the Center adopted an informal process to investigate the causes behind the criminal case and the parties' needs to dispose of the case through compromise.¹⁷⁰ This process of searching for a mutually acceptable ground is guided by a mediator who actively seeks to educate each party about the other's point of view.¹⁷¹ It is worth noting that many of the cases that were referred to the Center would have been dismissed if referred to a Court.¹⁷² This is evidenced by the fact that only 28% of the cases referred to a criminal court have resulted in misdemeanor guilty pleas and a handful of felonies have

¹⁶⁶ ROBERT C. DAVIS, MARTHA TICHANE, & DEBORAH GRAYSON, MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES: AN EVALUATION OF THE BROOKLYN DISPUTE RESOLUTION SYSTEM (FIRST YEAR), ii (1981) https://www.vera.org/downloads/Publications/mediation-and-arbitration-as-alternatives-to-prosecution-in-felony-arrest-cases/legacy_downloads/Mediation_and_Arbitration_as_Alternatives_to_Prosecution_of_Felony_Arrest_Cases.pdf.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

been indicted before a grand jury.¹⁷³ Yet, comparing mediated cases and court cases shows that complainants in mediation felt more involved in resolution of the dispute and viewed the presiding official as more fair and able to produce a balanced outcome.¹⁷⁴ Nonetheless, there is no evidence that disputes between the same disputants become less frequent after utilizing the mediation system.¹⁷⁵ After the mediated case, disputants stayed in contact but reported similar new problems to the police.¹⁷⁶ Accordingly, while the mediation system at the Center made parties to the criminal case feel more involved, it did not cut down the percentage of subsequent criminal cases between the same parties.¹⁷⁷

One notable aspect of the Center's mediation system revolves around the emotions at the center of mediation process. Although victims and prosecutors often share feelings of anger towards the defendant for their criminal culpability, the complainant (alleged victim) feels less angry or fearful against the defendant.¹⁷⁸ The extinguishment of negative emotions takes place due to direct communication between the victim and the defendant whereby the latter often apologizes and provides an insight into the real causes behind their crime.¹⁷⁹ This level of transparency and communication can have immeasurable value in especially emotionally charged cases, like homicides or other crimes of violence.

On the other hand, in a criminal court setting or before a prosecutor, a defendant would have to sacrifice their Fifth Amendment right against self-incrimination to communicate with the victim on the same humane and

¹⁷³ *Id.*

¹⁷⁴ *Id.* at iv.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

informal level.¹⁸⁰ The involvement of attorneys for both parties and the defendant's fear of punishment often deprives a victim from receiving a needed consolation from the defendant. Additionally, disputed criminal proceedings invariably involve often contentious cross examinations of the alleged victims, which can increase trauma and exacerbate an already stressful situation (for both alleged victim and defendant).¹⁸¹

In conclusion, the mediation system under the Brooklyn Center has been successful in conveying more positive feelings to disputants than the traditional criminal justice system. As mentioned, the Center was not successful enough in reducing rates of recidivism. Applying a mediation system on a larger scale would not guarantee reducing the rates of mass incarceration in the U.S.

Thus, we argue that settlement—as discussed above—prevails over mediation in adequately disposing a criminal case. This is because integrating settlement into the prosecutorial system is an official, yet flexible, process as opposed to the unofficial advisory nature of mediation. While the prosecutor's decision is binding in settlements against both disputants, the mediator's statements are advisory. Furthermore, mediation rarely engages parties' attorneys in the discussion as it is mainly focused on allowing both disputants to communicate with each other. In contrast, settlement through the public prosecution allows attorneys to have an advisory role in influencing parties to settle rather than choosing the litigation path.

III. Settlement and Rehabilitative Sentencing: Lessons Learned from Islamic Law Principles,

¹⁸⁰ See *United States v. White*, 322 U.S. 694 (1944); *Boyd v. United States*, 116 U.S. 616 (1886).

¹⁸¹ Kim Elsesser, *Cross-Examination Is Brutal—Is It Time To Consider Restorative Justice In Sexual Assault Cases?*, FORBES (Feb. 6, 2020), <https://www.forbes.com/sites/kimelsesser/2020/02/06/cross-examination-is-brutal-is-it-time-to-consider-restorative-justice-in-sexual-assault-cases/?sh=6bd0f5594f20>.

Egyptian Public Prosecution Practices, and the Icelandic Criminal Justice Model

A. The Settlement of Criminal Cases under Islamic law Principles and the Regulated Discretionary Power of Egyptian Public Prosecutors

Both settlement and mediation have been used as alternative dispute resolution mechanisms since early civilizations. The Arab peninsula administered both methods to resolve disputes amicably between disputants.¹⁸² In the 7th century, Islamic law emerged, providing one of the most comprehensive criminal justice systems at the time.¹⁸³

The general Islamic law principles are integrated into the Egyptian Legal System by the second article of the Egyptian Constitution.¹⁸⁴ Although most civil and criminal codes in Egypt are adopted in the footprints of their French counterparts, the Egyptian legislature benefited from many progressive principles of Islamic law by integrating them into criminal codes.¹⁸⁵ In this section, we provide an overview of the settlement mechanism in Islamic law and assess how successful its application proved to be in the Egyptian Criminal Legal System. In the second part of this section, we assess if mediation can benefit prosecutors in achieving justice. Finally, in the third part, we conclude that settlement is a better mechanism in resolving criminal disputes after scrutinizing the work of the Brooklyn Dispute Resolution System in the U.S.

¹⁸² Md. Shahadat Hossain, *Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview*, Vol 1, J. OF PHIL., CULTURE AND RELIGION, 1 (2013).

¹⁸³ *Id.*

¹⁸⁴ EGYPT CONST. art. 2. (2014) (“Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation.”).

¹⁸⁵ See THE LIBRARY OF CONGRESS, *The Judiciary, Civil Rights, and the Rule of Law, in EGYPT: A COUNTRY STUDY*. (Helen Chapin Metz ed., 1990); see *Field Listing—Legal system*, THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/legal-system/> (last visited Oct. 16, 2021).

