

2015

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Recommended Citation

Nguyen, Tran T. (2015) "Downgrading Non-Violent Drug Crimes: An End to the “Lock ‘em and Leave ‘em” Mentality," *Hamline University's School of Law's Journal of Public Law and Policy*: Vol. 36: Iss. 2, Article 5.

Available at: <http://digitalcommons.hamline.edu/jplp/vol36/iss2/5>

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DOWNGRADING NON-VIOLENT DRUG CRIMES: AN END TO THE “LOCK ‘EM AND LEAVE ‘EM” MENTALITY

Tran T. Nguyen¹

Introduction

“A felony? Possession of marijuana brownies is a felony?” Mary Jane Baker exclaimed.² Ms. Baker stood in shock. The last thing she expected to hear this morning was that her latest batch of baked goods could expose her to felony charges. Hundreds of miles away, Bernard Noble, a forty-five-year-old trucker and father of seven with two previous non-violent offenses, was stopped on a New Orleans street with a small amount of marijuana in his pocket.³ His sentence: more than thirteen years.⁴

¹ Journal Associate 2014-2015; JD from Hamline University School of Law 2015. Thank you to the entire Journal Board for their encouragement, support, and guidance, with special thanks to my primary editor, Nicholas Wolfe. To my family for being my foundation and for their unconditional love. To my cancer team at the Huntsman Cancer Hospital for their impeccable care and dedication in supporting me as I fought to reach my goals. To Joshua, for being my biggest support system through the roller coaster of law school. As you have been by my side as I endured my trials, I cannot think of anyone more deserving to share with in my achievements. Finally, I would like to dedicate this article to my son Calder. My hope is that you will grow up in a more peaceful and just world.

² Steven Bader, *When the Grass Turns Brown: Prosecuting Marijuana Mixtures in Minnesota*, BENCH & B. MINN. Jan. 11, 2012, at 32, 33.

³ Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES, July 28, 2014, <http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html>.

⁴ *Id.* See also *Louisianan Given 13-Year Prison Sentence for Possession of Two Marijuana Cigarettes*, DRUG POLICY ALLIANCE (Apr. 16, 2014), <http://www.drugpolicy.org/news/2014/04/louisianan-given-13-year-prison-sentence-possession-two-marijuana-cigarettes>. Bernard Noble was sentenced to 13.3 years of hard labor in prison without the opportunity for parole for possessing the equivalent of two marijuana cigarettes. Noble had two prior low-level nonviolent drug offenses that occurred eight and twenty years respectively before

Drug use has become an increasing problem in our nation. Abuse of tobacco, alcohol, and illicit drugs is costly to our nation, exacting over \$600 billion annually in costs related to crime, lost work productivity, and healthcare.⁵ For the individual, a felony drug charge makes it far more difficult to find a job, get housing, obtain or further education, and receive various government benefits. For the families of drug offenders who are incarcerated, homes are foreclosed on, wives lose the income of their husbands, and children lose parents and are put into foster homes. Decades of our nation's punitive drug laws, especially drug sentencing policies, led to the epidemic of drug-related mass incarceration in America.⁶ Luckily, this hazardous trend is giving way to increased support for drug law reform and altered sentencing policies throughout many states.⁷

On November 4, 2014, California voters passed an initiative called the "Safe Neighborhoods and Schools Act" under the label of "Proposition 47". This measure made several changes to the California Penal Code⁸ and the Health and Safety Code⁹, and established the Safe Neighborhoods and Schools Fund.¹⁰ For qualifying defendants, this means that many of their drug possession offenses will be reclassified from felonies to misdemeanors.¹¹ The money saved by this measure would be re-invested into K-12 schools, victim services, and mental health and drug treatment.¹²

his arrest in this case, and he had never been convicted of anything more serious than possession of drugs for personal use.

⁵ *Trends & Statistics*, NATIONAL INSTITUTE ON DRUG ABUSE, <http://www.drugabuse.gov/related-topics/trends-statistics> (last visited Jan. 16, 2015).

⁶ Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1106 (2013).

⁷ *Id.*

⁸ Sections 459a, 473 476, 490.2, 496, 666, and 1170.18 of the California Penal Code were amended.

⁹ Sections 11350, 11357, and 11377 of the California Health and Safety Code were amended.

¹⁰ See *infra* § 2 subd. C (explaining the Safe Neighborhoods and Schools Act).

¹¹ The Safe Neighborhoods and Schools Act § 3, St. Cal. Department Just. – Off. Att’y Gen., available at <https://oag.ca.gov/system/files/initiatives/pdfs>.

¹² Cal. Gov’t Code § 7599.2 (West).

This paper explores the costs and benefits of downgrading non-violent drug crimes from felonies to misdemeanors. It will also address the transition process and the ramifications that transition would likely have on our court system, the individual defendants, and our society as a whole. Part I introduces the blaring problem America faces with drug use and possession, and the rising attention that state and federal governments are giving to the need for drug law reforms with particular attention to California's newly passed Safe Neighborhoods and Schools Act. Part II will explore the evolution of America's battle with drug crimes, the different measures that states have implemented to fight drug crimes with a specific focus on California's newly enacted Safe Neighborhoods and Schools Act, and the costs of drug related incarceration. Part III will provide background on Minnesota's current approach regarding drug offenses and the different methods Minnesota has applied in the past in tackling this growing problem.

Part IV analyzes how Minnesota would benefit from adopting laws that would downgrade non-violent drug felonies to misdemeanors. It will further analyze whether Minnesota should implement the California model based on Minnesota's existing structure. The final section of Part IV will analyze Minnesota's drug courts and substance abuse treatment options as it relates to recidivism rates for drug offenders. Finally, Part V concludes this paper and gives thought to how Minnesota should move forward in addressing minor drug possession offenses.

I. Background

A. America's Growing Drug Problem

America's "War on Drugs" was declared by President Richard Nixon in the early 1970s.¹³ It was a direct response to the recreational drug use explosion in the 1960s.¹⁴ Since then, four

¹³ Susan Stuart, [*War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*](#), 36 S. ILL. U. L. J. 1, 5 (2011).

¹⁴ *Id.* at 7.

presidents¹⁵ have personally waged war on drugs; a war that we are losing.¹⁶ The presidency of Ronald Reagan marked the start of a long period of skyrocketing rates of incarceration, largely thanks to his unprecedented expansion of the drug war.¹⁷ The number of people behind bars for non-violent drug law offenses increased from 50,000 in 1980 to over 400,000 by 1997.¹⁸ The United States' incarceration rate climbed steadily throughout a thirty-year period beginning in the mid-1970s- coinciding with the most aggressive era of the War on Drugs.¹⁹ These increases in arrests and convictions have fueled a significant increase in the number of prison admissions for drug possession.²⁰

In 2013, an estimated 24.6 million Americans aged 12 or older- or 9.4 percent of the population- had used an illicit drug or abused a psychotherapeutic medication (such as a pain reliever, stimulant, or tranquilizer) in the past month of being surveyed.²¹ This is up from 8.3 percent in 2002.²² This increase mostly reflects a recent rise in the use of marijuana, the most commonly used illicit drug.²³ In fact, marijuana use has increased since 2007 with about 14.4 million past-month users from date of survey to 18.9 million past-month users from date of survey in 2012.²⁴

¹⁵ Presidents Nixon, Carter, Reagan, and Clinton have all declared wars on drugs and enacted different policies to combat drug use. *See generally, A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Aug 6, 2015).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Drucker, *supra* note 6, at 1099.

²⁰ Don Stemens & Andres F. Rengifo, *Alternative Sentencing Policies for Drug Offenders: Evaluating the Effectiveness of Kansas Senate Bill 123, Final Report 1* (Mar. 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238012.pdf>.

²¹ *Drug Facts: Nationwide Trends*, NATIONAL INSTITUTE ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/nationwide-trends> (last visited Aug. 6, 2015).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

There continues to be a large “treatment gap” in America.²⁵ In 2013, an estimated 22.7 million Americans needed treatment for a problem related to drugs or alcohol, but only about 2.5 million people received treatment at a specialty facility.²⁶ In 2013, 22.7 million persons aged twelve or older needed treatment for an illicit drug or alcohol use problem.²⁷ In comparison, only 2.5 million persons – a mere 0.9 percent of persons aged 12 or older and 10.9 percent of those who needed treatment – received treatment at a specialty facility for an illicit drug or alcohol problem.²⁸ Based on 2010 through 2013 combined data, among persons aged twelve or older who needed but did not receive illicit drug or alcohol use treatment, felt a need for treatment, and made an effort to receive treatment, commonly reported reasons for not receiving treatment were (a) no health coverage and could not afford cost, (b) not ready to stop using, (c) did not know where to go for treatment, (d) had health coverage but did not cover treatment or did not cover cost, and (e) no transportation or inconvenient.²⁹

B. The Shifting Mindset and Other States’ Responses to the Drug Problem

In August 2013, Attorney General Eric H. Holder Jr., in a speech at the American Bar Association’s annual meeting, announced the Obama administration’s new policy to ease overcrowding in federal prisons by ordering prosecutors to omit listing quantities of illegal substances in indictments for low-level

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings*, U.S. DEP’T. OF HEALTH AND HUM. SERV. - SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. CTR. FOR BEHAV. HEALTH STATISTICS AND QUALITY, <http://archive.samhsa.gov/data/NSDUH/2013SummNatFindDetTables/NationalFindings/NSDUHresults2013.htm> .

²⁸ Specialty treatment is defined as treatment received at any of the following types of facilities: hospitals (inpatient only), drug or alcohol rehabilitation facilities (inpatient or outpatient), or mental health centers. *Id.*

²⁹ *Id.*

drug cases.³⁰ Holder mandated a modification of the Justice Department's charging policies so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences.³¹

Many states have recently engaged in drug law reform and the reduced use of long mandatory sentences for nonviolent drug felonies.³² Over nineteen states have adopted some sort of legislation that aims at preserving prison space for the most dangerous and violent offenders.³³ Other states have also made substantial reductions in their prison populations, which dropped in twenty-six states between 2008 and 2010, with six states posting reductions of three to nine percent in those two years alone.³⁴ Additionally, other states have been closely following the development of California's Safe Neighborhoods and Schools Act and are now in the process of creating legislation of their own to downgrade drug sentencing.³⁵

Arkansas

In 2011, Arkansas passed Act 570 known as the Public Safety Improvement Act which allowed non-violent offenders to be sentenced to work with the Department of Community Corrections rather than be incarcerated.³⁶ The act has four primary mechanism:

³⁰ Charlie Savage, *Justice Department Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html>.

³¹ Eric H. Holder Jr., U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

³² Drucker, *supra* note 6, at 1102.

³³ Delaware, Hawaii, Kansas, Louisiana, Missouri, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, and West Virginia have also enacted sentencing reform for non-violent drug crimes.

³⁴ Drucker, *supra* note 6, at 1103.

³⁵ Illinois and Utah are two of the states who are also currently considering re-working their sentencing system for non-violent drug offenses.

³⁶ See generally Act 570, 2011 Ark. SB 750.

(1) redefining some non-violent felonies as misdemeanors, which will subject fewer people to prison sentences and allow the state to devote fewer resources to non-violent crimes; (2) making penalties for probation violations more efficient, which will make violators less likely to face prison time for technicalities and enable officers and courts to focus more attention on probationers committing new crimes; (3) professionalizing parole hearings through new standards and better adherence to State guidelines so that more prisoners receive early release; and (4) rewarding communities that implement local programs with an evidence-based history of reducing recidivism so that ex-prisoners are less likely to re-offend.³⁷

While the Act does not decriminalize any illegal activities entirely, it reduces to misdemeanors many crimes that would have been felonies prior to 2011.³⁸ Under Act 570, a first-time conviction for marijuana possession becomes a felony only if the offender possesses four ounces or more; a significant penalty reduction from prior law that allowed prosecutors to seek prison terms of up to ten years for possession exceeding one ounce.³⁹ In contrast to California's Proposition 47, a felony is still unavoidable for simple possession of methamphetamine or cocaine.⁴⁰

Two years after the implementation of the Act, the preliminary results were astonishing. The two pilot counties⁴¹ experienced a 40 percent reduction in prison placements and a 54 percent reduction in the number of probationers.⁴² Additionally, the counties saw a 23 percent increase in adult-education degrees, work-force certificates, and career readiness certificates.⁴³ Employment

³⁷ Mason Boling, *Legislative Note: That Was the Easy Part: The Development of Arkansas's Public Safety Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact*, 66 ARK. L. REV. 1109, 1113 (2013).

³⁸ *Id.* at 1114.

³⁹ *Id.* at 1115.

⁴⁰ *Id.*

⁴¹ *Id.* at 1122. Two Arkansas counties- Columbia and Union- served as test counties for Act 570's probation pilot program during 2011 and 2012.

⁴² *Id.*

⁴³ Boling, *supra* note. 37, at 1122.

also increased by 28 percent.⁴⁴ Finally, although 98 percent of participants tested positive for illegal substances at the outset of the program, within two months of graduation, the participants had zero positive drug tests, and the overall compliance rate for drug and alcohol tests stood at 93.4 percent.⁴⁵ In sum, the pilot program saved Arkansas an estimated \$4.2 million in 2011.⁴⁶

Georgia

In 2011, Governor Nathan Deal tasked the Special Council⁴⁷ to scrutinize sentencing and corrections data to identify factors driving prison growth.⁴⁸ In 2012, Governor Deal signed House Bill 1176 that allowed for alternative sentencing for low-level non-violent offenders.⁴⁹ Research indicated that prior to the passage of the bill, drug and property offenders accounted for almost 60 percent of prison admission in Georgia.⁵⁰ The law was expected to avert the projected 8 percent growth of the inmate population and the associated cost increase of \$264 million.⁵¹

Many long-term impacts remain to be seen, but overall, the prison population has held steady, and progress is also evident in the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The Special Council on Criminal Justice Reform for Georgians was created by the Georgia General Assembly in 2011. In 2011, the Special Council recommended a set of substantial policy changes that focused prison space on violent, career criminals while strengthening probation, drug courts and other sentencing alternatives for nonviolent offenders. *See*, Judge Michael P. Boggs & W. Thomas Worthy, *Report of the Georgia Council on Criminal Justice Reform* 3 (Feb. 2015), available at <http://www.gjp.org/wp-content/uploads/2014-2015-CJRC-Report.pdf>.

⁴⁸ *Id.* at 11.

⁴⁹ *See* Meg Buice & Tamara Garcia, *Crimes and Offenses: Appeal or Certiorari by State in Criminal Cases*, 29 GA. ST. U. L. REV. 290, 305 (2012).

⁵⁰ The Chicago Lawyer's Comm., *The Chicago Lawyers' Committee's Review of Alternatives for Non-Violent Offenders*, 1 at 7. *See also*, House Bill 1176, available at <http://www.legis.ga.gov/Legislation/20112012/127628.pdf>.

⁵¹ Boggs, *supra* note 46, at 12.

changing composition of that population.⁵² Georgia has increased prison terms for certain offenders while diverting many lower-level drug offenders to drug courts and alternatives.⁵³ By the end of 2013, the state's prison population dropped by fourteen percent, saving the state \$20 million. *Kentucky*

In 2011, the Public Safety and Offender Accountability Act was put into force. Like Georgia, Kentucky also worked with the Pew Center on States to develop HB 463 and overhaul their penal code.⁵⁴ This act allowed minor drug offenders to be sentenced to probation and treatment, and it also authorized earned compliance credits for parolees. The bill is estimated to save the Commonwealth \$422 million over ten years.⁵⁵ The law focuses on how low-risk, non-violent offenders can be effectively supervised in the community at a lower cost, ensuring that prison beds are available for more dangerous offenders.⁵⁶ The law revises penalties for simple possession of drugs by reducing the penalty for possession of controlled substances to a three year maximum term rather than the previous five-year maximum.⁵⁷

Texas

In 2007, the state of Texas had corrections costs of almost \$3 billion annually.⁵⁸ Through the passing of several pieces of

⁵² Judge Michael P. Boggs & W. Thomas Worthy, *Report of the Georgia Council on Criminal Justice Reform* 8 (2014), http://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/GA%20Criminal%20Justice%20Reform%20Council%20Report.pdf.

⁵³ *Id.* at 32.

⁵⁴ The Chicago Lawyers' Comm., *supra* note 50, at 6.

⁵⁵ Robert Veldman, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L.J. 777, 813 (2013).

⁵⁶ Rebecca Hsieh, *Public Safety and Accountability Act looks to lower jail costs*, NAT. ASSOC. OF COUNTIES (Dec. 5, 2011), <http://www.naco.org/newsroom/countynews/Current%20Issue/12-5-11/Pages/PublicSafetyandAccountabilityActlookstolowerjailcosts.aspx>.