1. The Settlement (sulh) of Specific Crimes under Islamic Law (Shari'ah)

Generally, ADR—such as settlement, arbitration, and mediation—has been used in the Arabian Peninsula even before Islam.¹⁸⁶ At the time, amicable dispute resolution mechanisms found their basis in tribal customs whose purpose was not to merely punish the offender, but to restore the equilibrium between the victim and the offender families and tribes.¹⁸⁷ Under tribal customs, influential noblemen assumed the role of arbiters in all disputes within the tribe or between rival tribes.¹⁸⁸ This basic tribal system that existed in the Arabian Peninsula centuries ago has become the seed for the current arbitration and mediation mechanisms in the modern era.¹⁸⁹

Although these ADR mechanisms predated Islam, they were merely customs not laws.¹⁹⁰ Only when Islamic Law emerged in the 7th century were these mechanisms legislated as laws in the Qur'an, Sunna (Hadith), consensus (egmaa), and analogy (qeyas).¹⁹¹ Unlike the tribal customs, Islamic law provides for a comprehensive criminal justice system where settlement, mediation, and arbitration are indispensable.¹⁹²

Under Islamic law, settlement (Sulh) is considered the preferred result in most private disputes.¹⁹³ Although many people believe that settlement is only viable in civil cases, Islamic law allows settlement in criminal disputes—even in homicide and bodily injury cases.¹⁹⁴ Settlement under Islamic law is offered by an appointed judge (qada).¹⁹⁵

¹⁸⁶ Hossain, *supra* note 182, at 1.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 3.

The settlement mechanism finds its cornerstone in the Qura'an and Sunna.¹⁹⁶ The Qur'an legislated settlement in the following verse: “[S]o judge between them by that which Allah hath revealed,”¹⁹⁷ but if thou judges, judge between them with equity,¹⁹⁸ and Lo! “We reveal unto thee the Scripture with the truth, that thou mayst judge between mankind by that which Allah showeth thee.”¹⁹⁹ Under Islamic law, the part of the verse regarding judging with equity is considered the root for the settlement mechanism.²⁰⁰

Further, Islamic law preaches believers to pardon and settle disputes as much as possible in the Sunna.²⁰¹ However, there is a distinction between crimes that touch the right of God (“Allah”) and crimes that only impact the rights of individuals.²⁰² While the latter can be settled any time before a judge, the former can only be settled before it reaches a judge.²⁰³ These inexcusable punishments that relate to crimes affecting the right of God are referred to as *hudud* or *hadd*.²⁰⁴ Thus, Islamic law allows settlement even in homicide cases if the victim’s family pardons the perpetrator before the case reaches a judge. However, if a case reaches a judge, a settlement is no longer viable.

¹⁹⁶ *Id.*

¹⁹⁷ *Al Qur'an, Al-Ma'idah* 5:48.

¹⁹⁸ *Al Qur'an, Al-Ma'idah* 5:42.

¹⁹⁹ *Al Qur'an, Al-Nisa* 4:105.

²⁰⁰ John Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. COMPAR. L. No. 1 63, 63–92 (1985).

²⁰¹ *Sunna* is the collection of all the sayings and doings of the Prophet Muhammad; Muhammad Tufail Ansari reported that the Prophet said: “[N]o person is caused to suffer injury on his body and then he forgives him (who injured him), but Allah elevates him a degree on that account or expiates his sin.” Anas ibn Malik is reported to have said: “No case involving *qisas* was referred to the Prophet s.a.w. unless he exhorted it to be pardoned therefore.” Muhammad Tufail Ansari, *Sunan ibn Majah (English Version)*, Vol. 4, Hadith no. 2693, 90.

²⁰² Hossain, *supra* note 182, at 7–8.

²⁰³ *Id.*

²⁰⁴ *Id.* at 7.

Settling a homicide case is based on the Qur'an, which states: "[W]e ordained therein for them: a life for a life, an eye for an eye, nose for nose, ear for ear, tooth for tooth and for wounds retaliation. But if anyone remits the retaliation by way of charity, it is an act of atonement for him."²⁰⁵ Moreover, the *Sunna* encourages the settlement of battery offenses and stipulates: "[N]o person is caused to suffer injury on his body and then he forgives him (who injured him) but Allah elevates him a degree on that account or expiates his sin."²⁰⁶ Accordingly, settlement was frequently encouraged in most criminal law cases, including homicide, under Islamic law.

It is worth noting that settlement can only be made between the offender and the victim or their family before the case is brought to court. This is stipulated by the *Sunna* where it says: "[W]hen an offence of *hudud* reaches (informed to or tried by) me, it becomes enforceable."²⁰⁷ The story behind this rule is based on Safwan ibn Umayya. It was reported that Safwan's sheet was stolen while he was sleeping in the mosque.²⁰⁸ He quickly woke up, ran after the thief, and caught him.²⁰⁹ Upon bringing him before the Prophet, the Prophet ordered to cut his hand as the *hadd* is prescribed in the Qur'an.²¹⁰ Safwan said to the Prophet, "I did not intend this (punishment), I give my sheet to him for free and I forgive him."²¹¹ The Prophet said, "[W]hy did you

²⁰⁵ *Al Qur'an*, 5:45; see also 2:178, 4:92.

²⁰⁶ Muhammad Tufail Ansari, *Sunan ibn Majah (English Version)*, Vol.4, Hadith no. 2693, 90.

²⁰⁷ Al-Tibrizi, *Mishkat al-Masabih*, Vol.2, al-Maktab al-Islami, Dimashq, 1961, 292.

²⁰⁸ Hossain, *supra* note 182, at 8.

²⁰⁹ *Id.*

²¹⁰ The Qur'an punishment for theft is stipulated by the following verse: "[A]s to the thief, male or female, cut off their hands as a reward of their own deeds, and as an exemplary punishment from God. For God is Mighty and Wise. But whoever repents and mends his ways after committing this crime shall be pardoned by Allah. Allah is forgiving and merciful." *Al Qur'an* 5:38-39.

²¹¹ Hossain, *supra* note 182, at 8.

not forgive him before bringing him to me.”²¹² This Sunna emphasized that settlement in *huddud* crimes is only possible before a case reaches a judge, otherwise the ordinary procedure applies and the victim has no right to interfere. Since a prosecutor is not a judge, it could easily be argued that Islamic principles would allow for settlements before a case is prosecuted and brought before a judge.

In conclusion, Islamic principles encourage settlement before a case reaches a judge and do not sacrifice deterrence. The prescribed punishments in the Qur’an remain extremely harsh. The punishment for theft is cutting off the thief’s hands.²¹³ Adultery in Islam is punished by a hundred lashes.²¹⁴ A piracy, mayhem, or robbery (*haraba*) perpetrator is punished either by death penalty, crucifixion, cutting off a hand and a foot, or exile.²¹⁵ While western scholars often condemn the extremism of these punishments, they also often neglect the comprehensive settlement mechanism in place of those punishments.²¹⁶ On the other hand, Islamic law scholars often argue that these extreme punishments are necessary to maintain peace and order.²¹⁷

Thus, the Islamic legal principles encouraging settlement at an early stage are worth following in any criminal justice system. These Islamic legal principles call for a working balance between punishment and settlement. Punishments are extremely harsh for the purpose of

²¹² *Id.*

²¹³ *Supra* note 164.

²¹⁴ “Those who commit adultery, men or women, give each of them a hundred lashes.” *Al Qur’an* 24:2.

²¹⁵ “The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.” *Al Qur’an* 5:33.

²¹⁶ See Mark Cammack, *Islamic Law and Crime in Contemporary Courts*, 4:1, BERKELEY J. MIDDLE E. & ISLAMIC L. 1, 3 (2011).

²¹⁷ Jamal Zeid Kilani, *The Aims of Punishment in the Islamic Shari’*, 28, AN-NAJAH UNIV. J. FOR RSCH. – B 1, 1–2 (2014).

maintaining public order.²¹⁸ Yet the settlement mechanism coupled with the high burden of proof required under Islamic law allow many suspects to be acquitted and avoid punishment altogether.²¹⁹

2. The Role of Egyptian Prosecutors in Settling Criminal Charges

The Egyptian public prosecution system follows the French model of public prosecution.²²⁰ Under Article 189 of the Egyptian constitution, the general role of public prosecution is to investigate, press charges, and prosecute all criminal cases.²²¹ One of the benefits of this prosecutorial system is that it allows prosecutors to get in touch with the victim and the suspect as soon as the crime is committed.²²² Thus, under this system, prosecutors are considered both chief police officers and prosecutors.²²³ Unlike the U.S. prosecutorial system, this system gives prosecutors firsthand knowledge about the crime under consideration right from the mouths of victims, suspects, and witnesses.²²⁴ Thus, the interrogation phase allows prosecutors to get to know the suspects and understand their reasons behind committing their crime.²²⁵ Further, prosecutors' communication with the victims enables prosecutors to understand the victims' needs behind filing a police report. For instance, based on

²¹⁸ *Id.*

²¹⁹ The burden of proof is stipulated by the *Sunna*, which provides that: “[A]void condemning a Muslim to a *hadd* punishment whenever you can, and when you can find a way out for a Muslim then release him for it. If the imam errs, it is better that he errs in favor of innocence (pardon) than in favor of guilt (punishment).” Hossain, *supra* note 182, at 7.

²²⁰ *Public Prosecution Office*, Egypt Justice (last visited Oct. 13, 2021) <https://egyptjustice.com/public-prosecution-office>.

²²¹ Constitution of the Arab Republic of Egypt, 18 Jan. 2014.

²²² *See* Public Prosecution Office, *Overview*, EGYPT JUSTICE, <https://egyptjustice.com/public-prosecution-office#:~:text=The%20role%20of%20the%20public,information%20such%20as%20news%20reports> (last visited March 26, 2022).

²²³ *See Id.*

²²⁴ *Id.*

²²⁵ *Id.*

my experience as a former prosecutor at the Egyptian public prosecution, most victims of simple larceny cases are willing to settle if they retrieved their stolen belongings, but are less likely to settle if their stolen belongings are not available for retrieval at the prosecutor's office. Thus, victims do not seem to prefer retribution over settlement if their self-interest or right of ownership is reinstated.

The competence and authority of the Egyptian prosecutorial system is determined by the Egyptian law of Judicial Authority and the Egyptian Code of Criminal Procedure.²²⁶ In fact, the Egyptian Code of Criminal Procedure had adopted the best of both worlds: the French Code of Criminal Procedure and Islamic law principles.²²⁷ The prosecutorial system is structured after the traditional French public prosecution, yet the criminal procedure code had adopted progressive Islamic law principles relating to settlement of specific classes of crimes.²²⁸

Under Egyptian Code of Criminal Procedure, prosecutors have the authority to dismiss a criminal charge upon multiple grounds. Pursuant to Art. 154 of the Egyptian Code of Criminal Procedure, one ground of dismissal is the insufficiency of evidence: when there is not enough evidence to support probable cause that the suspect has committed the crime.²²⁹ Another ground to dismiss a criminal charge is through settlement.²³⁰ In this regard, the Egyptian Code of

²²⁶ Mohamed S. E. Abdel Wahab, *UPDATE: An Overview of the Egyptian Legal System and Legal Research*, NYU L. GLOBAL, <https://www.nyulawglobal.org/globalex/Egypt1.html> (last visited Oct. 12, 2021).

²²⁷ *Id.*

²²⁸ *See id.*

²²⁹ Article 154 of the Egyptian Code of Criminal Procedure No. 150 of the Year 1950 (amended by law no. 189 of the year 2020), Arabic version available at <https://manshurat.org/node/14676>; English version available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf.

²³⁰ *Id.* at Art 18 of the Egyptian Code of Criminal Procedure No. 150 of the Year 1950 (amended by law no. 189 of the year 2020).