⁵⁷ *Id.*

⁵⁸ Vanita Gupta et. al., American Civil Liberties Union Ctr. for Justice, *Smart Reform Is Possible: States Reducing Incarceration Rates and Costs While*

legislation, Texas allocated \$241 million to creating parole and probation treatment programs and incarceration alternative including (1) more residential and out-patient beds for substance abuse treatment for those on probation; (2) new beds in halfway houses providing reentry services for those on parole; (3) additional beds in non-prison residential facilities for those committing technical probation and parole violations; and (4) more substance abuse treatment programs in prisons and jails.⁵⁹

Together with other reforms, Texas has achieved overwhelming success. From 2007 to 2009, the Texas prison population stabilized instead of increasing by 5,141 prisoners as projected.⁶⁰ In the first year, the 2007 reforms saved Texas \$210.5 million by reducing the original projected prison budget.⁶¹ The reforms will save an additional \$2 billion by 2012 that would have been incurred had the state simply constructed new prisons.⁶²

C. California's Safe Neighborhoods and Schools Act.

California's Safe Neighborhoods and Schools Act went into force on November 5th, 2014. The Act embodies five main provisions: (1) requires misdemeanor sentence instead of felony for certain drug possession offenses⁶³; (2) requires misdemeanor instead of felony for the following crimes when the amount involved is \$950 or less: petty theft, receiving stolen property, and forging or writing bad checks; (3) allows felony sentence for these offenses if the person has previous conviction for crimes such as rape, murder, or child

Protecting Communities 18 (2011), available at <https://www.aclu.org/files/assets/smartreformispossible.pdf>.

⁵⁹ *Id.* at 20.

⁶⁰ *Id.* at 22.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in a county jail for not more than one year. The Safe Neighborhoods and Schools Act, STATE CAL. DEP'T JUST. – OFFICE ATT'Y GEN. (Dec. 19, 2013), available at [https://oag.ca.gov/system/files/initiatives/pdfs/13-0060%20\(13-0060%20\(Neighborhood%20and%20School%20Funding\)\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/13-0060%20(13-0060%20(Neighborhood%20and%20School%20Funding)).pdf).

molestation or is a registered sex offender; (4) requires resentencing of persons serving felony sentences for these offenses unless the court finds the person to be an unreasonable public safety risk⁶⁴; and (5) applies the savings to mental health and drug treatment programs, K-12 schools, and crime victims.⁶⁵

Before this Act was passed, possession for personal use of most illegal drugs (such as cocaine or heroin) was a misdemeanor, a wobbler⁶⁶, or a felony- depending on the amount and type of drug. Under Prop 47, such crimes would always be misdemeanors. The measure would not change the penalty for possession of marijuana, which was either an infraction or a misdemeanor.⁶⁷

This Act reclassified many controlled substances crimes. Possession of narcotic controlled substances such as cocaine, heroin, morphine, or other opiates, possession of restricted dangerous drugs which would include stimulants such as methamphetamines, or hallucinogenics such as psilocybin mushrooms, and possession of concentrated cannabis (hashish) all became misdemeanor offenses.⁶⁸ As far as marijuana is concerned, the Act allows an individual to possess up to 28.5 grams of marijuana and still fall under the misdemeanor sentencing guidelines.⁶⁹

California lawmakers anticipate that this measure will save significant state corrections dollars on an annual basis.⁷⁰ Preliminary estimates range from \$150 million to \$250 million per year.⁷¹ Distribution of the funds shall be deposited into the Safe Neighborhoods and School's fund as follows:

⁶⁴ See *infra*, note 91.

⁶⁵ *Id.* at § 3.

⁶⁶ A wobbler is a crime that a prosecutor may elect to file as either a misdemeanor or a felony based on the facts of the case and a person's criminal history under California law. Cal. Penal Code § 17.

⁶⁷ *Proposition 47 Criminal Sentences, Misdemeanor Penalties, Initiative Statute.*, LEGISLATIVE ANALYST'S OFFICE, (Jul. 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf>.

⁶⁸ See generally, The Safe Neighborhoods and Schools Act, *supra* note 63.

⁶⁹ *Id.* at § 5 subd. b.

⁷⁰ *Id.* at § 3.

⁷¹ *Id.*

Twenty-five percent to the State Department of Education, to administer a grant program to public agencies aimed at improving outcomes for public school pupils in kindergarten and grades 1 to 12, inclusive, by reducing truancy and supporting students who are at risk of dropping out of school or are victims of crime

Ten percent to the California Victim Compensation and Government Claims Board, to make grants to trauma recovery centers to provide services to victims of crime⁷²

Sixty-five percent to the Board of State and Community Corrections, to administer a grant program to public agencies aimed at supporting mental health treatment, substance abuse treatment, and diversion programs for people in the criminal justice system, with an emphasis on programs that reduce recidivism of people convicted of less serious crimes, such as those covered by this measure, and those who have substance abuse and mental health problems.⁷³

D. The Opposition

The Act does not come without its critics. One critique is that the Act allows criminals, who under the previous law were prohibited from gun ownership, to own guns.⁷⁴ When a person is convicted of a felony, his/her sentence includes a prohibition on owning a gun.⁷⁵ Misdemeanors do not have the same requirement. Secondly, critics are concerned about the potential problems for victims of sexual assault. The Act makes it a mandatory misdemeanor if someone is found in possession of drugs, including GHB and Ryohypnol, common date rape drugs.⁷⁶ Others argue that there is a disincentive to seek drug treatment with the passage of Prop 47. Opponents believe that the Act will encourage those who are charged to plead

⁷² This is pursuant to Section 13963.1 of the Government Code regarding grants to trauma recovery centers; legislative findings and declaration; criteria; requirements.

⁷³ Cal. Gov't Code § 7599.2 (West).

⁷⁴ Selena Farnesi & Emily Reynolds, *Proposition 47: The Safe Neighborhoods and School Act* 94 (2014), available at <http://www.mcgeorge.edu/Documents/Publications/Proposition472014.pdf>.

⁷⁵ CAL. PENAL CODE, Ch. 12- Punishments.

⁷⁶ *Supra* note 74, at 95.

out and never seek treatment because they will not be eligible to serve serious prison time.⁷⁷

The group “Californians Against 47” turned to the California District Attorneys Association’s (CDAA) evaluation of the Act and echoed the CDAA’s concerns.⁷⁸ They cited that although the Act Proposes to direct monetary savings to support program in K-12 schools, victim services and treatment, the Act ignores the costs to the criminal justice system for the proposed “resentencings”, costs to business owners, and costs of recidivism to the community.⁷⁹ In the same vein with resentencing, opponents argue that this is the equivalent to the early release of violent or dangerous felons.⁸⁰

Finally, the last major argument from opponents is that the “unreasonable risk of danger to public safety” application is extraordinarily narrow. U.S. Senator Dianne Feinstein stated that the Act only covers those who are at risk of committing eight specific crimes: three specific sex offenses, murder or solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction or an offense punishable by life in prison or death.⁸¹ She continued “This means an individual at risk of committing serious crimes other than the eight listed above, such as carjacking or robbery, would automatically qualify for resentencing if he is serving time for a crime covered by Prop. 47.”⁸²

II. California’s Transition

The Judicial System Court Calendars

⁷⁷ *Id.* at 96.

⁷⁸ *About Proposition 47: CDAA Looks at Proposition 47*, Californians Against 47, <http://californiansagainst47.com/about-proposition-47/> (last visited Aug 6, 2015).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Dianne Feinstein, *Prop. 47 will make Californians less safe: Dianne Feinstein*, LOS ANGELES DAILY NEWS (Oct. 15, 2014), <http://www.dailynews.com/opinion/20141015/prop-47-will-make-californians-less-safe-dianne-feinstein>.

⁸² *Id.*

The Legislative Analyst's Office projects state savings in the low hundreds of millions of dollars annually, partially offset in the first few years by increased court and parole costs associated with the resentencing option.⁸³ Initially, the courts would experience a one-time increase in costs resulting from the resentencing of offenders and from changing the sentences of those who have already completed their sentences.⁸⁴ However, the above costs to the courts would be partly offset by savings in other areas.⁸⁵ First, because misdemeanors generally take less court time to process than felonies, the proposed reduction in penalties would reduce the amount of resources needed for such cases. Second, the measure would reduce the amount of time offenders spend on county community supervision, resulting in few offenders being supervised at any given time. This would likely reduce the number of court hearings for offenders who break the rules that they are required to follow while supervised in the community.

Overall, the Legislator's Analyst Office estimates that the measure could result in a net increase in court costs for a few years with net annual savings thereafter.⁸⁶ California cites the specific example that unlike misdemeanor cases, all felony cases include a preliminary hearing unless waived.⁸⁷ Each preliminary hearing costs about \$667.⁸⁸

More recently, the appellate review process has been called into question regarding Proposition 47. At first blush, judges speculated that it was unlikely that Prop 47 will apply to cases pending on appeal.⁸⁹ Judge Couzens sited that "The trial court does

⁸³ Selena Teji, *Proposition 47: Should California Reduce Penalties For Drug and Property Crimes and Invest In Treatment?*, CAL. BUDGET PROJECT 3 (2014), available at http://www.cbp.org/pdfs/2014/140909_Proposition_47_BB.pdf.

⁸⁴ *Proposition 47*, *supra* note 67, at 8.

⁸⁵ *Id.*

⁸⁶ *Id.* at 9.

⁸⁷ Cal. Budget Project, *supra* note 83, at 5.

⁸⁸ *Id.*

⁸⁹ Memorandum from the Honorable Judge J. Richard Couzens & Honorable Justice Tricia A. Bigelow, *Proposition 47: "The Safe Neighborhoods and Schools Act"* 34 (Feb. 2015), available at <http://www.courts.ca.gov/documents/Prop-47-Information.pdf>.

not have jurisdiction over a cause during the pendency of an appeal.⁹⁰ A person currently serving a sentence may only file a petition under Prop 47 once his/her judgment is final and jurisdiction over the cause has been returned to the trial court; then appellant's eligibility for recall of sentence will be determined at that point in time.⁹¹

The memorandum also points out that although petitioners only have two years to file a petition to recall sentence under Prop 47, there is an exception for 'good cause', and pendency of appellate proceedings and consequent lack of jurisdiction over the cause in the trial court would necessarily constitute good cause for a filing delay.⁹² Additionally, in regards to which court has proper jurisdiction for appeals, nothing in the text of Prop 47 or the ballot materials for Prop 47. . . contains any indication that Prop 47 or the language of section 1170.18, subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction.⁹³ An appeal to challenge the grant or denial of a petition or application under section 1170.18 must be heard by the Court of Appeal, not the appellate division of the superior court.⁹⁴

Attorneys

Attorneys, both for the different prosecuting agencies as well as defense teams (private counsel and public defender offices), will see a significant increase in their caseload over the next few years. Chief Deputy District Attorney Dave Greenberg said his office will hand off about 3,000 defendants' cases to the San Diego City Attorney's Office. "They're absolutely going to be impacted, so they're going to have to figure out their staffing. They're going to be receiving up to maybe 280 to 300 new defendants a month that they're going to have to review and the make decisions."⁹⁵

⁹⁰ *Id.* citing *People v. Flores* (2003) 30 Cal. 4th 1059, 1064.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *People v. Rivera*, 233 Cal. App. 4th 1085, 1100 (2015).

⁹⁴ Couzens, *supra*, note 89, at 77.

⁹⁵ Doug Porter, *California's Proposition 47 Passed. Now What?*, SAN DIEGO FREE PRESS (Nov. 6, 2014), <http://sandiegofreepress.org/2014/11/californias-proposition-47-passed-now-what/>.

Only one week after Proposition 47, the San Diego County District Attorney's Office had received more than 1,000 petitions for reduced sentences and convictions. The office expects to receive 4,600 petitions from 1,800 in-custody offenders, filed by the San Diego County Office of the Public Defender. That number will grow when offenders on probation, parole, and post-release community supervision—as well as inactive cases—are taken into account.⁹⁶ Los Angeles City Attorney Mike Feuer asked the City Council for \$510,000 to hire fifteen lawyers and assistants to handle the anticipated influx of misdemeanor prosecutions, which previously would have been prosecuted as felonies by the district attorney's office.⁹⁷

In terms of the public defender's office, their already overburdened caseload will only be increased. The public defender's office may reach as far back as 1990 to resentencing certain felonies to misdemeanors.⁹⁸

Drug Court and Mental Health Court

Mental health courts provide judicial supervision of mental health treatment in lieu of jail time for people charged with nonviolent crimes. This innovative program demonstrates participant re-arrest rates that are significantly lower than those for nonparticipants.⁹⁹ Likewise, drug courts - which operate similarly to mental health courts - reduce recidivism by up to twenty-six percent among participants compared to nonparticipants.¹⁰⁰ These types of interventions can also result in long-term public safety saving. For example, San Francisco's drug courts have resulted in an estimated

⁹⁶ Sherene Tagharobi, *DA Receives Over 1,000 Sentence Petitions Prop 47's First Week*, NBC SAN DIEGO (Nov. 12, 2014), <http://www.nbcsandiego.com/news/politics/Over-1000-Sentence-Petitions-Filed-in-Prop-47s-First-Week-282511651.html>.

⁹⁷ Paige St. John & Marisa Gerber, *Prop. 47 Jolts Landscape of California Justice System*, LA TIMES (Nov. 5, 2014), <http://www.latimes.com/local/politics/la-me-ff-pol-proposition47-20141106-story.html>.

⁹⁸ Tagharobi, *supra* note 96.

⁹⁹ Cal. Budget Project, *supra* note 83, at n. 17.

¹⁰⁰ *Id.* at n. 19.

\$48 million in savings over thirteen years from lower case-processing costs and reduced recidivism among drug court participants.¹⁰¹

Probation, Parole, and Corrections

Proposition 47 impacts the state prison population and associated costs in two ways. First, changing future crimes from felonies to misdemeanors would make fewer offenders eligible for state prison sentences.¹⁰² Second, the resentencing of inmates currently in state prison could result in the release of several thousand inmates, temporarily reducing the state prison population for a few years.¹⁰³ Most significantly, the measure would reduce the jail population as most offenders whose sentence currently includes a jail term would stay in jail for a shorter time period.¹⁰⁴ This does mean; however, that the parole population will increase temporarily, unless a judge waives that requirement.¹⁰⁵

In recent years, California has been under a federal court order to reduce overcrowding in the prisons operated by the California Department of Corrections and Rehabilitation.¹⁰⁶ From November 2014 to January 28, 2015, the inmate population in California's prisons was about 113,500, or 3,600 inmates below the

¹⁰¹ *Id.* at 4.

¹⁰² *Proposition 47*, *supra* note 67, at 8.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 9. The Legislator's Analyst Office also estimates that county community supervision populations would decline because offenders would likely spend less time under such supervision if they were sentenced for a misdemeanor instead of a felony.

¹⁰⁵ *Impact of Proposition 47 On State Corrections 1*, LEGISLATIVE ANALYST'S OFFICE (Mar. 5, 2015), available at <http://www.lao.ca.gov/handouts/crimjust/2015/Impact-of-Proposition-47-on-State-Corrections-030515.pdf>.

¹⁰⁶ Mac Taylor, *The 2015-2016 Budget: Implementation of Proposition 47*, LEGISLATIVE ANALYST'S OFFICE (Feb. 2015) 9, available at <http://www.lao.ca.gov/reports/2015/budget/prop47/implementation-prop47-021715.pdf> (last visited Aug. 27, 2015).

set February 2015 inmate cap the federal government.¹⁰⁷ The expected impact of Proposition 47 on the prison population will make it easier for the state to remain below the population cap.¹⁰⁸

The Individual

Different Stages, Different Paths

Defendants facing current charges, at any stage short of sentencing will reap the most benefits from this new Act. A defendant will simply be adjudicated in accordance with the Act. A drug possession crime that would have been charged as a felony prior to the Act will be treated as a misdemeanor. There are, however, several exceptions where a defendant will face felony charges for non-violent drug possession.

Anyone currently serving prison time for a felony conviction on a reclassified crime may be able to petition for a new sentence (resentencing)—even those incarcerated under the state’s “Three Strikes¹⁰⁹” law.¹¹⁰ Any recalled sentencing would go before the trial court that entered the judgment of conviction in his or her case. Upon

¹⁰⁷ *Id.* at 10. The federal court ordered the state to reduce the prison population to 141.5 percent of design capacity by February 28, 2015 and to 137.5 percent of design capacity by February 28, 2016. *Id.* at 9.

¹⁰⁸ *Id.*

¹⁰⁹ California’s Three Strikes sentencing law was originally enacted in 1994. This law required a defendant convicted of any new felony, having suffered one prior conviction of a serious felony to be sentenced to state prison for twice the term otherwise provided for the crime. If the defendant was convicted of any felony with two or more prior strikes, the law mandated a state prison term of at least 25 years to life. On November 6, 2012, California voters approved Proposition 36 which substantially amended the law with two primary provisions: (1) the requirement for sentencing a defendant as a third strike offender were changed to 25 years to life by requiring the new felony to be a serious or violent felony with two or more prior strikes to qualify for the 25 year to life sentence as a third strike offender; and (2) the addition of a means by which designated defendants currently serving a third strike sentence may petition the court for reduction of their term to a second strike sentence, if they would have been eligible for second strike sentencing under the new law. *See generally, California’s Three Strikes Sentencing Law*, The Judicial Branch of Cal., <http://www.courts.ca.gov/20142.htm> (last visited Jul. 28, 2015).