Criminal Procedure had provided an exclusive list of a certain classes of crimes that are subject to settlement by the victim or their family before the public prosecution.²³¹ Furthermore, the Egyptian legislature had conferred the right to propose settlement upon all Public Prosecutors regardless of their ranks.²³² It is worth noting, however, that this prosecutorial right to propose settlement is restricted to a specific list of misdemeanors and fines.²³³ Some examples of misdemeanors that are subject to settlement include simple larceny, battery, and involuntary manslaughter.²³⁴ The common ground among all these excusable crimes is they mainly affect individuals' or their family's personal rights rather than society's rights. The result of settling a criminal case before the public prosecution is the dismissal of the criminal charge against the suspect.²³⁵

The advantages of the settlement mechanism in criminal cases outweigh its disadvantages. There are three main advantages of settling a criminal case before the public prosecution. First, it significantly reduces the excessive workload of criminal cases before courts, enabling criminal judges to focus their efforts on criminal law cases with enough culpable gravity. Second, settling criminal cases benefits the victim, the suspect, and the justice system (including the prison system). It aids the victim in obtaining almost an immediate relief to their injury. The owner of a stolen iPhone or seized vehicle retrieves it the next day instead of waiting several months until a judgment is rendered. In practice, assault, battery, and unintentional manslaughter victims or their families often receive an immediate proportional financial compensation from the suspect or the suspect's family so as to not proceed forward with pressing charges, which is often more appreciated by

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *See id.*

²³⁵ *See id.*; articles 61 and 209 of the Egyptian Code of Criminal Procedure.

victims.²³⁶ Third, the settlement of criminal cases serves the overcrowded Egyptian prisons by reducing the number of new prisoners. By its turn, this enables prisons to meet the minimum humane standards of living for prison inmates by supplying enough food, room, and light to prisoners.²³⁷

Although the settlement mechanism under the Egyptian Code of Criminal is only applicable to specific classes of crimes as mentioned above, Egyptian prosecutors may dismiss felony charges or misdemeanors that are not in the exclusive list of Article 18 of the code on suitability and adaptability grounds (“mwa’ma” and “mola’ama”).²³⁸ These grounds allow prosecutors to dismiss criminal cases when they believe that society’s interest would be better realized by not pressing criminal charges against the defendant and dismissing the case on *mootness due to unimportance*.²³⁹ The proponents of these legal grounds argue that this prosecutorial discretionary power does not infringe on the prosecutor’s duty to apply criminal law.²⁴⁰ This is because the prosecutor’s duty is not to apply criminal law equally and blindly to defendants, but to adopt the most suitable outcome to promote society’s interest.²⁴¹ The

²³⁶ See Pieter Verrest, *French Public Prosecution Service*, 8 EUR. J. CRIME CRIM. L. & CRIM JUST. 210, 236 (2000); New legislation in preparation to revitalize criminal settlements: the highlights, eubelius, 2017.

²³⁷ See Masrawy, the visit of the Egyptian public prosecution team to the Turra Prison, *translated in YouTube* (Nov. 10, 2019), <https://www.youtube.com/watch?v=ME2zlWJzxr0&t=353s>.

²³⁸ Code Criminal Procedure [C. crim. Proc.] arts. 18, 209 (Egypt); see The Egyptian Legal System, Global Ethics Observatory, Unesco *supra*, note 178; see also Nourhan Fahmy, *Egypt’s Empowered Prosecution and Threats to Fair Trial Guarantees*, The Tahrir Institute for Middle East Policy (May 4, 2020).

²³⁹ See Egypt Justice, Criminal Law, Guide To Egypt’s Penal Code and Other Criminal Laws, Arts. 18, 209 Egypt Criminal Procedure Code–English Translation, https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf (last visited Oct. 8, 2021).

²⁴⁰ See *id.*

²⁴¹ See C. Crim. Proc. arts. 61, 209 (Egypt), available at <https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b989>

interest of society is often promoted more adequately by an individualized assessment of the crime and the suspect, considering all the motives and surrounding circumstances.²⁴²

This prosecutorial discretionary power to dismiss cases finds its basis in Articles 61 (concerning misdemeanors) and 209 (regarding felonies) of the Code of Criminal Procedure.²⁴³ These Articles allow prosecutors to dismiss criminal charges upon their discretion when a criminal charge is considered moot, or unimportant to society.²⁴⁴ This discretionary settlement mechanism comes into play when a prosecutor is bound by the exclusive excusable misdemeanors list or Article 18 felonies.²⁴⁵ For instance, battery that led to a victim's disability cannot be settled under Article 18 because it is a felony.²⁴⁶ Yet, upon their discretion a prosecutor may assess the extent of the victim's disability; the inability to move one finger is not viewed as equal to losing eyesight.²⁴⁷ After assessing the gravity of the victim's injury and health-care needs, a prosecutor may mediate between the victim and the suspect to forego pressing criminal charges through settlement.²⁴⁸ This usually works by increasing the suspect's fear of severe

0e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf (last visited Oct. 8, 2021).

²⁴² See C. Crim. Proc. arts. 61, 209 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf (last visited Oct. 8, 2021).

²⁴³ *Id.*

²⁴⁴ See *id.*; Research on the Prosecutorial Power to Dismiss Criminal Charges, Academic Blog, <https://www.startimes.com/?t=27934913>.

²⁴⁵ See generally C. Crim. Proc. art. 18 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf (last visited Oct. 8, 2021).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

charges and lowering the victim's expectations of a successful criminal trial.

This approach often induces the suspect to provide monetary compensation to the victim in exchange for the victim's withdrawal of their incriminating statements against the suspect, rendering the case moot and unimportant.²⁴⁹ Thus, the Egyptian public prosecution has the authority to dismiss felonies and inexcusable misdemeanors by exploiting its discretionary power in rendering a criminal charge moot for unimportance.²⁵⁰ It is worth noting that, practically, this approach is adopted by the public prosecution for crimes concerning insignificant culpability of the suspect.²⁵¹ Hence, prosecutors are reluctant to use such discretionary power in a first-degree murder or a homicide case.²⁵²

The Egyptian public prosecution's role in settling criminal cases on these grounds significantly decreases the incarcerated population.²⁵³ By reducing the number of criminal cases referred to court, it follows that the number of incarcerated people is also reduced. This leaves both the victims and the suspects better off. A victim receives a monetary compensation that they would not have received had they won the case, and a suspect wins their freedom if their crime was not sufficiently culpable to render them a

²⁴⁹ See *supra* note 166, at iii.

²⁵⁰ Egyptian Code of Criminal Procedure. arts. 61, 209 (Egypt), https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf (last visited Oct. 8, 2021).

²⁵¹ The same criteria behind mediating criminal disputes based on criminal culpability also exists before the Brooklyn Dispute Settlement Center., *supra* note 166, at iii.

²⁵² See *id.*

²⁵³ *Egypt's Judiciary: A Tool of Repression, Lack of Effective Guarantees of Independence and Accountability*, INT'L COMM'N OF JURISTS (2016) [hereinafter *Egypt's Judiciary*], <https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>.

danger to society.²⁵⁴ While the Islamic law system is broader in its settlement mechanism in that it includes homicide, the Egyptian legal system only lists exclusive misdemeanors and fines as excusable.²⁵⁵ The public prosecution's discretionary power to dispose of criminal cases fills this gap in the Egyptian legal system.²⁵⁶ Thus, prosecutors rely on the discretionary power conferred upon them by Articles 61 and 209 of the Egyptian Code of Criminal Procedure to dismiss criminal charges beyond the exclusive list, including felonies.²⁵⁷

These settlement mechanisms do not only decrease the number of incarcerated persons, but also promote the public prosecution's purpose to serve justice by acquitting suspects who are not dangerous to society. The benefits of such settlement mechanisms extend beyond reducing incarceration rates.²⁵⁸ A first-time offender whose crime was settled by public prosecution would have no criminal record. This allows a first-time offender to be treated as a non-offender in the eyes of society and escape the stigma associated with offenders who have passed through the prison system.²⁵⁹

There are two main criticisms that can be directed to the discretionary power of prosecutors that is often necessary to settle criminal cases. First, one might argue that prosecutors choosing to settle criminal cases swallows the original purpose behind penalties, which is to deter and

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See generally C. Crim. Proc. arts. 61, 209 (Egypt), available at https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/554b9890e4b029f0ef3a188d/1431017616683/Egypt+Criminal+Procedure+Code_English_Final.pdf (last visited Oct. 8, 2021); *Egypt's Judiciary*, *supra* note 253.

²⁵⁸ *Egypt's Judiciary*, *supra* note 253.

²⁵⁹ See e.g., Abby Marco, *The Life-Long Stigma of Being an Ex-Prisoner*, CMTY. CHANGE (Apr. 1, 2014), https://communitychange.org/life_long_stigma_ex_prisoner/.

retribute criminals and potential criminals.²⁶⁰ For instance, if every victim in a larceny case agreed to settle to receive their stolen item back momentarily, more vulnerable people will attempt larceny, having no fear of the consequences. The solution to that is rather simple and is in the hands of the public prosecution. By deciding on a case-by-case basis whether to accept the victim's settlement or proceeding with prosecuting the suspect, an equilibrium is naturally created to maintain the balance between deterrence and settlement.

Second and more notably, widening the discretionary powers of prosecutors without strict legal safeguards stipulated by law or a reviewability mechanism in place may in fact further injustices. A discretionary power without checks may result in applying the law discriminately on suspects, depending on the suspect's race, social-status, or gender.²⁶¹ Moreover, some prosecutors, even if non-corrupt, may unconsciously use their discretionary power in a way that corresponds and feeds their inner beliefs.²⁶² For instance, a religious prosecutor may refuse to use his discretionary power in settling a case against a sex-worker upon his belief that sex-work is a punishable sin. Another prosecutor in the same public prosecution office may settle a case against a sex-worker because he believes that sex-workers are victims, and their self-autonomy is compromised. This may lead to extreme discrepancies that create unacceptable inequalities before the law.

This is the most dangerous trait of U.S. prosecutorial discretionary power. Indeed, some U.S. prosecutors apply the law discriminately based on the suspect's race, color, or social status.²⁶³ U.S. prosecutors are often condemned for having a bias to charge people of color (especially members of Black and Latino communities)

²⁶⁰ See Travis et al., *supra* note 10, at 20.

²⁶¹ See Davis, *supra* note 97, at 56–57.

²⁶² *Id.*

²⁶³ *Id.*

more than they charge white suspects.²⁶⁴ Statistics show that a Black male has a 1-in-3 chance of being imprisoned during his lifetime compared to 1-in-6 chance for a Latino male.²⁶⁵ In contrast, a white male has a 1-in-17 chance of being incarcerated in the U.S.²⁶⁶ Although the whole U.S. criminal justice system is responsible for these stark discrepancies based on race, the dominating role of U.S. prosecutors call for the blame.²⁶⁷

Furthermore, the lack of any reviewability mechanism renders the U.S. prosecutorial discretionary power almost absolute and without checks.²⁶⁸ For example, if a suspect in the U.S. is arrested for cocaine possession, the prosecutor can dismiss the case even if the evidence is sufficient to prove the case beyond a reasonable doubt.²⁶⁹ No one, not even a judge, has standing to challenge the prosecutor's decision.²⁷⁰ By reverse analogy, if a prosecutor decided to charge a person of color because they believe that he is more likely to commit the crime, no one can review such decision. This lack of a reviewability mechanism to oversee the fairness and legality of the prosecutor's decision leads to injustices such as overcharging suspects or the failure to dismiss criminal charges, which by the same token lead to over incarceration.²⁷¹

²⁶⁴ *Id.* at 60.

²⁶⁵ PRESS RELEASE, BUREAU OF JUSTICE STATISTICS, *Prevalence of Imprisonment in the U.S. Population, 1974–2001* (Aug. 17, 2003) [hereinafter BJS PRESS], <https://bjs.ojp.gov/press-release/prevalence-imprisonment-us-population-1974-2001>. Statistics for Latinos are difficult to obtain due to differences in classification and other causes. For statistics showing the disproportionate representation of Hispanics at every step of the process in the federal system, see Angela Arboleda, *Latinos and the Federal Criminal Justice System*, NATIONAL COUNCIL OF LA RAZA (July 2002).

²⁶⁶ BJS PRESS, *supra* note 265; Arboleda, *supra* note 265.

²⁶⁷ Davis, *supra* note 97, at 56–57.

²⁶⁸ *See id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 60.