¹¹⁰ St. John, *supra* note 97.

receiving a petition, the court shall determine whether the petitioner satisfies the criteria for resentencing.

There is a caveat that anyone who petitions for resentencing undergoes a thorough review of their criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety.¹¹¹ At the court's discretion, the court may deny resentencing if it determines that the petitioner would pose an unreasonable risk to danger to public safety.¹¹²

Should the court choose to resentence a petitioner, the person shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court releases the person from parole.¹¹³

It is also clear that persons on parole or post release community supervision (PRCS) are entitled to seek relief under Proposition 47; however, which portion of section 1170.18 to grant relief depends on interpretation. If being on parole or PRCS is considered "currently serving a sentence," the person will be required to petition for relief where the court must determine whether the petitioner is unreasonably dangerous to the community before granting the petition.¹¹⁴ If being on parole or PRCS is *not* a part of the sentence, the sentence will be considered completed and the person is eligible to apply for a reduction to a misdemeanor, which does not include a requirement that the judge consider the person's dangerousness.¹¹⁵

¹¹¹ The Safe Neighborhoods and Schools Act, *supra* note 63, at § 3.

¹¹² *Id.* at § 14. The court has discretion in determining if the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider: (1) the petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) the petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. It is essentially that the petitioner will commit a new violent felony.

¹¹³ *Id.*

¹¹⁴ Couzens, *supra* note 89, at 29.

¹¹⁵ *Id.*

The Act also has retroactive effects. For those who have already completed his or her sentence for a conviction and who are no longer on probation or parole, this Act authorizes the individual to apply for a reduction of their felony conviction to a misdemeanor (reclassification). The person would only have to file an application before the trial court¹¹⁶ that entered the judgment of conviction in his or her case.¹¹⁷ Persons with one or more prior convictions for offenses listed under section 667(e)(2)(C)(iv) or for a sex offense that requires registration under § 290(C) are not eligible for reclassification.¹¹⁸

It is important to keep in mind that this Act does not open petitions for an infinite timeframe. Any petition or application must be filed within three years after the effective date of the Act or at a later date upon a showing of good cause.¹¹⁹ Additionally, should relief be granted, this does not permit the person to own, possess, or have in his custody or control a firearm.¹²⁰

However, this Act does not benefit everyone. If the court finds that the petitioner is an unreasonable danger to public safety¹²¹, it can deny re-sentencing. In exercising its discretion, the court may consider: (1) the petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) the petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) any other evidence the court determines to be relevant.¹²²

¹¹⁶ If the original judge is unavailable, in which case the presiding judge must designate another judge to rule on the petition. See *Proposition 47: The Safe Neighborhoods and Schools Act*, California Courts: The Judicial Branch of Cal., <http://www.courts.ca.gov/Prop47.htm> (last visited Jul. 28, 2015).

¹¹⁷ *Id.* The person still must satisfy the criteria in subdivision (f) and not be ruled as an unreasonably dangerous person.

¹¹⁸ *Id.*

¹¹⁹ The Safe Neighborhoods and Schools Act, *supra* note 63, at § 14.

¹²⁰ *Id.*

¹²¹ Unreasonable risk of danger to public safety means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667. *Id.*

¹²² *Id.*

Some offenses are not at the court's discretion for sentencing. Individuals who do not benefit from this Act are those who have previous convictions, or are at risk of committing, very serious crimes including: sexually violent offenses and sex offense against minors, rape, murder, attempted murder, and solicitation to commit murder, assault with a machine gun on a police officer or firefighter, possession of a weapon of mass destruction, any offense punishable in California by life in prison or death, or any person who is required to register as a sex offender.

To be excluded in this way, the District Attorney must file an opposition in response to a defendant's application for Proposition 47 relief, and will request what is called a Dangerousness Hearing.¹²³ At this hearing, the District Attorney must prove by a preponderance of the evidence that a defendant is at risk of committing one of the referenced offenses in the future.¹²⁴

Proposition 47 distinguished from the Three Strikes Reform Act of Proposition 36

Those who are seen as a public safety risk will also have great difficulty petitioning for their felony to be re-sentenced.¹²⁵ In 2012, Californians approved Proposition 36, which revised the "Three Strikes law to impose life sentences only when the new felony conviction is 'serious or violent.'" ¹²⁶ The vast majority of three-strikers who have asked for reduced sentence have been successful, but about 118 inmates have been declared a risk to public safety.¹²⁷ Proposition 47 gives inmates in that small group another opportunity to ask for shorter sentences if their third strikes were for one of the minor felonies downgraded under the new Act.¹²⁸

¹²³ *Resentencing Under California's Proposition 47*, NOLO PRESS, <http://www.nolo.com/legal-encyclopedia/resentencing-under-californias-proposition-47.html> (last visited Feb. 17, 2015).

¹²⁴ *Id.*

¹²⁵ *See generally*, The Safe Neighborhoods and Schools Act, *supra* note 63.

¹²⁶ Drucker, *supra* note 6, at 1103.

¹²⁷ St. John, *supra* note 97.

¹²⁸ *Id.*

Incarceration's Indirect Effects

“It used to be you do the crime, you do the time, but it’s no longer like that. The felony conviction on your record lasts for a long time. You can’t get a job, you can’t get housing, and you recidivate.”¹²⁹ Known as collateral consequences¹³⁰, incarceration alone has numerous negative impacts on an individual once they are released from confinement. Many collateral consequences affect a convicted person’s employment and business opportunities. Beyond employment, felons are often denied access to government benefits and program participation, including student loans, housing, contracting and other forms of participation in civic life.¹³¹

Serving time reduces hourly wages for men by approximately 11 percent, annual employment by nine weeks, and annual earnings by 40 percent.¹³² To make matters worse, many inmates emerge with substantial financial obligations, including child support, alimony, probation costs, restitution, and other court-related fees.

This economic effect trickles down to huge impacts to the former inmate’s children and family. Fifty-four percent of inmates are parents with minor children (ages 0-17).¹³³ Family income averaged over the years a father is incarcerated is 22 percent lower

¹²⁹ Quote from a Human Impact Partners focus group participant. *Rehabilitating Corrections in California: The Health Impacts of Proposition 47*, <http://www.prop47impacts.org/> (last visited Aug 5, 2015).

¹³⁰ There are two types of consequences: direct and collateral. Direct consequences are “those which flow definitely, immediately, and automatically from the guilty plea, namely, the maximum sentence to be imposed and the amount of any fine. *Alanis v. State*, 583 N.W.2d 573, 578 (Minn. 1998). In contrast, collateral consequences are considered to be “civil and regulatory in nature and are imposed in the interest of public safety.” *State v. Kaiser*, 641 N.W.2d 900, 904 (Minn. 2002).

¹³¹ Sarah B. Berson, *Beyond the Sentence- Understanding Collateral Consequences*, 272 NAT’L INST. JUST. J. 25 (2013).

¹³² *Collateral Costs: Incarceration’s Effect on Economic Mobility*, THE PEW CHARITABLE TRUSTS (2010), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf.

¹³³ *Id.*

than family income was the year before a father is incarcerated.¹³⁴ Even in the year after the father is released, family income remains 15 percent lower than it was the year before incarceration.¹³⁵ However, parental incarceration doesn't just have a financial impact. Children with fathers who have been incarcerated are significantly more likely than other children to be expelled or suspended from school (23 percent compared with 4 percent).¹³⁶

Collateral consequences may be a result of state or federal law, by administrative rule, by court rule, or by the actions of private individuals.¹³⁷ Federal law, for example, states that (1) an individual who is convicted of a felony is ineligible to enlist in any service of the armed forces¹³⁸; and (2) a person who is convicted of a federal or state drug offense while receiving Federal student aid is ineligible¹³⁹ to continue to receive federal student loans, grants, or work-study funds¹⁴⁰. This is just a small snapshot of the restrictions a convicted felon faces.

¹³⁴ *Id.* at 5.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Kelly Lyn Mitchell, *Reining in Collateral Consequences by Restoring the Effect of Judicial Discretion in Sentencing*, 27 *HAMLIN J. PUB. L. & POL'Y* 1, 23 (2005).

¹³⁸ 10 U.S.C. § 504 (2014).

¹³⁹ The individual is ineligible to receive further aid for a specified period of time upon conviction. Ineligibility period can be shortened by (1) successfully completing an approved drug rehabilitation program that includes passing two unannounced drug tests, or (2) passing two unannounced drug tests administered by an approved drug rehabilitation program, or (3) having the conviction reversed, set aside, or otherwise rendered invalid. *See generally*, *FAFSA Facts*, OFFICE OF NAT'L DRUG CONTROL POL'Y: U.S. DEPT. OF EDU., available at <https://www.whitehouse.gov/sites/default/files/ondcp/recovery/fafsa.pdf> (last visited Aug 2, 2015).

¹⁴⁰ 20 U.S.C. § 1091 subd. (r) (2014). A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance. . . shall not be eligible to receive any grant, loan, or work assistance. . . from the date of that conviction for the period of time specified.

The Community

The job market will see a great benefit from Prop 47. Non-violent offenders can still have the opportunity to become productive members of society. The National Employment Law Project estimates that 70 million people- a quarter of US adult citizens- have an arrest history that can show up on a background check, whether or not they were convicted. Ex-offenders are disproportionately poor, less educated, and Black or Hispanic. These groups often already struggle to find work even without criminal records. Coupled with the slow economic recovery, ex-offenders have found it nearly impossible to find employment.¹⁴¹

In addition to a healthier workforce, Proposition 47 project savings in the millions of dollars in the long run for the court system. This in turn means that taxpayers will save money fighting crime in the courtrooms. Instead, taxpayer money will be diverted to drug treatment programs and educational drug prevention programs.¹⁴² In California, all felony cases must include a preliminary hearing unless waived.¹⁴³ Each preliminary hearing costs about \$667 per hearing.¹⁴⁴ When a person is in prison, taxpayers may incur additional- or indirect- costs as well, such as the costs of social services, child welfare, and education.¹⁴⁵ Finally, shorter jail sentences could reduce the harm that incarceration causes to an individual's physical and mental health.¹⁴⁶ Researchers have observed hypervigilance, social withdrawal, and post-traumatic stress among incarcerated people.¹⁴⁷

¹⁴¹ Ben Casselman, *Finding A Job With A Felony Conviction Is Hard*. *California May Make It Easier*, FIVETHIRTYEIGHT (Nov. 3, 2014, 10:53 AM), <http://fivethirtyeight.com/features/finding-a-job-with-a-felony-conviction-is-hard-california-may-make-it-easier/>.

¹⁴² The Safe Neighborhoods and Schools Act, *supra* note 63, at § 4.

¹⁴³ Cal. Budget Project, *supra* note 83, at 5.

¹⁴⁴ *Id.*

¹⁴⁵ Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST. OF JUST. (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

¹⁴⁶ Cal. Budget Project, *supra* note 83, at 5.

¹⁴⁷ *Id.*

There are also higher rates of contagious disease like tuberculosis and hepatitis in correctional facilities.¹⁴⁸

Parental incarceration can greatly affect the futures of our youth due to extreme familial instability. Nationally, one in 28 children had a parent in jail or prison in 2008, and studies have linked parental incarceration with childhood financial instability, behavioral difficulties, lower academic test scores, and increased likelihood of delinquency.¹⁴⁹

III. Minnesota's Current Approach to Drug Offenses

Generally

Marijuana is by far the most used illegal drug among adults in Minnesota, with almost seven percent reporting use at some time during the past year.¹⁵⁰ Any other single illegal drug, besides marijuana, was used by less than one percent of Minnesota adults.¹⁵¹ Approximately 122,000 offenders- on supervised release, probation, or parole- are being supervised in Minnesota's communities. By comparison, approximately 9,700 offenders are incarcerated in Minnesota's prisons for various offenses.¹⁵²

In July 1990, nine percent of those who were incarcerated in Minnesota state correctional facilities were drug offenders.¹⁵³ On July 1, 2005, drug offenders accounted for 25 percent of Minnesota's

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Alcohol and Other Drugs: Drugs*, MINN. DEP'T. OF HEALTH, <http://www.health.state.mn.us/divs/hpcd/chp/cdr/alcohol/drugs.html> (last visited Feb. 19, 2015).

¹⁵¹ *Id.*

¹⁵² *Fact Sheet: Correctional Delivery Systems*, MINN. DEP'T. OF CORR., available at <http://www.doc.state.mn.us/PAGES/files/5613/9878/6654/DeliverySystemsFactSheet.pdf> (last visited Feb. 12, 2015).

¹⁵³ *Fact Sheet: Drug Offenders in Prison*, MINN. DEP'T. OF CORR. (Mar. 2014) 1, available at <http://www.doc.state.mn.us/pages/files/8513/9878/7361/DrugOffendersFactSheet.pdf> (last visited Aug. 15, 2015).

adult inmate population.¹⁵⁴ The number of drug offenders has declined fairly steadily since 2005, and on July 1, 2013, the 1,633 incarcerated drug offenders accounted for 17 percent of the overall prison population.¹⁵⁵

Current Controlled Substance Possession Laws

In Minnesota, possession of any controlled substance not prescribed to the individual by a physician, dentist, or other licensed professional is illegal.¹⁵⁶ Possession crimes range from fifth degree drug charges to first degree drug charges with the degree of the charge depending on the amount of the controlled substance in question.¹⁵⁷

The development of drug sentencing in Minnesota since the inception of the Sentencing Guidelines¹⁵⁸ shows an indulgence in over-punishment, a disregard for proportionality, and a high tolerance for disparity.¹⁵⁹ In 2007, the Sentencing Guidelines Commission recommended that sentences for first-degree and second-degree drug crimes be moved down one level, so that the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See generally*, MINN. STAT. § 152.12 (2014).

¹⁵⁷ *See generally*, MINN. STAT. § 152.021-.025 (2014).

¹⁵⁸ The Sentencing Guidelines determine the presumptive sentence for felony offenses committed on or after the effective date. The Sentencing Guidelines embody the goals of the criminal justice system as determined by the citizens of the state through their elected representatives. This system promotes uniform and proportional sentences for convicted felons and helps to ensure that sentencing decisions are not influenced by factors such as race, gender, or the exercise of constitutional rights by the defendant. The Guidelines are based on a grid structure. One axis of the Grid represents the severity of the offense for which the offender was convicted. The second axis represents a measure of the offender's criminal history. *About the Guidelines*, MINN. SENTENCING GUIDELINES COMM., available at <http://mn.gov/sentencing-guidelines/guidelines/about/> (last visited Feb 18, 2015).

¹⁵⁹ John Stuart & Robert Sykora, *Recent Development In Criminal Law: Issues Of Sentencing and Public Defense: Sentencing: Minnesota's Failed Experience With Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 WM. MITCHELL L. REV. 426, 437 (2011).

presumed first offense sentence for first degree would be forty-eight months in prison instead of eighty-six months.¹⁶⁰

Current Statistics

In 2013, the crime rate in Minnesota was about 13 percent lower than the national average rate.¹⁶¹ Additionally, Minnesota's incarceration rate is about 52 percent lower than the national average of incarcerated (in prison) adults per 100,000.¹⁶² In terms of taxpayer money, Minnesotans paid about twenty-nine percent higher than the other states per inmate in 2012.¹⁶³ In 2010, the average annual cost per inmate was \$41,364.¹⁶⁴ As a whole, the total state cost of prisons was \$395.3 million when the Minnesota Department of Corrections prison budget was only \$365.5 million- 7.5 percent over budget.¹⁶⁵ However, this lower incarceration rate means that the state has a sixty-five percent higher probation rate than the national average.¹⁶⁶

As of July 2014, 18.1 percent of adult inmates were sentenced for a drug crime.¹⁶⁷ The majority of drug offenders (58%) are serving a sentence from outside the metropolitan area, due in part to the large percentage (66%) of offenders from Greater Minnesota whose offense involved methamphetamine.¹⁶⁸ In contrast, 42 percent of cocaine offenders are serving a sentence from a county outside the

¹⁶⁰ *Id.* at 439.

¹⁶¹ *Corrections Statistics by State: Minnesota*, NAT'L. INST. OF CORR., <http://nicic.gov/statestats/?st=MN> (last visited Feb. 12, 2015).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *The Price of Prisons-Minnesota*, VERA INST. OF JUSTICE, (Jan. 30, 2014), available at <http://www.vera.org/files/price-of-prisons-minnesota-fact-sheet.pdf>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Adult Inmate Profile* § 1, MINN. DEP'T. OF CORR., (Jul. 1, 2014), http://www.doc.state.mn.us/pages/files/8314/1511/5797/Minnesota_Department_of_Corrections_Adult_Inmate_Profile_07-01-2014.pdf.