Fortunately, we have valid solutions to these vital concerns, most of which are derived from the Egyptian criminal justice system. First, the legal grounds upon which Egyptian prosecutors use their discretionary power to dismiss a criminal charge is thoroughly regulated by the Egyptian Code of Criminal Procedure.²⁷² In addition, a prosecutor's decision to dismiss a criminal charge must be explicit, in writing, and accompanied by thorough legal reasoning.²⁷³ As discussed below, this allows the attorney of a discontent party to challenge the prosecutor's decision by filing a petition.²⁷⁴

Second, the judicial system must be extremely careful with selecting prosecutors. In Egypt, prosecutors are appointed by a presidential decree after a candidate passes through several evaluations that take up to three years.²⁷⁵ These evaluations include an interview, a psychological and political evaluation that lasts more than four hours, and a background check by the General Intelligence Services, the Administrative Prosecution Authority, and the police.²⁷⁶ From one's experience in the public prosecution, I can comfortably group people who want to become prosecutors into two groups: those who are after public interests and those who have a desire for power. Selecting prosecutors from the former group often yields a greater benefit to society. This can be easily done by reviewing the candidate's file thoroughly (e.g., reading the personal statement they used in applying to law school and the general

²⁷² See Egyptian Code of Criminal Procedure, *supra* note 237.

²⁷³ Egyptian Cassation Court Case No. 726 of the year 56 (1986).

²⁷⁴ See *infra* p. 50 and note 277.

²⁷⁵ Randa Mostafa, *Judicial candidates forced to undergo unprecedented evaluations as presidency exerts further control*, MADA MASR (Feb. 13, 2019), <https://www.madamasr.com/en/2019/02/13/feature/politics/judicial-candidates-forced-to-undergo-unprecedented-evaluations-as-presidency-exerts-further-control/>.

²⁷⁶ *Id.*

theme behind the courses they focused on in their second and third years of law school, if elective such as in the U.S.).

Third, when the law provides prosecutors with discretionary power to settle criminal cases, it should be surrounded by strict safeguards to preserve fairness. For instance, in the Egyptian public prosecution system, there are specific legal grounds upon which prosecutors may settle or dismiss a criminal case as we discussed above. Moreover, there is a double-review system in place so that the other party may challenge the prosecutor's decision.²⁷⁷ A higher ranked prosecutor may review the petition.²⁷⁸ If a party to the criminal case feels the reviewed decision is still unfair, they may petition the prosecutor's decision before a higher ranked prosecutor as a last resort.²⁷⁹ This is applicable in both misdemeanors and felonies.²⁸⁰

Finally, although Egyptian prosecutors of all ranks may suggest dismissing a criminal case upon a unimportance or insufficient evidence, their suggestion of dismissal in a felony is only validated by the attorney general's approval (a very high rank in the Egyptian prosecutorial system).²⁸¹

These safeguards prevent prosecutors from abusing their discretionary power either through corruption or settling cases based on their beliefs. Finally, each party to the criminal case's right to challenge the prosecutorial decision and its review by a higher ranked prosecutor is a second layer of remedying corruption or partiality. All these legal safeguards, which are absent in the U.S., protect the public and preserve the main purpose behind granting prosecutors discretionary powers.

²⁷⁷ *The duration in which a party must challenge a prosecutorial decision*, Law Library—LawyerEgypt; Art 167 of the Egyptian Code of Criminal Procedure.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Law No. 150 of 1950 (Criminal Code of Procedure), art. 209 (Egypt) (amended by law no. 189 of the year 2020).

We will end our discussion with a popular saying within the Egyptian public prosecution system: “justice can be achieved by both referring a criminal suspect to trial and by dismissing the case against them... do not hesitate to dismiss the case when appropriate.”²⁸²

In conclusion, adopting similar legal grounds of dismissal in states’ criminal laws would undeniably lead to more safeguards against arbitrary discretionary power of U.S. prosecutors—a reason behind the high incarceration rates in the U.S.

B. How the U.S. can Benefit from the Rehabilitative Techniques adopted by the Icelandic Criminal Justice system

The Icelandic criminal justice system is considered one of the world’s leading criminal justice systems.²⁸³ This is not surprising since Iceland has one of the world’s lowest crime rates.²⁸⁴ In 2011, the United Nations Office on Drugs and Crime (“UNODC”) determined that the homicide rate in Iceland from 1999 to 2009 was never more than 1.8 per 100,000 people on any given year.²⁸⁵ The U.S. Department of State Overseas Security Advisory Council (“OSAC”) confirmed the UNDOC report and attributed Iceland’s low crime rates to the high standard of living, lack of tension between socio-economic classes, small population, strong social attitudes against criminality, high level of trust in law enforcement, and a well-trained, highly educated police force.²⁸⁶ Yet, Iceland faced a surge in criminal court decisions from 2013 to 2019, putting pressure on the

²⁸² Khalf AlHadath, *Egyptian Prosecution Ceremony of the Class of 2018*, YouTube, (Dec. 5, 2021 at 14:31), <https://www.youtube.com/watch?v=XZIIzvEQ2I>.

²⁸³ Andrew Clark, *Why Violent Crime is so Rare in Iceland*, BBC (Dec. 3, 2013), <https://www.bbc.com/news/magazine-25201471>.

²⁸⁴ *Id.*

²⁸⁵ U.N. OFFICE OF DRUGS AND CRIME, GLOBAL STUDY ON HOMICIDE (2011).

²⁸⁶ OVERSEAS SECURITY ADVISORY COUNCIL, ICELAND CRIME & SAFETY REPORT (2020).

Icelandic public prison system.²⁸⁷ As a result, the Icelandic government built a new prison near Reykjavik to replace three smaller prisons.²⁸⁸ Nonetheless, courts have increasingly introduced and implemented non-custodial rehabilitative sanctions such as electronic monitoring (“EM”) and community service work.²⁸⁹

Mainly, Iceland adopted four alternative rehabilitative techniques to imprisonment in the past two decades. The first program was introduced in 1990.²⁹⁰ Inmates who were suffering from alcohol and drug abuse could complete the last six weeks of their prison sentence at a rehabilitation center.²⁹¹

In 1995, the Icelandic legislature issued law that allowed community service as an alternative to a prison sentence.²⁹² Community service is a temporary unpaid job for the community that replaces an imprisonment sentence.²⁹³ However, it had stringent rules.²⁹⁴ For instance, only prisoners sentenced to six months in prison were eligible to apply.²⁹⁵ According to the community service law, forty hours of community service would count as one month in prison.²⁹⁶ Further, the prisoners who joined this program had to complete the work within two months.²⁹⁷ According to Iceland Prison Statistics from 2009, each year about 100 people serve their prison term by doing

²⁸⁷ Helgi Gunnlaugsson, *Criminal Justice in a Small Nordic Country: The Case of Iceland*, NORDISK TIDSSKRIFT FOR KRIMINALVIDENSKAB 27 (2021).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 38.