¹⁶⁸ *Fact Sheet: Drug Offenders in Prison*, MINN. DEP'T. OF CORR., (Mar. 2014), available at <http://www.doc.state.mn.us/pages/files/8513/9878/7361/DrugOffendersFactSheet.pdf>.

metropolitan area.¹⁶⁹ Overall, 31 percent of drug offenders were convicted of a first-degree controlled substance offense. Those whose offense involved cocaine was most likely to be convicted of a first-degree offense (52%) followed by those whose offense involved methamphetamine (32%) or crack (23%). Only six percent of the offenders incarcerated for marijuana-related offenses were convicted of first-degree controlled substance.¹⁷⁰

A drug offender's sentence typically depends on the type of drug the offender was in possession of and the amount of the drug he/she is in possession of. The sad reality is that they are often convicted of a first-degree offense. Offenders with the longest average sentence length are those incarcerated for cocaine (75.6 months), methamphetamine (64.5 months), and crack (63.8 months).¹⁷¹ Overall, 49 percent of all drug offenders had been incarcerated as an adult in a Minnesota correctional facility prior to the present incarceration.¹⁷² Finally, the average age at first incarceration was approximately thirty years old.¹⁷³

Past Drug Reforms

In 1980 Minnesota became the first state to adopt legally-binding sentencing guidelines, and it was the first state to employ a permanent, independent sentencing commission to develop and monitor the implementation of guidelines and make other recommendations related to sentencing.¹⁷⁴ The nature of the guidelines has made it easier for the state to foresee and prevent overcrowded prisons, and set priorities in making use of limited prison space.¹⁷⁵

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Richard Frase, *Sentencing Policy and Criminal Justice in Minnesota: Past, Present, and Future*, COUNCIL ON CRIME AND JUSTICE, <http://www.crimeandjustice.org/councilinfo.cfm?pID=52> (last visited Feb. 18, 2015).

¹⁷⁵ *Id.*

In 2009, Minnesota SF 802 granted judicial discretion to sentence below the mandatory minimum controlled substance possession or sale offense.¹⁷⁶ The court may make its own motion to sentence below the mandatory minimum or the prosecutor may file a motion to do so.¹⁷⁷ The judge must find substantial and compelling reasons on the record to depart from the mandatory minimum.¹⁷⁸ Since this measure, this is the only drug law reform legislation in Minnesota from 2009-2013.

Minnesota Drug Courts

Minnesota's first drug court was established in Hennepin County in 1996 and has grown to more than thirty-seven specialty courts, serving more than 30 counties.¹⁷⁹ A 2012 statewide study confirmed that the labor-intensive but cost-effective effort was paying off: The study of 535 participants in sixteen different courts who entered drug court between July 2007 and December 2008 found a 37 percent reduction in recidivism rates (compared with nonparticipants); a 47 percent reduction in reconviction rates; a 54 percent graduation rate; higher rates of completing drug treatment programs and obtaining sobriety; higher rates of employment and educational achievement; and greater command of such life skills and responsibilities as obtaining a driver's license, locating housing and making child-support payments.¹⁸⁰

Of the participants who were part of the study, most were diagnosed with drug-use disorders, and slightly less than half also had mental-health diagnoses.¹⁸¹ Finally, the study found that

¹⁷⁶ Ram Subramanian & Rebecka Moreno, *Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013* 11, VERA INST. OF JUSTICE (Apr. 24, 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013-v6.pdf>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Sarah T. Williams, *Drug Courts in Minnesota: Smart on crime, not 'soft on crime'*, MINNPOST (Mar. 05, 2014), <http://www.minnpost.com/mental-health-addiction/2014/03/drug-courts-minnesota-smart-crime-not-soft-crime>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

incarceration costs (both prison and jail) were about \$3,000 less for drug court participants than nonparticipants.¹⁸² It is important to note that not everyone is eligible to participate in drug court: those who committed violent crimes, have gang affiliations, sold drugs to children, or caused vehicular homicide are barred.¹⁸³

Staying Ahead of the Curve: An Analysis

Overview

Minnesota has long been a leader in enacting and implementing drug law reform. To this end, Minnesota already has many different alternatives in place for a successful transition to downgrading simple drug possession offenses. The transition is not without its costs, but the front-loaded costs would be outweighed by the long term benefits that downgrading would offer. Minnesota has long been a crusader for drug reform. Adopting the reclassification of drug crimes would add to the State's positive reputation. .

The Court System

Downgrading drug possession crimes would reap tremendous benefits for Minnesota's judicial system. These benefits would not only be seen in achieving the judicial system's mission of justice and rehabilitation, but also be seen in monetary savings as well. In the short term, the state would most likely see increased calendars and spending to (1) re-sentence individuals currently serving felony drug possession sentences to misdemeanors, and (2) reviewing petitions from individuals who have already completed their sentence and wish for their conviction to be re-classified as misdemeanors.

If Minnesota is able to divert some state funds to this, the state would most likely see significant savings in the long run. The state would see savings stemming from court costs, additional court fees, decreased incarceration, less reliance on public assistance, and a healthier economy.

The courts would need to have judges available to sign re-sentencing orders and review petitions from applicants wishing to

¹⁸² *Id.*

¹⁸³ *Id.*

have their felony drug charges amended to misdemeanors. If following the California model, Minnesota does not have to require a hearing for these petitions unless the petitioner requests a hearing. In doing so, the court would not see a significant increase in the daily calendar.

As far as subsequent drug offenders, the court calendar would not change significantly. People will still be charged with crimes, but the prosecuting agency handling each file would shift. County Attorney Offices may see a decline in the number of drug cases they need to charge out. This would enable the County Attorney Offices to focus more resources on prosecuting dangerous criminals. This shift in more misdemeanor charges would most likely mean more files for city attorneys to handle. However, misdemeanor cases often settle before reaching the trial phase, so this would not pose a great burden on the offices.

In terms of defense attorneys, the Board of Public Defense may need to hire additional attorneys to handle both the short term effects of a downgrade measure as well as long term court alternatives. For the first few years, more attorney focus would be on the petitions from individuals to have their cases reviewed by the court. The Strickland Standard states that a criminal defendant has a Sixth Amendment right to be represented by counsel at all critical stages of the proceedings in which his substantial rights are at stake.¹⁸⁴ Sentencing is a stage at which a defendant has a right to counsel.¹⁸⁵ In determining whether there is a right to counsel, it may be necessary to distinguish between resentencing proceedings, where a petitioner's liberty interest is at stake, and reclassification proceedings, where the sentence has been completed.¹⁸⁶ It may be argued that there is not a right to appointed counsel in the latter circumstance since it is no longer a "critical stage of the proceedings."¹⁸⁷ The Minnesota Judicial Branch would need to decide when an appointed attorney would be appropriate.

¹⁸⁴ See generally, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

¹⁸⁵ Couzens, *supra* note 89, at 67.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

In the long term, both public defenders and prosecutors should work together to explore other alternative to incarceration; most notably the use of drug courts. Drug courts have yielded positive results in terms of government costs, decreased recidivism rates, and better re-entry for convicted persons. Drug courts also provide a great monitoring tool for the court. As a team, drug courts are comprised of judges, attorneys, treatment personnel, and mental health personnel. This team has the best opportunity to provide a successful rehabilitation plan for the offender and increase the probability of rehabilitation; thus utilizing less government resources and decreasing recidivism costs.

Downgrading non-violent drug possession crimes has proven to decrease costs as well as maintaining a lower inmate population in other states. Therefore, Minnesota should see the same effects from downgrading. Minnesota already incarcerates less people in their correctional facilities, but the main effect would be the cost savings of approximately \$41,000 a year per inmate. These savings could be redirected to the costs of implementing this reform for the first few years, and then re-directed towards prevention and treatment programs in the long run. Also, correctional facilities would experience an immediate decrease in their prison population from released inmates who qualify for the re-sentencing. In fact, post-release supervision would also see a change. Generally, those who are convicted of a misdemeanor are on probation for much shorter period than those convicted of felonies.