²⁹⁰ Helmut Kury & Evelyn Shea, *Punitively International Developments*, 8–3 CRIME AND CRIME POLICY 55 (2011).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Sigríour Þóra Ingadóttir, *Peoples opinion on the punishments in the Icelandic Criminal Justice system*, REYKJAVIK UNIVERSITY BSC IN PSYCHOLOGY, 4–6 (2020).

²⁹⁴ *Id.*

²⁹⁵ Kury, *supra* note 290.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

community work.²⁹⁸ In a questionnaire answered by 100 individuals who had finished their community service, the results revealed that eighty-six among them gained a positive experience.²⁹⁹ Further, sixty-seven individuals said they would like to do some volunteer work in the future after being influenced by the positive experience.³⁰⁰

A third alternative to imprisonment was introduced in 1995.³⁰¹ This alternative was open to prison inmates who are nearing the end of their prison sentence or inmates who received a short sentence while maintaining steady employment.³⁰² This allows eligible inmates to stay at an outside house run by Vernd (a private non-profit association).³⁰³ The inmates may pay rent, hold an outside job, and have more interaction with families, but under strict rules of conduct.³⁰⁴ These alternatives emphasize Iceland's will in prioritizing rehabilitation as a means of crime control over punishment and retribution.³⁰⁵ These measures have also decreased government expenditures on prisons and reduced pressure on the prison system.³⁰⁶

Finally, EM is allowing an offender to stay at home or at an approved residence with a monitor on them to track their journeys.³⁰⁷ It is important to assess the success of these alternative mechanisms by measuring their impact on recidivism rates. A Belgian study proved that EM helps

²⁹⁸ *Id.*

²⁹⁹ M. Varah, *What about the Workers? Offenders on Community Service Orders Express their Opinions*, SPO, Community Service, Warwickshire, 123 (Sept. 1, 1981) https://journals.sagepub.com/doi/pdf/10.1177/026455058102800404?casa_token=FJRAXO6p4dsAAAAA:xoYQ-EvpmpHdUV0J9RjNez4V0qD2-2BP16lTelDA9M12yEapJOYs0BmTskMdkbDZJ7Dw1Wa71q-zs5o.

³⁰⁰ *Id.*

³⁰¹ Kury, *supra* note 290.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Ingadottir, *supra* note 293.

offenders' motivation to stay away from criminal behavior by allowing them to be around their families.³⁰⁸ An Argentinian study revealed that EM leads to significant reduction in recidivism by 11–13%.³⁰⁹ Regarding community service, a Netherlands study showed recidivism rates among those who did community service was almost 46.8% compared to those sentenced to imprisonment.³¹⁰

In the U.S., some private universities have attempted to partner with correctional facilities to provide college education to inmates.³¹¹ This is an example of a vital—yet widely neglected—rehabilitative technique, which is to provide high-level education to prison inmates.³¹² For instance, the New York University (“NYU”) Prison Education Program (“PEP”) offers free college courses to incarcerated or formerly incarcerated students at Wallkill Correctional Facility.³¹³ Thanks to NYU’s vast resources, the program allows NYU faculty and staff to travel weekly to the correctional facility to teach classes to

³⁰⁸ *Id.* at 5.

³⁰⁹ *Id.* at 4–5.

³¹⁰ *Id.* at 5.

³¹¹ See, e.g., *Goucher Prison Education Partnership*, GOUCHER COLL., <https://www.goucher.edu/learn/goucher-prison-education-partnership/> (last visited Oct. 10, 2021, 12:38 PM); *Bard Prison Initiative*, BARD COLL., <https://bpi.bard.edu/> (last visited Oct. 10, 2021, 12:46 PM); *Center for Prison Education*, WESLEYAN UNIV., <https://www.wesleyan.edu/cpe/> (last visited Oct. 10, 2021, 12:47 PM).

³¹² See generally, James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, J. CORR. EDUC., Dec. 2004, at 297.

³¹³ See *NYU Prison Education Program*, N.Y. UNIV., <https://prisoneducation.nyu.edu/> (last visited Oct. 10, 2021, 1:12 PM). For statistics on the NYU program, see *NYU Prison Education Program: What We Do: Prison Education: Quick Facts*, N.Y. UNIV., https://prisoneducation.nyu.edu/what_we_do/#1574360618518-00ae69cc-915d (last visited Oct. 10, 2021, 1:14 PM) (“50–60 students are enrolled each semester at Wallkill Correctional Facility[;] 280 incarcerated people have earned transferable NYU credits[;] 14 students have earned their A.A. degree while incarcerated (4+ prospective graduates in 2020–2021[;] 5 students have earned their B.A. degree post-release[;] 21 students have earned degrees (A.A., B.A., or M.A.) through NYU PEP since it was founded in Spring 2015.”).

nearly fifty students for an Associate of Arts degree.³¹⁴ Most of the student-inmates enrolled in this program have one to two years remaining on their respective sentences.³¹⁵ NYU PEP also offers these students the opportunity to continue working toward a degree after release from prison.³¹⁶ Education's role in restoring prison inmates to society is indeed indispensable. Giving prison inmates a new purpose in life, enabled by a college degree, opens their eyes to the right path to follow in the future and heals them from what they endured in prison.³¹⁷

As a corollary, the rehabilitative justice model of Iceland proved to be more beneficial to society at large than the retributive justice model of the U.S. Combining settlement and mediation mechanisms administered by prosecutors with rehabilitative sentencing will significantly reduce the mass incarceration crisis in the U.S.

Yet, unlike other scholars, we do not argue to abolish conventional penalties that are often necessary to achieve general deterrence.³¹⁸ However, we argue that justice can be better administered by legislating specific legal grounds upon which U.S. prosecutors may apply their discretion and establishing a reviewability mechanism such as in the Egyptian criminal justice system.³¹⁹ Further, introducing an obligatory settlement mechanism at an early stage will force prosecutors to fairly consider parties'

³¹⁴ NYU Prison Education Program: *What We Do: Prison Education*, N.Y. UNIV., https://prisoneducation.nyu.edu/what_we_do/#1574360618518-00ae69cc-915d (last visited Oct. 10, 2021, 1:32 PM).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ See, e.g., Miles, A.A. Liberal Studies, NYU SPS Class of 2020, NYU PEP Testimonial, N.Y. UNIV., <https://prisoneducation.nyu.edu/> (last visited Oct. 10, 2021, 1:42 PM) ("Being incarcerated for 11 years and then coming home and being able to attend a prestigious college is a priceless moment for me, and graduating from NYU is a dream come true.").

³¹⁸ See, e.g., Robin Ferguson Shaw, *Angela Y. Davis and the Prison Abolition Movement, Part II*, 12 CONTEMP. JUST. REV. 101 (2009).

³¹⁹ *Supra*, notes 222–29.

respective circumstances and needs. At the end of the settlement stage, a U.S. prosecutor would have three options: First, prosecutors may choose to settle the criminal case by dismissing the criminal charge against the suspect upon one of the legal grounds provided by law. Second, a prosecutor may choose to sentence an offender by applying one or the other of the Icelandic rehabilitative techniques.³²⁰ Third, a prosecutor may choose to put the offender through the traditional incarceration system. This policy complies with the discrepancies and complexities of the human character. While some would never change except through deterrence, others can easily become better humans after listening to a short preach. In fact, some criminals—especially those imprisoned for drug offences—have become leading members of society after rehabilitating.³²¹ Yet, others have relapsed into the same criminal activity that put them into prison.³²²

Understanding the potential needs of each offender through settlement and mediation will lead prosecutors to make the right decision in directing the offender towards rehabilitation or referring them to the traditional criminal system for deterrence. Treating all offenders as the same is injustice in itself.

IV. CONCLUSION

Restorative justice goes hand-in-hand with settlement and mediation mechanisms. While conventional

³²⁰ *Supra*, notes 238–62.

³²¹ See Monte Morin, *Robert Downey Jr. Gets 3 Years in Prison*, L.A. TIMES (Aug. 6, 1999, 12:00 AM PST), <https://www.latimes.com/archives/la-xpm-1999-aug-06-me-63303-story.html>; (the Hollywood actor Robert Downey, Jr.); Ryan Gilbey, *Robert Downey Jr.: From Lost Cause to Highest-Paid Hollywood Actor*, THE GUARDIAN (July 17, 2013, 11:06 EST), <https://www.theguardian.com/film/shortcuts/2013/jul/17/robert-downey-jr-highest-paid-hollywood> (same).

³²² See Andrew Snell, *How Ted Bundy Escaped from Jail—and Went on to Murder Three More Women*, MIRROR (Jan. 31, 2019, 4:44 PM), <https://www.mirror.co.uk/news/us-news/how-ted-bundy-escaped-jail-13917658> (the serial killer Ted Bundy).

retributive justice fails to adequately address the needs of the victim, the defendant, and the community, restorative justice—administered by prosecutors who apply settlement and mediation mechanisms—may indeed solve the problem of mass incarceration in the U.S.³²³

Prosecutors are the means by which the U.S. may put an end to the mass incarceration crisis. We call upon the U.S. Congress to intervene and adopt the following policies accordingly: (1) an obligatory settlement or mediation mechanism at an early prosecutorial stage; (2) specific legal grounds upon which prosecutors may dismiss a criminal charge rather than unlimited discretion; (3) a reviewability mechanism whereby a party to a criminal case may challenge the prosecutor's decision; and (4) setting forward a number of rehabilitative sentences for the prosecutor to choose from—in the footprints of the Icelandic model of criminal justice—for crimes that do not carry heavy culpability.

We call upon U.S. prosecutors to take a stand against injustices by vacating extra charges that lead to excessive prison time for all defendants currently incarcerated. Moreover, we call upon prosecutors to limit their practice of overcharging a suspect to induce them to accept a plea bargain. Finally, regarding cases referred to trials, it is more impressive to charge a defendant with one strong criminal count that will survive trial than with a safety net of multiple counts that, if successful, will lead to decades or even centuries in prison.

We call upon judges to follow the path of District Judge Hon. John Gleeson and District Judge Hon. Robert W. Pratt in calling upon the prosecution to intervene and vacate additional criminal counts to correct excessive sentences.³²⁴

³²³ Flora Go, *supra* note 49, at 5.

³²⁴ See Corinne Ramey, *Former Judge Seeks to Shorten Mandatory Prison Terms He Once Imposed*, WALL ST. J. (Dec. 1, 2020, 4:56 PM EST), <https://www.wsj.com/articles/former-judge-seeks-to-shorten-mandatory->

Punishing a convicted individual after a trial in court—where both the defendant and victim had no chance of real communication—does not necessarily restore the losses the victim suffered or answer the victim’s questions.³²⁵ Communicating with the defendant and hearing their apologetic justifications—even if invalid—sometimes allows victims to get closure and address their losses.³²⁶ Deterrence is necessary to ensure public safety, yet excessive incarceration produces the contrary result.³²⁷

Finally, offenders do not benefit much from retributive justice because spending a large portion of their lives in prison prevents them from making adequate reparations to themselves or for the harm they have caused to victims.³²⁸ They end up suffering from negative consequences leaving them demonized and unrehabilitatable for the rest of their lives—all due to excessive mass incarceration.³²⁹

prison-terms-he-once-imposed-11606859191 (Judge Gleeson); *United States v. Brown*, 411 F. Supp. 3d 446, 454 (S.D. Iowa, 2019) (Judge Pratt).

³²⁵ Flora Go, *supra* note 49, at 5.

³²⁶ *See id.* at 5, 6.

³²⁷ *See, e.g.,* Yasmin Anwar, *Prison Time Has Little or No Bearing on Long-Term Public Safety*, BERKELEY NEWS (May 16, 2019), <https://news.berkeley.edu/2019/05/16/prison-public-safety/> (discussing research study challenging tough-on-crime measures and recommending prison diversion programs for probation-eligible individuals).

³²⁸ Flora Go, *supra* note 49, at 6.

³²⁹ *See id.* at 6.