The Individual

Individuals with felony convictions often face stigma and legal restrictions that hinder them from reintegrating back into their communities. These collateral consequences for individuals with felony convictions contribute to recidivism. In particular, growing background check requirements make obtaining housing, employment, and social services significantly harder for a person with a felony conviction.¹⁸⁸ Having a felony conviction can also

¹⁸⁸ Cal. Budget Project, *supra* note 83, at 4.

impair a person's voting rights¹⁸⁹, parental rights, and immigration status.¹⁹⁰ Moreover, felony drug convictions often lead to a greater number of collateral consequences than any other category of crime due to Drug War policies that disqualify individuals with felony drug convictions from various federally funded programs.¹⁹¹

Most individuals affected by these collateral consequences are already indigent and may live in communities with high risk of food insecurity, unemployment, and poverty.¹⁹² Reclassifying certain low-level crimes as misdemeanors would help reduce the collateral consequences of convictions for reclassified crimes and thereby help some people successfully integrate into the community once they have paid their debt to society.¹⁹³

Current illicit drug use differed by employment status in 2013.¹⁹⁴ Among adults aged 18 or older, the rate of current illicit drug use was higher for those who were unemployed (18.2 percent) than for those who were employed full time (9.1 percent), employed part time (13.7 percent), or "other" (6.6 percent) (which includes students, persons keeping house or caring for children full time, retired or disabled persons, or other persons not in the labor force).¹⁹⁵

¹⁸⁹ Adopted on August 29, 1857, Minnesota's constitution bars from voting those "convicted of treason or felony until restored to civil rights". Minnesota Statute 609.165 restores the right to vote upon discharge from sentence. This means that once a Minnesota resident has completed their entire sentence for a felony conviction, probation or parole and all, their right to vote is automatically restored. This applies to people living in Minnesota who may have been convicted in another state. *Felon Disenfranchisement*, COUNCIL ON CRIME & JUSTICE, <http://www.crimeandjustice.org/councilinfo.cfm?pID=170> (last visited Feb. 20, 2015).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings*, § 2, U.S. DEP'T. OF HEALTH & HUMAN SERV. (Sept. 2014), <http://archive.samhsa.gov/data/NSDUH/2013SummNatFindDetTables/NationalFindings/NSDUHresults2013.htm> (last visited Feb. 16, 2015).

¹⁹⁵ *Id.*

Based on the research regarding recidivism and the collateral consequences that face an individual convicted of a felony, downgrading drug possession crimes to misdemeanors should lower the risk of recidivism and enable a person to rehabilitate and continue to make positive contributions to the community.

According to Minnesota Statute 609A.02, the only drug felony that is eligible for expungement is controlled substance in the fifth degree.¹⁹⁶ This means that individuals who are charged and convicted of a higher degree of controlled substance crime are not be able to seal their records.

Taking all these possible collateral consequences into account, it is reasonable to conclude that a felony drug conviction has detrimental effects on an individual and their families. Being convicted of a felony causes a snowball effect in the felon's life. Being incarcerated generally means that the job he/she held is gone, and his/her professional skills erode while sitting in a cell block. Once they are out of jail, the individual does not have a job, and a felony record keeps many individuals from being able to obtain another job. Unable to obtain employment, the individual often turns to public assistance and looks for ways to increase his/her education. This is where individuals run into another roadblock. Most individuals cannot get federal financial aid if they have a drug felony—a higher education is out the window or put on hold. Additionally, getting public assistance becomes astronomically harder because some programs bar recipients from having felony convictions. The result? A high probability of recidivism and the vicious cycle begins again.

Downgrading drug possession crimes would re-open these doors for many individuals. More individuals would have access to healthcare and treatment programs to break them of the addiction cycle. Minnesota should not only extend the downgrading benefit to future offenders, but also allow past offenders the opportunity to petition for their felony non-violent convictions to be re-classified as misdemeanors. California gives past offenders three years to file a petition for review; Minnesota should consider the same. Minnesota

¹⁹⁶ MINN. STAT. § 609A.02 (2014).

should give ample notice and access for a specified time period (absent good cause) to file a petition to have an individual's conviction reviewed.

The Community

Most critics of downgrading measures are concerned with public safety. However, less incarceration for nonviolent crimes could actually improve community health. The biggest argument for this is the effect that incarceration has on an individual's physical and mental health.¹⁹⁷ Researchers have observed hypervigilance, social withdrawal, and post-traumatic stress among incarcerated people.¹⁹⁸ There are also higher rates of contagious diseases (such as tuberculosis and hepatitis) in correctional facilities.¹⁹⁹ Downgrading drug possession felonies in Minnesota would decrease the amount of contagious diseases that could spread among the public after the inmate is released.

Additionally, parental incarceration often results in extreme familial instability.²⁰⁰ In 2008, one in twenty-eight children had a parent in jail or prison, and studies have linked parental incarceration with childhood financial instability, behavioral difficulties, lower academic test scores, and increased likelihood of delinquency.²⁰¹ The geographically isolated location of state prisons can exacerbate these effects, as children are often unable to maintain a relationship with their parent during incarceration.²⁰² Studies have shown that children who maintain contact with their parent during the parent's incarceration exhibit fewer disruptive and anxious behaviors.²⁰³

¹⁹⁷ Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, U.S. DEP'T. OF HEALTH & HUM. SERV. (December 2001), available at <http://aspe.hhs.gov/basic-report/psychological-impact-incarceration> (last visited Aug. 27, 2015).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Cal. Budget Project, *supra* note 83, at 5.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

From these statistics, it can be argued that keeping parents out of jail and prison has a tremendously positive impact in the lives of their children.

Where public safety is concerned, Minnesota should turn to California's approach to the changes in drug crimes. California's Proposition 47 is very specific in not extending the downgrade benefits to dangerous offenders. Drug offenders who have a prior history of violent crimes such as murder, rape, child sex crimes, etc. are barred from having any subsequent drug possession crimes downgraded to a misdemeanor. Rather, those individuals are still charged, and sentenced, according to felony statute. Minnesota can adopt the same type of changes. Those who are deemed by the court as 'dangerous' can still be convicted of a drug possession felony, while those who are non-violent are given different alternatives to rehabilitation and treatment.

Additionally, Minnesota taxpayers see thousands of dollars a year- totaling in the millions- to incarceration costs. This is separate from the court costs that taxpayers also pay. Like other states who have implemented drug reforms, it is likely that Minnesota would see a great decrease in incarceration costs. For example, if Minnesota were to divert drug possession offenders into drug court rather than felony incarceration terms, over the course of two and a half years, a study revealed that the incarceration costs were an average \$3,189 less per drug court participant than nonparticipants.²⁰⁴ Drug court participants spend less time incarcerated. Additionally, even if a drug offender was not accepted into the drug court program, a misdemeanor carries a maximum jail sentence of one year. Therefore, even if an offender was given jail time, the time spent in a correctional facility would be far shorter than their felony counterpart; again saving taxpayers' money.

The last thing to consider in terms of cost savings relates back to a convicted individual's ability to obtain employment following

²⁰⁴ *Minnesota Statewide Adult Drug Court Evaluation* 13, MINN. JUDICIAL BRANCH (June 2012), available at http://www.mncourts.gov/Documents/0/Public/Drug_Court/2012%20Statewide%20Evaluation/MN_Statewide_Drug_Court_Evaluation_Report_-_Final_Public.pdf.

their conviction. By not convicting every drug possession offender with a felony, our society allows that individual to have a better chance at obtaining education and employment. This would mean less taxpayer money going toward welfare, food stamps, medical assistance, and other state public assistance program for those who could work, but cannot because of a non-violent conviction. Unemployment has been linked to recidivism in offenders. Recidivism would not only diminish public safety, expose citizens to becoming victims of crime, but also mean more court and incarceration costs. Finding channels to decrease Minnesota's unemployment rate and increase job availability is a win-win for all parties involved.

IV. Conclusion

Minnesota should adopt laws and put into force legislation that would downgrade non-violent drug possession felonies into misdemeanors. In light of the current fiscal crisis, there is a nationwide drive to reduce incarceration and corrections costs without jeopardizing public safety. Increasingly, states are considering new ways to respond to people convicted of drug offenses, a largely non-violent group that constitutes a sizeable minority of the incarcerated population.²⁰⁵ Luckily, Minnesota has been ahead of the national curve for decades with the implementation of drug sentencing reform, drug courts, and a wide availability to substance abuse treatment programs and facilities. Downgrading non-violent drug possession crimes would only put Minnesota that much further ahead.

In deciding whether Minnesota should model downgrading laws after California's Safe Neighborhoods and Schools Act, Minnesota's legislature should carefully analyze the different judicial structure and socio-economic status of each state. The most prudent course of action moving forward would be to specifically

²⁰⁵ *A Natural Experiment in Reform: Analyzing drug policy change in New York*, VERA INST. OF JUSTICE, available at <http://www.vera.org/project/analyzing-drug-policy-change-new-york> (last visited Aug. 27, 2015).

tailor drug possession downgrade laws to the current needs and available resources to Minnesota.